RICHARD D. GIERLOFF, #6350
Attorney At Law
45 West Jefferson
Suite 412
Phoenix, Arizona 85003
602/254-8861
Richard@aztrialattorney.com

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA Plaintiff, v. JAMES CORNELL HARROD, Defendant.	NO. CR1995-009046-001 **REPLY TO STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF** **CAPITAL CASE** (Assigned to the Hon. Joseph Welty)

The Petitioner, James Harrod, by and through counsel undersigned hereby replies to the State's Response to his Petition for Post-Conviction Relief.

As an initial matter, Mr. Harrod points out three very serious errors in the State's Response. First, the State adopts the factual error contained in both the first and third appellate opinions. The Response states ". . . the trustees were permitted to invade the corpus for [Jeanne Tovrea's] benefit." (Response p. 2, ll. 22-23). This language is a quote from *Harrod III*, 218 Ariz. 268, 273-274 ¶ 3, 183 P.3d 519 (2008).

In *Harrod I* the court stated Hap Tovrea hired Mr. Harrod to kill Ms. Tovrea because she was ". . . depleting the remaining assets with her new boyfriend." *State v. Harrod,* 200 Ariz. 309 ¶ 11 and FN1, 26 P.3d 492 (2001). (Response, p. 5, l. 4) It was the notion that the trust was being depleted which created a sense of urgency about Hap's motive and was the lynchpin of the State's case. It is however untrue, which Mr. Harrod pointed out in his Petition (Petition, pp. 39-40, ll.

15-11).[1] Without this sense of urgency Hap Tovrea would have little motive to engineer the death of his stepmother. The State's case required the perpetuation of this falsehood for its vitality and plausibility but it is simply not true.

The second very serious error is the State's claim that Mr. Harrod did not seek the admission of his successful polygraph results in the guilt/innocence phase of his 1997 trial (Response, p. 31, ll. 8-9). This is incorrect. Mr. Harrod filed his written motion seeking the admission of his successful polygraph results on September 17, 1997 (Inst. #432). At page 11 of the Motion, the potential impact of the results on jurors is discussed. Trial in this matter started October 10, 1997, a time when Arizona still had Judge sentencing. By definition, Mr. Harrod had sought the admission of this evidence in the guilt/innocence phase of the trial. The motion was denied by written MEO on October 6, 1997 (Inst. #156), four days before the start of the taking of evidence.

As a result of this error, the State makes only a *proforma* procedural argument that the 1997 sentence "no longer exists" and the claim of error is unreviewable and moot. While it is true that Mr. Harrod did also seek the admission of the results in the penalty phase of the 1997 trial, the State moved to preclude them by written motion on February 3, 1988 (Inst. #239). Mr. Harrod's direct appeal in 1998 did raise only the preclusion of the results in the penalty phase, doing so by arguing that it was error for the court to refuse to consider the results *as a matter of law, citing Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954 (1978). Moreover, the court did not reject this claim as urged by the State (Response, p. 31, l. 21). Rather, the Court only decided to not reach the issue because, had the trial court considered the polygraph results, it would still have imposed death *Harrod I* ¶ 39 and FN7.

Petitioner is not alone in noting that the Arizona Supreme Court avoided deciding this issue. Justice Feldman expressed his frustration with the "Court's failure to grapple with this issue

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[1] The trust administrator, Glenn Kearney had no knowledge of the trust ever losing principle (R.T. 10-23-97, p. 131); Kenneth Reeves whose firm drafted the will and trust testified that "the trust specifically provided that she couldn't invade the principle for her own benefit." (R.T. 9-20-05, pp. 120, 127).

leaves the question unresolved in Arizona." (*Harrod I,* ¶ 77). It is precisely this evasion by the court which dooms the continuing vitality of *Harrod I,* as is argued in the Petition in the "Significant Change in the Law" argument at page 36.

It is the significant change in the law with the adoption of the *Daubert* standard on January 1, 2012, together with the switch to jury sentencing following *Ring* which makes the State's preclusion claim inapt and not sustainable. Rule 32.2(b) excepts from preclusion claims based on a significant change in the law.

The third very serious error results from the State's adoption of the *Harrod I* Court's recitation of the number of phone calls between Hap Tovrea and James Harrod in paragraph 10 of that Opinion (Response, p. 4, FN 2). The footnote essentially states that there were 1500 calls between them in "the months preceding the murder" and 52 calls "the day before the murder." (*Id.*). Petitioner does not know the source of this misinformation but it is stunningly incorrect. Wayne Drew of the Rocky Mountain Information Network (R.T. 11-06-97, p. 36) prepared several charts documenting the phone traffic between the two men (*Id.*, p. 41, *et. seq.*). His testimony showed that on March 31, 1988 there were 9 calls, not 52, between them, 6 placed by Hap Tovrea (*Id.*, p. 50, Exhibit #248; p. 54, Exhibit #251) and 3 placed by James Harrod (*Id.*, p. 49, Exhibit #247; p. 54 Exhibit #247). An error of this magnitude is emblematic of the failure of critical thinking caused by the fingerprint evidence sweeping all other evidence before it. Who could possibly think two persons conspiring to commit murder would call each other 52 times the day before? What could they possibly have to say? The error in the total number of calls is addressed below in the fifth anomaly argument.

Before turning to the arguments by order, a fourth and fifth anomaly in the Response must be noted. It has long been contended by the State that the fact that the kitchen window was not connected to the alarm system made it attractive as a point of entry. (Response p. 3, ll. 20-21). The sole source that Mr. Harrod knew the window was not connected to the alarm was Anne Costello, his ex-wife. She claimed that he had told her that he was ". . . supposed to get into the house and check out the security system." (R.T. 11-14-97, p. 13), "that there was one window, there was one place where they hadn't set it up and that was the kitchen window.: (*Id.*, p. 18). To gain entry, the

window pane was removed in its entirety and set aside (Response p. 3, l. 13). The problem with this scenario is that, if the intruder *knew* the window was not on the alarm system, he scarcely would have bothered with the laborious process of removing the four pieces of weatherstripping and the window pane. This was a standard aluminum-framed sliding window. The latch can be released by sliding a credit card or a long thin metal shim in the gap between the overlapping window frames and simply sliding the window open. The fact that the intruder went to the trouble to remove the window pane is evidence that he did *not* know the window was not on the alarm system. Thus, yet another cornerstone of the State's theory is revealed to be based on a simple misunderstanding of the facts.

A fifth anomaly in the State's theory is the number of phone calls between Hap Tovrea and Mr. Harrod. The response notes over 1500 calls in the months before the murder and 52 on the day before (Response, p. 4, FN2). As stated above, Wayne Drew prepared charts of the phone traffic between the two men. The most comprehensive, Exhibit #241, documents 1234 calls between the two men between July 3, 1987 and November 19, 1991 (R.T. 11-06-97, p. 44). Obviously, there could not have been 1500 phone calls in the months preceding the murder. Exhibits #243 and #244 show 271 calls from July 3, 1987 to April 1988, far from 1500 calls. The origin of the "1500" number is a mystery. The anomaly is that there is any phone traffic at all. One would think that if they were conspiring to murder Hap's stepmother, they would go to great lengths to *minimize* their association. The volume of the lesser number of phone calls (which included faxes) suggests strongly these calls were made to further their legitimate business interest in developing a sulphur mine in China, as Mr. Harrod has always maintained.

The State offers no substantive arguments for many of the claims herein, relying instead on the procedural bars of waiver and preclusion. To those claims which it offers no substantive argument it has waived any substantive objection to the claim. *State v. Palankas*, 188 Ariz. 201, 205 FN3 ("The state argues on appeal that its "concession" was limited to preclusion of references to defendant's contact with his attorney. Although that is the only issue conceded in the State's written response to the defendant's *Motion in Limine*, the State did not otherwise object to the preclusion of the defendant's refusal to consent to a warrantless search of his car, and the prosecutor

clearly conceded "those issues" in open court when asked if she had any objection to the motion. We therefore reject the State's position that the court's *in limine* ruling was limited to evidence of defendant's contact with his attorney."); *State v. Rodriguez*, 186 Ariz. 240, 246, 921 P.2d 643, 649 (1996) ("Defendant argues that the error is not harmless. The state does not argue to the contrary. The state thus concedes the point.") *See also*, Rule 35.1, Arizona Rules of Criminal Procedure ("If no response is filed, the motion shall be deemed submitted on the record before the court.").

