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ATTORNEYS FOR RESPONDENTS

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, PLAINTIFF, -VS- JAMES CORNELL HARROD, DEFENDANT.	NO. CR1995–09046 RESPONSE TO PETITION FOR POST-CONVICTION RELIEF (Honorable Welty, presiding) **DEATH PENALTY CASE**

Pursuant to Rule 32.6(a) of the Arizona Rules of Criminal Procedure, the State opposes James Harrod's Petition for Post-Conviction Relief ("PCR"). For the reasons set forth in the following Memorandum of Points and Authorities, the Petition should be dismissed and relief should be denied because the asserted claims are either precluded or fail to state colorable claims for relief.

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RESPECTFULLY SUBMITTED this 25th day of March, 2013.

THOMAS C. HORNE
ATTORNEY GENERAL

/s/
Susanne Bartlett Blomo
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ATTORNEYS FOR PLAINTIFF

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. THE CRIME.

The facts of Jeanne Tovrea's murder are set forth in *State v. Harrod* (*Harrod I*), 200 Ariz. 309, 311–12, ¶¶ 2–11, 26 P.3d 492, 494–95 (2001) and *State v. Harrod* (*Harrod III*), 218 Ariz. 268, 273–74, ¶¶ 2–7, 183 P.3d 519, 524–25 (2008).

> Jeanne [Tovrea] had married Ed Tovrea, Sr., in 1973. She had an adult daughter from a previous marriage, Debbie Luster. Ed had three children from a previous marriage, Ed Jr. [hereinafter "Hap"], Georgia, and Priscilla. When Ed Sr. died in 1983