Petitioner notes in passing the State misstates the burden for presenting a colorable claim. The State misquotes *Runningeagle*: "A colorable claim consists of factual allegations which, if true, **would** have changed the outcome of the proceedings." (Response, p. 9, l. 21). Emphasis added. The correct language is "one that, if the allegations are true, **might** have changed the outcome." *State v. Runningeagle,* 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

The Petitioner now turns to the arguments in the Response in order.

FINGERPRINT EVIDENCE

The State deeply misapprehends the fingerprint argument. The issue is: (1) The core tenant of fingerprint analysis, that no two persons have the "same" fingerprints has never been empirically tested or proven and (2) what the 1997 jury was *told* about fingerprints. Moreover, the argument is not subject to preclusion because the scientific understanding of the nature of latent print evidence has changed so dramatically as to constitute newly discovered evidence as provided by Rule 32.1(e) and Rule 32.2(b). The 2006 Department of Justice Report on the FBI's Handling of the Brandon Mayfield case, the 2009 National Academy of Science Report on Forensic Sciences and the 2011 Fingerprint Inquiry Report on the events underlying the perjury prosecution of former Scottish Constable Shirley Mckie could be nothing but newly discovered evidence. That is self evident. The reason no objection was made to the introduction of fingerprint testimony in the 1997 trial was because the facts underlying these three studies were as of yet unknown. The State is essentially arguing that, at the time of the 1997 trial people believed the world was flat and Petitioner should be precluded from offering evidence that it is round.

There exists ample authority to apply newly discovered scientific knowledge to cases which were concluded prior to the existence of its development. This is exactly what occurred in the

hundreds of cases, capital and otherwise, where DNA testing has exonerated innocent persons convicted of crimes they did not commit. Ray Krone being perhaps Arizona's best known example. There is no difference from DNA testing with techniques which were not available at the time of trial than applying new principles to fingerprint analysis or arson investigation John Henry Knapp, (Justice Feldman ¶ 80, *Harrod I).* and now Louis Taylor are Arizona's best known examples of the latter. The process of applying developments in scientific understanding to old cases even has the impremature of the Arizona Legislature. In 2010, it passed House Concurrent Resolution 2066. The Resolution addressed arson investigation and adopted the standards contained in the National Fire Protection Association (NFPA) 921, Guide for Fire and Explosion Investigations. The Resolution notes there are 89 persons in Arizona Prisons serving time for arson, and expressly states that "it is possible that some of those persons convicted of Arson in Arizona may have been convicted using antiquated and unreliable techniques in the past." But most importantly it expressly resolves: "1. That the Legislature supports *judicial review* of those arson convictions using evidence that is now known to be unreliable." (Emphasis added).

Arizona cases holding that advances in scientific knowledge constitutes newly discovered evidence are *State v. Bilke*, 162 Ariz. 51, 781 P.2d 28 (1989) "Post Traumatic Stress Disorder was not a recognized mental condition" at the time of trial in 1974 (*Id.*, at p. 51-52) and held assertion of PTSD was a colorable claim of "newly discovered material facts" (*Id.* at p. 52); and State v. *Tankersley,* 211 Ariz. 323, 121 P.3d 829 (2005) (current studies cast doubt on the reliability of "bite mark" evidence's ability to identify a specific person). The advances in the understanding of latent fingerprint analysis has undergone a similar evolution and must be accorded the same treatment. *Youngblood III*, 173 Ariz. 502, 844 p.2d 1152 (1993), Justice Feldman ¶ 79 in *Harrod I.*

The State's implication that Petitioner is somehow urging the use of completely "new" evidence by its citation to the *State v. Sanchez*, 200 Ariz. 163, 24 P.3d 610 (App. 2001) illustrates the depth of its misunderstanding of Petitioner's fingerprint argument. The latent fingerprint impressions and the 10 point exemplars *were* in existence at the time of trial, it is the scientific understanding of the limitations of fingerprint evidence which has changed over the last two decades.

The balance of the State's fingerprint argument is simply old wine in a new bottle. The flaws in Karen Jones' methodology is well documented in the Petition *(see pages 4 through 6)*. She *simultaneously* examined the inked exemplar and the latent prints without first thoroughly examining the latent prints (R.T. 9-20-05, p. 62). This poses the risk of talking yourself into seeing points that aren't really there (Testimony of Pat Wertheim, *HMA v. Mckie*, 5-11-99, pp. 166-67). It is the same methodology error which caused the FBI's Mr. Green to misidentify Brandon Mayfield (U.S. D.O.J. Executive Summary, p. 128).

Similarly, Joseph Silva's so-called confirmation was tainted by his knowledge that Ms. Jones had made an identification. This is the same error made by the FBI's LPE Massey and Weiner. (*Id.*, p. 128). Since neither Ms. Jones nor Mr. Silva made any bench notes during their examination, it is impossible to know whether they examined the same latent prints, examined the same features or examined the same points. (Petition pp. 13-14). Since there is no way of verifying or disputing their work, Mr. Silva's "verification" has to be rejected as unreliable, as does Ms. Jones' identifications. Both employed the ACE-V examination method, which the NAS Report found to be riddled with subjectivity (NAS Report, p. 139) and "not specific enough to qualify as a validated method for this type of analysis." (*Id.*, p. 142). The NAS Report found that "merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results." (*Id.*). Rather than address the factual and procedural issues raised by Petitioner and the three studies, the State simply blithely argues that the state of latent print examinations is just fine and all is right with the world. This is no where made more clear than the State's argument as to the "unlikelihood that three[2] latent print examiners would each misidentify the same 18 latent prints." (Response, p. 18, ll. 8-9). This is merely a reiteration of the discredited testimony by a Crown witnesses in the Mckie trial: "Ms. McBride advanced a variant (of the claims of infallibility) that it was not possible for a combination of five examiners to make a mistake." (FIR Ch. 38, para 38.9, p. 863).

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[2] As argued below, Petitioner disputes that Mr. Wertheim made any comparisons, and as noted above, Mr. Silva's examination was not "blind".

The State spends not a single word addressing the findings of the three reports nor the merits of Petitioner's argument. It appears that the State is comfortable that it will succeed in its effort to procedurally block the argument. It has fundamentally misunderstood the fingerprint argument and its reliance entirely on a procedural strategy has been at is own peril. It has waived any substantive argument.

The State spends not a word addressing what the 1997 jury was told about fingerprint evidence. The jury was *told* repeatedly, and the State's witnesses testified repeatedly, that fingerprint identification is a matter of infallible 100% scientific certainty. Rather, the State simply pretends this never happened. It points, in footnote 9, to the *single instance*, in the very last question to Mr. Wertheim, that the word "opinion" was used. The State claimed in its opening that it would be "uncontroverted that those **in fact** are the finger and palm prints of James Harrod" (R.T. 10-20-97, p. 5).

Thereafter, for days on end State latent print examiners as well as Mr. Wertheim repeatedly testified, without qualification, that a fingerprint identification is made with bedrock scientific certainty. The use of the word "opinion" in the very last question posed to Mr. Wertheim (and no other state expert) could only have been heard by the jury as a semantic nicety as the prosecutor took his leave of the witness. That this is so is amplely illustrated in the State's closing where it was argued: "Without any doubt, without any question, 100 percent, those are his." and "fourteen identified to James Harrod, unquestionably. No doubt, hundred percent." (R.T. 11-17-97, p. 24) and "we have got three different examiners: Karen Jones, Joe Silva and Pat Wertheim who looked at those prints and who have said, without any doubt -- we are not talking about reasonable doubt here. We are talking about 100 percent certainty – those are his prints. That's him." (*Id.*, p. 54). It is disingenuous to maintain that this improper testimony simply did not occur.

The State's claim that there is "no support" for the claim that Pat Wertheim committed perjury is preposterous. By Pat Wertheim's own admission, he did just two things in this case (1) examined the latent prints for signs of forgery (Appendix, Items 4 and 5; R.T. 11-07-97, p. 24) and (2) plotted the locations of specific latent prints on photocopies of the exemplars (Appendix, Items 7 and 8; R.T. 11-06-97, p. 114; Defense Interview 8-18-97, p. 12, Appendix Item 6). Again, the

State misapprehends the very nature of the argument. Mr. Wertheim testified in *State v. Harrod* in November 1997. He did not testify in *HMA v. Mckie* until May 1999 and his role in that trial did not become general knowledge until the publication of the Fingerprint Inquiry Report in December, 2011. The factual basis for the claim did not exist at the time of trial or direct appeal. Again, as argued above, the entire fingerprint argument, and this claim in particular, comes within the ambit of newly discovered evidence and is not subject to preclusion. The State supports its claim that there is no evidence that Pat Wertheim committed perjury with nothing more than obfuscation. Mr. Harrod did not just "suggest preparing Exhibit 259 was the extent of Mr. Wertheim work conduct ed after the defense interviews" (Response, p. 20, ll. 8-9) he proved it with the comparison of Mr. Wertheim's multi-page bench notes when examining the latents for evidence of forgery or fabrication in this case, and his mult-page bench notes in the *Mckie* trial, to the scant quarter page of bench notes for the work he performed "at a later time" (R.T. 11-6-97, at 113), and Exhibit 259 itself. For the State to point to Mr. Wertheim's repeatedly testifying that he examined Mr. Harrod's inked prints is ludicrous. That is the perjury! If Mr. Wertheim performed a comparison of the latents to the inked exemplar, where are his bench notes? The quarter page of bench notes he prepared to document his work "at a later time" address only another examination for signs of forgery (Appendix, Item 8). There is no mention of making comparisons. One need only examine Exhibit 259 itself to see that it was wholly unsuitable for comparison purposes. It is a very poor quality photocopy of an inked exemplar. Some of the locations which Mr. Wertheim "plotted" as the location of a particular latent print are completely void. (Appendix, item 7, #27). How can a comparison be made to a blank spot on a photocopy?

With all due respect to the State, Mr. Harrod did not "misread" Mr. Wertheim's testimony (Response, p. 20, l. 23). It is the State which misrepresents his testimony. The State recites "The record does not reflect that Wertheim used the photocopy when comparing Harrod's prints to the 18 latent prints." (Response, p. 21, l. 7-8). What the record actually does not reflect is that Mr. Wertheim made any comparisons whatsoever. There are no bench notes, there is no paper trail, no evidence that he ever made any comparisons. What the record reflects is that he examined the latent prints for signs of forgery (Appendix, Item 4 and 5; R.T. 11-07-97, p. 24) and later, on 8-18-97

plotted the locations of specific latent prints on a photocopy of the inked exemplars. (Defense Interview 8-18-97, p. 12, Appendix Item 6; R.T. 11-06-97, p. 114; Appendix Items 7 and 8).

The latter examination produced only a quarter page of notes (Appendix Item 8) which is consistent with the childsplay of plotting locations from latent lift cards on which Karen Jones had already marked with their locations. Defense requested Mr. Wertheim's billings or invoices, believing they would confirm the scant amount of time he spent on this task (May 21, 2012). This request was granted (MEO 6-27-12). The State was unable to locate any invoices after two months of searching (MEO 9-07-12).

The State characterizes the lack of objection at trial as "telling" (Response, p. 20, l. 12). To the contrary, it was the defense lawyer who blundered into the whole idea that Mr. Wertheim had made any comparisons at all. (Petition, p. 21; R.T. 11-06-97, pp. 113-114). He could scarcely have objected when he was oblivious to the damage he had just caused. This ineffective assistance is raised in the Petition at page 72.

The State complains that Petitioner offers no motivation for Mr. Wertheim to lie. (Response, p. 21, l. 15). Mr. Harrod is not required to prove his specific motivation and declines to speculate. It is though of more than passing interest that, when the State was performing its court ordered search for Mr. Wertheim's invoices mentioned above, it discovered that Mr. Wertheim *himself* was no where to be found. It seems extremely peculiar that a person of his international reputation as an expert would suddenly vanish from the face of the earth. Mr. Harrod is not speculating that Mr. Wertheim lied, an examination of his work product in both this and the *Mckie* case, the complete absence of material suitable for making comparisons, the fact that he was not asked to make comparisons and the absence of any bench notes indicating that he did make comparisons all point to the inescapable conclusion that he committed perjury.

IDENTIFICATION ISSUE

Mr. Harrod is neither precluded nor has he waived the issue, as he is claiming ineffective assistance of Appellate counsel for failing to raise the unduly suggestive procedures issue, rather than the weaker, subjective post-hypnosis issue. See *Smith v. Robbins*, 528 U.S. 259, 288 (2008) *citing Gray v. Greer*, 800 F.2nd 644, 646 (7th Cir. 1986).

This claim is also bolstered by Petitioner's assertion of ineffective trial counsel for failing to call an expert on eye-witnesses and memory (Petition, p. 72 and the Identification Argument, Petition p. 24, *et. seq.*) and other witnesses from the Balboa Bay Beach Club to rebut Debbie Nolan.

Initially, the State makes the puzzling claim that Petitioner offers testimony from the "hypnosis" hearing rather than the *Dessureault* hearing held on October 1 and 3, 1997 (Response, p. 24, ll. 2-10). What is puzzling is that the State itself notes, in footnote 13, that "Testimony regarding the hypnosis motion was also intermittently received on these days" [on which the *Dessureault* hearing was held]. (Response, p. 24). The State does not explain how intermittently receiving evidence during the *Dessureault* hearing transforms into a "hearing on his hypnosis motion." The claim is specious, if not a deliberate misrepresentation. So too with the State's urging that the 10-10-97 argument be disregarded as being "[not] testimony from the *Dessureault* hearing." (Response, p. 24, ll. 9-10).

Distinguishing between testimony and argument thereon is likewise specious. In fact, testimony on the identification issue was taken 10-01-97, 10-03-97, 10-06-97, 10-09-97 and 10-10-97. The testimony regarding hypnosis was not "intermittently" received, it was co-mingled with the identification issue throughout the five days of the hearing. The State itself considered both the *Dessureault* and hypnosis issues to be part and parcel of the larger issue of whether the identification procedures were unduly suggestive.[3] Defense counsel expressly argued that the hypnosis issue was ". . . part of the totality of the circumstances of the various attempts of identification made." (R.T. 10-10-97, p. 97, ll. 1-1, specifically lines 9-10). Quotes from areas other than this hearing are necessary for context or further illustration of testimony given in this hearing and should not be disregarded.

The finding by the trial court that the identification procedures were not unduly suggestive is certainly subjective and should be reviewed in light of Petitioner's argument in the Judicial Bias section. Petitioner steadfastly maintains that he was misidentified as Gordon Phillips. The

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[3] Mr. Culbertson: I think we have concluded with the Dessureault **portion** but we have not concluded with the hypnosis **portion** (R.T. 10-03-97, p. 85, ll. 10-12 emphasis added)

enormous passage of time from contact to identification and the fact that Petitioner was the only person included in both a photo line-up and the live line-up are strong evidence that there was a misidentification in this case. The State next gives its preferred version of the Gordon Phillips saga (Response, pp. 24-27). Petitioner will not engage in a point by point analysis but does note that there were witnesses from the Balboa Bay Beach Club who could have been called to dispute her claim that security was called after Gordon Phillips left the premises (Response, p. 25, l. 10) see Petition, p. 32, ll. 12-13; p. 72, ll. 19-24; Appendix Item 4. Petitioner also notes that his calculation of the time from when Debbie Luster met Gordon Phillips to identifying Mr. Harrod as Phillips at trial (129 months) is incorrect and the State's calculation of 113 months and 7 days is accurate.

The State claims that Petitioner cannot show prejudice under *Strickland* by the admission of the identification testimony because the evidence against him was "overwhelming" does not bear up under closer scrutiny. (Response, p. 29, l. 18). The state lists 9 factors in support of its claim (*Id.*, pp. 29-30), four of which are entirely and solely dependent on the testimony of his former wife. This is the same person whom the trial judge found lacked sufficient credibility that he declined to find that the (F)(4)[4] aggravator had been proven. Her lack of credibility is illustrated by her claim that Petitioner received money from Hap Tovrea both before and after the murder of Jeanne Tovrea (Response, p. 30, l. 4). The State had to concede at trial that no money passed from MECA to James Harrod until March of 1989 (R.T. 11-17-97, p. 30). Also, she is the sole source of the completely false claim that Ms. Tovrea was invading the principle of the estate, as set out above and in the Petition at pp. 39-40, ll. 16-8.

Four other factors listed by the State were based on the receipt of cash and phone calls from Hap Tovrea these were secondary to their legitimate business venture. This leaves only the fingerprints which has been addressed above. The word of an unreliable witness and evidence of legitimate business activities is scarcely "overwhelming" evidence. The improper admission of Debbie Luster's "identification" of Petitioner is, and was, a very viable issue and it was ineffective

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[4] The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

assistance of appellate counsel to not brief the issue on direct appeal, the State's speculation that prejudice cannot be shown notwithstanding. This was a much stronger issue than the Rule 11 argument, thus Petitioner has met the test of *Smith v. Robbins,* 528, U.S. 259, 288 (2000) (Response, p. 13, ll. 8-10).

POLYGRAPH ISSUE

The incorrect claim that Petitioner did not seek admission of his successful polygraph results has been addressed above as one of the "very serious errors" in the State's response. Because the State did not address the merits of the argument, it should be deemed to have admitted error. Additionally, the claim is not subject to preclusion because it is based on a substantial change in the law. See Petition, pp. 33-35. The state of the law may have inclined the initial appellate defense to include only the preclusion of the polygraph in the penalty phase because that was the stronger of the two claims at that time. The procedural predicate, the adoption of *Daubert,* had not yet occurred. That has since occurred, constituting a significant change in the law.

The same reasoning applies to the 2005 resentencing and direct appeal. There has been a significant change in the law since those two events so the claim is not subject to preclusion. Moreover, the State's mistaken belief that the polygraph issue was not raised in the guilt phase of the 1997 trial could have the effect of rendering the State's arguments about its preclusion in both penalty phases irrelevant and moot. If relief is granted regarding its preclusion from the 1997 guilt phase, the 2005 sentence would be vacated.

The State next makes the claim that Petitioner fails to explain how the change in Arizona Rule of Evidence 702 from *Frye* to *Daubert* constitutes a significant change in the law (Response pp. 32-33). Petitioner does not have to explain it, the Arizona Supreme Court has already itself made that characterization in *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993). The State's characterization of this language as "*dicta*" is nonsense. (Response p. 33, FN 20). Petitioner is not claiming that the Arizona Supreme Court *held* that a change from *Frye* to *Daubert* was a significant change in the law, only that it recognized it to be so. The Arizona State Supreme Court certainly is authoritative on this matter.

The State blends its "nonretroactivity" argument in with its other arguments. That fails here

for the same reason it failed in the fingerprint argument. Both newly discovered facts and a significant change in the law, by their very nature, are applicable to cases previously decided. The court does not "retroactively" apply the new facts or changed law rather, it applies them to the previous proceeding and decides whether such new facts "probably exist and such facts probably would have changed the verdict or sentence" (32.1e) or, with a change in the law "which if determined to apply to defendant's case would probably overturn the conviction or sentence." (32.1g). This same reasoning in *Bilke (supra)* and *Tankersley (supra)* as was applied in the fingerprint argument applies here.

Also the State did not respond to the fact that the trial court never at any stage held an evidentiary hearing on the request to admit the polygraph results. Because of this lack of hearing "'the fact-finding process itself is deficient' and not entitled to deference. *Maddox,* 366 F3d at 1001." *Hurles v. Ryan,* 650 F.2d 1301, 1312 (2001). The defense repeatedly requested an evidentiary hearing for this issue. (Inst. #132; R.T. 10-06-97, pp. 3, 4, 5). The decision to not hold an evidentiary hearing was made in 1997, thirteen years ago. It is reasonable to assume that in the intervening thirteen years, the quality and reliability of polygraph testing has steadily improved. The lack of an evidentiary hearing, the adoption of *Daubert* and the advances in polygraph science combine to make a compelling case for the re-examination of this issue.

The State argues that the adoption of *Daubert* does not make the admission of polygraph results mandatory, rather, it is still a matter of discretion (Response p. 34, ll. 3-6, 17-19). This is precisely Petitioner's point, an evidentiary hearing is mandated at this time. The balance of the State's argument at page 34 is dogged by its mistaken impression that admission of the polygraph results was not sought in the 1997 guilt phase.

Lastly, the State argues Rule 26.7(b) A.R.C.P. requires that evidence presented at an evidentiary hearing be reliable. (Response, p. 35). This argument was directly addressed in the Petition at page 33. §13-751(c) is the statue which applies to capital sentencings, a fact noted by Justice Feldman in *Harrod I* at p. 325. This statue does not require any showing of reliability on evidence introduced in a capital sentencing.

ADMISSION OF PHOTOGRAPHS IN THE 1997 AND 2005 TRIALS

Petitioner will address the admission of the photographs in the 2005 trial first. The argument that this claim was waived and therefore precluded is incorrect. In the 2006 direct appeal, Appellate counsel presented a change in theory argument:

"The prosecutor committed misconduct by intentionally presenting a false argument to the sentencing jury." (Appendix Item 21, p. 41). This argument was based on the switch from conceding it could not prove Petitioner was the actual shooter in the 1997 trial (R.T. 11-17-97, p. 25). The court agreed, saying in its special verdict that "Although the State did not prove beyond a reasonable doubt that the defendant fired the shots that actually killed Jeanne Tovrea. . ." (Inst. #258, p. 15). At the 2005 trial the State switched theories and offered evidence and argument that Petitioner was indeed the actual shooter. (R.T. 10-05-05, p. 26). The argument on direct appeal was solely prosecutorial misconduct, not double jeopardy or violation of law of the case. Because appellate counsel had not raised the claim in this context, Petitioner claims ineffective assistance of Appellate counsel. (Petition, p. 43, l. 15-17). The complained of photographs were exclusively in support of, and inextricably intertwined with, the switch in the State's theory, now claiming Petitioner was the actual shooter. The issue of the inflammatory photographs was set out separately (Petition, p. 36) for the same reason several other issues were separately stated though they operated in support of another claim as well, to demonstrate in detail why the other claim is meritorious.[5] The testimony of the Crime Scene Reconstructionist, Lucian Haag, contains references to photographs which could only be photos of Ms. Tovrea taken at the scene though no exhibit numbers are recited (R.T. 9-20-05, pp. 93, 96, 99). The previous day, Officer William Heady had identified photo #62 as depicting the gunshot wounds to Ms. Tovrea's face (R.T. 9-19-05, pp. 73-74). These photographs may have had some minimal relevance in the 1997 trial when the State was attempting to prove that the murder was committed in an especially cruel, heinous or depraved manner. The court's rejection of this aggravator completely foreclosed any relevance whatsoever of these photos in the 2005 trial (Inst. #258, Special Verdict). Use of the photos violated the double

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[5] *E.g.* the Selective Immunity Argument. See Petition, p. 13; Conflation of Burdens, p. 14

jeopardy clause, the law of the case, and the due process clause (Petition p. 43, l. 14-27). It was ineffective assistance of Appellate counsel to fail to raise these arguments on direct appeal (*Id.*, l. 17).

PROSECUTORIAL MISCONDUCT

Selective Immunity

The State is incorrect in claiming that Petitioner's selective immunity argument is precluded. (Response, p. 36)/ The selective immunity argument is raised in the context of ineffective assistance of counsel in the 2005 retrial and is thus not subject to preclusion. (Petition, p. 47, l. 5-6; p. 73, l. 2-3). The argument is set out separately to demonstrate in detail why it was ineffective assistance to not seek immunity for Hap Tovrea. The selective immunity argument itself recites the ineffectiveness claim and incorporated again in the ineffectiveness claim proper. The direct appeal of the 2005 trial raised the related, though different claim that it was error for the court to not order that Hap Tovrea answer non-incriminating questions about his legitimate business dealings with Mr. Harrod. It was not an immunity based argument.

The State raises no substantive argument in response to this claim but rather defers its analysis to section (K)(2)(a). For the sake of clarity, Petitioner will follow suit.

DOUBLE JEOPARDY AND LAW OF THE CASE VIOLATIONS

The State's response that these claims are waived is incorrect. These claims are integral to Section 3 of the Misconduct Argument and set out the substantive arguments underlying the change in theory argument. As stated above in the discussion of the photographs, the Direct Appeal argued only prosecutorial misconduct by making a "false argument" to the jury (Appendix Item 21). Not urging a violation of double jeopardy and law of the case violations was ineffective assistance of counsel. Petitioner expressly alleges ineffective assistance of Appellate counsel for failing to make these arguments (Petition, p. 31, ll. 15-17).

The entirety of the State's presentation of the circumstances of the crime was nothing other than an attempt to show the crime was committed in an especially cruel, heinous or depraved manner. It was precluded from doing so by the express ruling of the Special Verdict that "the State failed to prove beyond a reasonable doubt that the murder was committed in an especially heinous,

cruel or depraved manner." (Inst. #258, p. 8). The State appears to have understood that it was precluded from arguing the (F)(6) factor because the Notice of Aggravating Factors filed before the 2005 trial alleged the sole aggravating factor of §13-703(F)(5). (Inst. #229). Despite having conceded that it was precluded from alleging (F)(6), the State nonetheless presented evidence and argument that could only have been in support of that factor.

The Double Jeopardy Clause applies to capital sentencing proceedings where such proceedings "have the hallmarks of the trial on guilt or innocence." *Sattizahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S.Ct. 732, 737 (2003) *quoting Bullington v. Missouri*, 451 U.S. 430 at 439, 101 S.Ct. 1852 (1981). Arizona follows this principle. *See, State v. Rumsey*, 136 Ariz. 166, 665 P.2d 48 (1983). (Petition, pp. 41-42). The State has waived any substantive objection by relying exclusively on procedural bar.

CHANGE IN THEORY

The State's claim the Petitioner has waived this issue and is precluded is incorrect. As stated immediately above, in the Photograph and Double Jeopardy/Law of the Case violations sections and is incorporated hereby. Petitioner alleges ineffective assistance of Appellate counsel for raising prosecutorial misconduct only in the context of presenting a "false argument" to the jury rather than the State's change in theory in the 2005 trial violated the Double Jeopardy Clause and the law of the case.

The State has waived any substantive objections to this argument by relying exclusively on a procedural bar argument.

MISREPRESENTED THE CIRCUMSTANCES OF THE OFFENSE

The State offers no substantive argument in response to this claim, instead it relies solely on a preclusion argument. It has waived substantive objection to this claim. The State's claim that this argument is waived is incorrect. Petitioner expressly incorporated the above subsection arguments 2 and 3 (Double Jeopardy/Law of the Case; Change in Theory) which expressly argue ineffective assistance of Appellate counsel. Therefore, the claim is not waived. (Petition p. 45, l. 27-28). As argued in the Petition, it is axiomatic that it is improper to take a mitigating circumstance and present it as an aggravating circumstance (Petition, pp. 45-46). Misrepresenting

the circumstances of the offense as an aggravating circumstance defeats, indeed reverses, the narrowing function of Arizona's death penalty scheme and violates due process of law. (Petition, p. 26). The issue was preserved by 2005 trial counsel's written objection to evidence pertaining to guilt (Inst. #381) and it was ineffective assistance of trial counsel to not argue this on direct appeal.

JUDICIAL BIAS

The State makes only a cursory procedural bar argument to this claim. The claim of preclusion is incorrect because the 9th Circuit Court of Appeals opinion in *Hurles v. Ryan*, 650 F.3d 1301 (2011), critical of the named judge's judicial conduct constitutes newly discovered material facts.

As noted in the Petition, the named judge is ". . . one of our most experienced, and deservedly most respected [on the bench]." Petition, p. 55, quoting Justice Feldman's concurring opinion, in *Harrod I,* 200 Ariz. at 326. The judicial bias argument was not raised on direct appeal because such a claim at that time and under those circumstances was simply untenable. After the *Hurles v. Ryan* Opinion, it became unavoidable. Petitioner emphasizes that he need not show actual bias on the part of this judge to prevail, only that the judge's conduct presented "the unconstitutionally high risk of potential bias." Petition, p. 55 *quoting Caperton v. Massey*, 556 U.S. 859, 129 S.Ct. 2252, 2262 (2009).

CONFLATION OF MITIGATION BURDEN OF PROOF AND PERSUASION.

This claim is neither waived nor precluded as it is raised in the context of ineffective assistance of trial counsel (Petition, p. 73, l. 4). The claim is set out separately to demonstrate in detail why this was ineffectiveness. Burden shifting is fundamental error requiring reversal. *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984); *State v. Johnson,* 173 Ariz. 274 842 P.2d 1287 (1992). This burden shifting pervaded the voir dire in this case. (Petition, pp. 63-64). The State's suggestion that this bombardment of fundamentally erroneous misinformation was somehow cured by the correct statement of the law in the final jury instructions is simply untenable. (Response, p. 38). Any presumption that jurors follow their instructions is thoroughly rebutted when one considers the cascade of misinformation that pervaded voir dire.

ERRONEOUS JURY INSTRUCTION RE: "MUST" VOTE FOR DEATH.

The State's claim of waiver and its reliance on *State v. Tucker*, 215 Ariz. At 318, 160 P.3d at 1168 (2007) (Response, p. 38) fails to account for what was essentially a substantial change in the law as expressed in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531 (2004). Tucker's continuing vitality following *Blakely* is dubious. Changes in the law are seldom "watershed" occasions. Rather, they are more often incremental as shown by the evolution of 6th Amendment jurisprudence reflected in the progression of *Jones v. U.S.*, 526 U.S. 227, 119 S.Ct. 1215 (1999), *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428 (2002) and *Blakely v. Washington (supra).* While *Blakely* speaks of the court's "commitment to *Apprendi* in this context reflects not just our respect for long standing precedent", it is its emphasis on how these opinions express the "fundamental reservation of power" which has implications for Arizona's death penalty statutes and jury instruction which are perhaps not immediately apparent. Petitioner believes this to be a meritorious colorable claim.

THE VOIR DIRE PROCESS AND 'FOLLOW THE LAW" QUESTIONS.

These claims are neither waived nor precluded, as they are raised in the context of ineffective assistance of counsel. (Petition, p. 73, l. 4). The State offers no substantive argument on these issues at this juncture but does so in the IAC section. For clarity, Petitioner will follow suit.

INEFFECTIVE ASSISTANCE OF COUNSEL.

1997 Trial

The State's dismissal of trial counsel's failure to prepare mitigation evidence as moot because that death sentence was vacated (Response, p. 39) overlooks the obvious. Had mitigation been properly prepared and presented, petitioner might have received a life sentence. Thus this error cascades through all subsequent litigation. Moreover, by the time petitioner was first sentenced to death in 1998, he had become so alienated and distrustful of the process that he was unable and unwilling to cooperate in the development of mitigation evidence. This persisted throughout the 2005 trial. (Inst. 446, Motion for Rule 11 Prescreen). The opportunity to develop mitigation was lost forever by the 1997 trial counsel's failure.

The State's claim that trial counsel reasonably pursued a forgery, rather than a misidentification theory is simply a nonsequitor. The issue is that trial counsel's inept voir dire led Pat Wertheim to testify falsely that he made identifications of the 18 latent prints as those of Mr. Harrod's. Likewise, the State's claim that there is no evidence Wertheim testified falsely is preposterous. Replies to these claims by the State have been made above at pages 5-10 and are incorporated herein.

The failure to call witnesses to rebut evidence of pecuniary gain is not limited to the penalty phase, as suggested by the State. (Response, p. 40). Calling Jason Hu to testify as to the legitimate business dealing between Hap Tovrea and Mr. Harrod was useful but no substitute for Mr. Tovrea. The State's claim that Petitioner fails to show what testimony Hap Tovrea would have offered is incorrect. (Response, p. 41). Such information was presented in a written offer of proof submitted in conjunction with the 2005 attempt to call Hap Tovrea as a witness (Inst. #463). His testimony would have been the same in 1997, had trial counsel thought to subpoena him. That Hap Tovrea's testimony was important is illustrated by the fact that a juror submitted a question asking if he would be called as a witness (Inst. #593).

The State's claim that Petitioner failed to submit an affidavit to support his claim of IAC for failing to call witnesses to rebut Debbie Nolan's identification of Mr. Harrod as Gordon Phillips is misplaced and unavailing. (Response, p. 41, l. 16-17). The police report submitted as Appendix Item 14, adequately identifies the anticipated testimony (Petition, p. 72). The response addresses only that the security log makes no mention of Gordon Phillips being on the property (and urges that this is consistent with Debbie Luster's testimony (Response, p. 42, ll. 1-4). This ignores the other half of the issue; that there was no record of security patrolling the grounds at the request of Ms. Tovrea. (Petition, p. 72, ll. 17-24). These were not anonymous witnesses who would have offered unspecified testimony, such as prompted the *Borbon* court's preference for affidavits (Response, p. 17-18). *See State v. Borbon,* 146 Ariz. 392, 399, 706 P.2d 718 (1985) "First, defendant does not indicate the names of witnesses nor include affidavits containing what testimony would have been offered." These were known persons who would have offered known tesimony.

The claim of a requirement for affidavits directed at the testimony of Dr. Elizabeth Loftus,

is clearly misplaced and unpersuasive. (Response, p. 42, ll. 21-23). The Petition sets out in great detail the nature and specifics of her proposed testimony (Petition, pp. 24-32, Identification Argument). Dr. Loftus is certainly not anonymous and she is not an unknown quantity. "Dr. Loftus specializes in an area of experimental and clinical psychology dealing with perception, memory retention and recall. Her qualifications are unquestioned, and if may be fairly said that she 'wrote the book' on the subject." *State v. Chapple*, 135 Ariz. 281, 291, 660 P.2d 1208, 1218 (1983). Petitioner has provided the State with a roadmap of Dr. Loftus' proposed testimony, not the generalizations concerning anonymous witnesses decried in *Borbon.* That case only suggests one method by which a petitioner can put the parties and court on notice as to potential claims. Petitioner has exceeded that method with his detailed pleading and identification of Dr. Loftus.

FAILURE TO REQUEST IMMUNITY FOR HAP TOVREA

Petitioner includes this claim as ineffective assistance of counsel and sets out its foundation in detail in the Petition at pp. 47-54. The state sets out only the generalized claim that – all else being equal – a defendant does not have the right to obtain immunity for a witness. (Response, p. 43, l. 13). Even this generalization is subject to exceptions under Arizona law. *See Smith v. Arizona*, 17 Ariz. App. 79, 495 P2d 519 (1972); (Petition, p. 48, ll. 23-25). The State concedes that its generalized claim is incorrect when it notes, albeit too narrowly, that immunity can be granted to defense witnesses in instances of prosecutorial misconduct (Response, p. 44, l. 7). The claim that prosecutorial "misconduct" is required to trigger the due process right of a grant of immunity to a defense witness is too narrow, as can be seen by the analysis set forth in *U.S. v. Straub,* 384 F.3d 567 C.A.9 (Cal) (2004); (Petition, pp. 51-54)[6]. There is no doubt that withholding immunity from Hap Tovrea had the *effect* of distorting the fact finding process (Petition, p. 53, l. 21) and that Mr. Tovrea was both intimidated and harassed by this (Petition, p. 53, ll. 14-16).

The citation by the State of *State v. Axely*, 132 Ariz. 383, 388, 646 P.2d 268, 273 (1982) in support of its generalized claim of no defense right to immunity is misplaced. *Axely* examined both

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[6] Petitioner did include this issue as an instance of prosecutorial misconduct although the State's reading of "misconduct" is too narrow.

U.S. v. Morrison, 535 F.2d 223 (3rd Cir. 1976) and *Virgin Islands v. Smith*, 615 F.2d 964 (3rd Cir. 1980) and simply found each to be inapplicable to *Axely's* facts *(Id.* at 388; 273). It so found because in *Axely* there was no showing of prosecutorial misconduct nor was there any showing that the witnesses "testimony would have been clearly exculpatory and essential to *Axely's* case." *(Id).* Petitioner herein easily makes both these showings under the *Straub* analysis. The *Axely* court also noted that the witness, a co-defendant, still retained the right to appeal, and later did so "the government had a strong interest in withholding immunity." (*Id.*) Here, no such interest was present, as the government had been investigating Mr. Tovrea at that point for seventeen years and had gathered everything it needed to prosecute him through the execution of search warrants on his home and business in 1988 (Petition, p. 49, ll. 16-28; R.T. 3-22-05, p. 16, p. 23). What the *Axely* court did **not** do was reject the concept that, under certain circumstances, due process may require the immunization of defense witnesses. Mr. Tovrea's lawyer all but elbowed Mr. Harrod's defense counsel in the ribs during the 3-22-05 hearing to quash the Tovrea subpoena when he said "I am assuming that Mr. Ahler doesn't intend, *on behalf of the sovereign*, to apply for use immunity for Mr. Tovrea . . ." (R.T. 3-22-05, p. 24) (emphasis added). Unfortunately, defense counsel did not take the hint and made no motion that the court order the State to do so or itself grant immunity under its inherent powers.

THE "FOLLOW THE LAW" QUESTIONS

This issue is titled "*Witherspoon/Blakely* error in the Petition and one ground of ineffective assistance of counsel in the 2005 trial (Petition, p. 72). The ineffectiveness was both in failing to object to the improper use of the questions by the prosecution and their use by defense counsel himself. Petitioner disagrees that he cited no authority for this argument. In arguing the prosecutorial misuse of these questions he cited *Witherspoon v. Ilinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968), *Wainwright v. Witt*, 469 U.S. 412, 1055 S.Ct. 844 (1985), *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045 (1987) and *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531 (2004). This prong of the argument is essentially that the State usurped the role and invaded the province of the jury by coercing them into abandoning their own sense of moral certitude in determining whether life or death was the appropriate penalty. The prosecutor was not entitled to even ask these

questions. These jurors were not opposed to the death penalty and their views would not have "prevent[ed] or substantially impair[ed] the performance of [their] duties." *Wainwright v. Witt*, *supra* at 420. In order for the question to be proper, the juror must both be opposed to the death penalty and that opposition must be so strong that it would "'prevent or substantially impair his performance of his duties in accordance with his instructions and his oath.' *Adams v. Texas*, 448 U.S. 38 [45] 100 S.Ct. 2651" *Wainwright, Id.* These jurors satisfied neither condition. Rather, the state used "follow the law" questions to coerce (with their great authority) the jurors into abandoning their own sense of which crimes might warrant the death penalty and substitute that of the State. It fell below prevailing standards to not object.

The use of the "follow the law" questions by the defense operated differently. The defense used "follow the law" questions to rehabilitate *Morgan*[7] excludable jurors who should have been stricken for cause. (Petition, pp. 74-75). Juror 16 did express a general willingness to listen to the evidence and the ability to impose a life sentence. (R.T. 9-13-05, pp. 134-136). But when asked about what would be important to know about the circumstances of the crime or the person committing it, he was unable to say (*Id.*, p. 139). Finally, he was able to say: "I guess to know whether it was, how would you say, premeditated or – I don't know if I'm answering the question right or not." And: "I guess basically that would be important to know, whether it was premeditated or if something that just happened on the spur of the moment. I guess just, you know that's basically the only best answer I could give you." (*Id,* p. 140). The juror just told the lawyer he might not impose the death penalty for second degree murder. Rather than pointing out second degree murder is not death eligible, he tells #16 it has already been decided the murder was premeditated and inexplicably asks: "would that have any effect on your ability to be fair and impartial in this case?" (*Id*). Predictably, the answer was "no" despite the fact that he had just said the only important factor was premeditation.

Juror #43 said "I believe every person is or should be sentenced to death" (R.T. 9-14-05, p. 73). Juror #46 believed in "an eye for an eye" (R.T. 9-14-05, p. 76). Juror #53 believed "If

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[7] *Morgan v. Illinois*, 504 U.S. 719, 122 S.Ct. 2222 (1992).

somebody commits murder, they should receive the death penalty." (R.T. 9-14-05, p. 103). Juror #60 could not think of anything that could persuade him to grant life (R.T. 9-14-05, p. 125). All of these persons were *Morgan* excludable and could have been shown to have been irrevocably so, given competent questioning. The recitation by the State that jurors are presumed to follow the law (Response, p. 45, l. 5) is irrelevant as well as clearly rebutted by the circumstances.

CONFLATION OF THE BURDENS OF PROOF AND PERSUASION

The State's argument that the burden is on the defense to establish mitigating circumstances by a preponderance of the evidence is a correct statement of the law, so far as it goes.[8] (Response, p. 45). However, they did not stop there. Both sides repeatedly went on to argue, to fully ten of the sixteen seated jurors, that the defense also had the burden of persuasion, that the mitigation was sufficiently substantial to call for leniency. That was fundamental error (Petition, p. 63, ll. 14-15). That *Baldwin*[9] had not yet been published is of no moment. *Baldwin* did not announce new law. The parties and the court were well aware that this very issue had been argued in *Baldwin* a few days earlier while jury instructions were being settled in this case. (R.T. 10-20-05, p. 73, p. 78). The parties had to have been aware that their statements in *voir dire* constituted burden shifting as the instruction given to the jury, presumably prepared in the wake of *Ring,* properly stated that neither party bore the burden of persuasion. (Inst. #633, p. 5). Upon settling the jury instructions, defense counsel should have realized the error committed during *voir dire* and moved for a mistrial. However, no motion was made.

FAILURE TO REHABILITATE PROSPECTIVE ANTI-DEATH PENALTY JURORS

Petitioner's point is that the trial attornies did not even attempt to rehabilitate these jurors. Many veniremen with scruples about imposing a sentence of death when advised during *voir dire* that the sentencing decision is their *individual* decision and that the law does never *require* them to impose a sentence of death are then empowered to state honestly that they can "follow the law" and honestly consider the appropriateness of both a sentence of life and a sentence of death. This

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[8] It fails to account for the fact that jurors are free to find their own mitigation.

[9] *State ex rel Thomas v. Granville, Baldwin RPI*, 211 Ariz. 468, 123 P.3d 666 (2005).

is precisely the point Petitioner makes in his 13-751(E) argument. §13-751(E) currently tells jurors that they **must** impose death if they unanimously conclude that the mitigation was not sufficiently substantial to call for leniency. (Inst. #633, p. 5). This invades the province of the jury and has the effect of unconstitutionally disenfranchising a host of citizens who, for one reason or another, have doubts about the propriety of ordering another human being to his death. Any juror may individually find mitigation anywhere in the record. That record includes the judge noting that the defendant is present each day of trial. That means he is alive and is a sentient human being. If an individual juror finds this fact, even standing alone, to be mitigation sufficiently substantial to call for leniency, the law empowers him to do so. These persons are unconstitutionally disenfranchised for having an expansive sense of mitigation.

Whether any of these persons could have been rehabilitated if they had been properly voir dired is impossible to determine due to the acquiescence of trial counsel to their dismissal.

FAILURE TO MOVE TO STRIKE PRO-DEATH PROSPECTIVE JURORS

This argument has been substantively replied to above in the "Follow the Law" argument.

DEFICIENT PERFORMANCE IN QUESTIONING A MITIGATION WITNESS

The State argues that the witness volunteered information about death row inmates. (Response, p. 47, l. 16). The witness actually mentioned death row several times (R.T. 10-19-05, p. 11, l. 23; p. 12, l. 5, l. 9, l. 10, l. 11, l. 19, l. 21). Rather than move to strike as unresponsive, the attorney simply let the answer stand. She even incorporated the term in her questioning, although with the gentler term "condemned row". (*Id.*, p. 12, l. 14, l. 25). On cross-examination the term "death row" was repeatedly used (*Id.*, p. 13, l. 9, l. 18; p. 14, l. 2). On redirect, the defense attorney used the term "death row" (*Id.*, p. 14, l. 24). There could be little doubt that the jury inferred that Petitioner had been on death row due to the repeated referrals to it in both questions and answers. Had he not been on death row, such references would have been irrelevant and prejudicial. As it was, such references were relevant but still prejudicial. Eliciting damaging evidence without sound strategy is deficient performance, and ineffective if there is prejudice, *see People v. Dalessandro*, 165 Mich. App. 569, 612-614; 419 N.W.2d 609 (1988); *White v. McAninch*, 238 F.3d 988, 997-998 (6th Cir. 2000).

Here the jury had just two tasks; to determine if the crime was committed for pecuniary gain and, if so, what was the appropriate sentence. Learning that Petitioner had previously been sentenced to death had to have been staggeringly damaging. The jurors had to have felt that death was the appropriate penalty, if he had been sentenced previously to death. There could have been no strategic reason for permitting this information to be conveyed to the jury.

***PORTILLO* ARGUMENT**

The State's claim that Petitioner has waived this argument by not raising it on Appeal is incorrect (Response, p. 48, l. 2). Petitioner's claim is that the instruction both lowered the burden of proof and shifted the burden of proof to the defendant. (Petition, p. 75, l. 24). The instruction requires the defendant to prove there is a "real possibility" that he is not guilty. (Inst. #228, p. 5). Petitioner made these objections of both lowering the burden and shifting the burden at trial (R.T. 11-14-97, p. 88). Burden shifting is fundamental error requiring reversal. *State v. Hunter,* 142 Ariz. 88, 688 P.2d 980 (1984); *State v. Johnson,* 173 Ariz. 274, 842 P.2d 1287 (1992). It was ineffective assistance of Appellate counsel to not raise this issue on Appeal.

RESTRICTIVE MITIGATION

The State responds both that this issue was not raised on direct appeal and is therefore waived (Response, p. 48) and that the jury instruction was favorably commented upon by the court in *Harrod III* (*Id.*, p. 49). This confusion apparently results from Arguments VI and VII in the 2006 Opening Brief. Argument VI was headed "The Penalty Phase Instructions and Form of Verdict, Taken as a Whole, Impermissively Created and Shifted a Burden of Proof, Resulting in a 'Presumption of Death'" (Appendix, Item 21, p. 61). Argument VII is headed "This Court is Required to Conduct Independent Review of Aggravators and the Propriety of Harrod's Death Sentence; if it Concludes that the Trial Court Improperly Excluded Relevant Mitigating Evidence, it May Remand Rather than Conduct Such Review." (*Id.*, p. 66). The brief then merely urges remand, rather than offering substantive argument.

The issue is not waived or precluded because Petitioner expressly incorporated the *Witherspoon/Blakely* argument with its criticism of the "Follow the Law" questions and its resultant IAC claim. (Petition, p. 78, ll. 4-5). Because Petitioner asserts ineffective assistance of trial counsel

in the 2005 trial, the claim is not waived.

Petitioner's claim is that the final jury instructions restrict the jurors to considering mitigation to that mitigation "**so long as it relates to** an aspect of the defendant's background, character, propensities, record or circumstances of the offense." (Inst. #633, p. 4, emphasis added) (Petition, p. 77).

There is no pleading or argument in the record showing that this restriction was opposed or objected to by the 2005 defense counsel. Indeed, near the end of the trial, the state objected to a paragraph in a document prepared by an expert offered in mitigation[10] because it did not "go to any aspect to the defendant's character, his propensity for (sic) record in (sic) any of the issues of the offense." (R.T. 10-20-05, p. 27, ll. 1-3). The defense did not argue in response that these factors were too restrictive and thereby violated due process. The court sustained the objection and struck the paragraph (*Id.*).

This argument also incorporates the 403 and 2005 prosecutorial misconduct arguments. Those arguments illustrate how skewed against Petitioner the 2005 proceeding was and further supports his due process violation arguments.

This confusion over the proper scope of mitigation evidence is present in the *Harrod III* opinion itself. It states, variously "We conclude that '[s]uch a directive does not violate the Eighth Amendment so long as jurors are allowed to consider any mitigating evidence.'" (*Harrod III*, p. 281, 532 ¶ 49); "Here several jury instructions informed jurors that they could find mitigating factors from anything presented during the resentencing proceeding." (*Id*). But then, in the footnote to that sentence, it offered examples of those instructions, one of which has the very "so long as it relates to" language. (*Id.*, FN 11). This restriction violates due process of law and it was ineffective assistance of counsel to not object.

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[10] Mr. Chase Rivland, a former executive of various state departments of correction (R.T. 10-19-05, p. 49, *et. seq.*)

ACTUAL INNOCENCE

> "The ability of any examiner to 'individualize' without the potential for any error at the claimed level of one person in the whole of human history is not scientifically validated."
>
> Fingerprint Inquiry Report, para. 38.18, p. 683

The core tenet of fingerprint identification, that a particular fingerprint impression was made by only one person and none other in the world, has never been scientifically validated. The 2009 National Academy of Sciences Report found that the core claims of fingerprint analysis, 100% accuracy and an error rate of zero were unsustainable and unsupported by scientific examination (NAS Report, p. 142). Fingerprint evidence was the only thing that mattered in convicting Petitioner and it has since been learned that what the jury was told about fingerprint identification in the 1997 trial to obtain that conviction was inaccurate and unjustifiable. A closer look at the methodology of Karen Jones and Joseph Silva, in light of the new criticisms of latent print forensics does much to cast doubt on their findings. They fatally damaged their credibility by testifying with absolute certainty when all along they knew they were only testifying as to their opinions. Future jurors would rightly be skeptical of their credibility and veracity for their having concealed this critical fact from the 1997 jury. The subjective nature of the ACE-V method they employed was fully documented in the NAS Report (Petition, pp. 14, 15). Mr. Silva did not know which features Ms. Jones relied upon in making her identifications. Mr. Silva never documented which features he relied upon in my making his verifications. They could have each rejected features relied upon by the other. Their lack of bench notes prevents any meaningful review of their work and essentially renders their work and their opinions worthless. Their future testimony could even be precluded (Petition, p. 15).

Without the claim of 100% accuracy of fingerprint identification, and the shoddy methodology of Jones and Silva the rest of the evidence simply falls apart. The lynchpin of the State's case, that Ed Tovrea, Jr., had to act because his stepmother was depleting the assets of the estate is demonstrably false. (This Reply, p. 2, FN 1). The kitchen window being the point of entry because it was not connected to the burglar alarm is illogical (This Reply, p. 3). The phone traffic between Mr. Tovrea and Mr. Harrod is indicative of an open, legitimate business relationship rather

than an ill-concealed murder conspiracy, as is the easily traceable transfers of funds which did not start until months after the murder.

The State is unusually selective in its description of the phone traffic in its Response to the Actual Innocence claim, noting only "phone contact the day before and the day after the murder". (Response, pp. 49-50, no cite to the record supplied). The State itself earlier noted that there were 5 phone calls between them on the actual day the murder was discovered (Response, p. 30, ll. 10-11). In those days before the Internet, it is scarcely surprising that Mr. Tovrea would contact a business associate in the town in which his stepmother was found murdered to learn more details (R.T. 11-12-97, pp. 61, 64). The State's assertion that after the murder the phone calls dropped off dramatically is inaccurate. (Response, p. 30, l. 12). Chart #243, prepared by Wayne Drew, shows voluminous phone traffic throughout February and May 1989 (R.T. 11-06-97, p. 46). Also as noted earlier the State has conceded that payment from MECA did not begin until May, 1988 (Response, p. 30, l. 6)

The statements of Anne Costello are uncredible. Most of what she claimed to have been told by Mr. Harrod is simply not susceptible to proof, such as her claim of statements before and on the night of the murder (R.T. 11-14-97, pp. 9, 12, 13, 15, 17, & 20). On cross examination she had to admit that most of what she told the police were only assumptions on her part (*Id.*, pp. 43-48). Of the balance of the information she provided, 90% of it could have been gleaned from watching the Unsolved Mysteries program, though she denied that was the source (*Id.*, p. 48, 69). The trial court was skeptical of her credibility, finding that her uncorroborated statements were insufficient to constitute proof beyond a reasonable doubt (Inst. 258, Special Verdict). Also, the 1997 jury discounted her testimony (Inst. #252, p. 16).

Lastly, the perjury, and now, apparent disappearance of Pat Wertheim leaves the fingerprint evidence in shambles. Stripped of the aura of invincibility, undermined by shoddy methodology, and exposed as outright fabrication by Pat Wertheim, the fingerprint evidence could well be disregarded by a future jury, if not actually precluded due to the lack of repredictability of their findings (Petition, p. 15).

Should Jones and Silva be precluded from testifying because their results cannot be

reproduced or attacked due to their lack of bench notes, Petitioner will have come a very long way in showing that no reasonable jury would have found him guilty. Add to this Pat Wertheim's destroyed credibility, presume his successful polygraph results are admitted under *Daubert* and Petitioner has a powerful claim no reasonable finder of fact would have found him guilty.

CONCLUSION

Each argument raised by Harrod states a colorable claim. None are barred procedurally. It is therefore requested that this court authorize further factual development of these colorable claims.

RESPECTFULLY SUBMITTED this 10th day of May, 2013

/s/ Richard D. Gierloff
Richard D. Gierloff
Attorney for Defendant

The foregoing efiled and notification sent electronically this 10th day of May, 2013, to:

The Hon. Joseph Welty
Maricopa County Superior Court
201 West Jefferson
Phoenix, Arizona 85003

Susanne Bartlett Blomo
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 850072997

James Cornell Harrod, #136270
ASPC - Florence
Eyman Complex - Browning Unit
P.O. Box 3400
Florence, Arizona 85232

/s/ Kimberly Rodriguez

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Filed By:
Kimberly Rodriguez
Law Offices of Richard D. Gierloff, P.C.
45 West Jefferson, Suite 412
Phoenix, AZ 85003
602-254-8861 / krod27@msn.com

Authorizing Attorney:
006350 (AZ)
richard@aztrialattorney.com

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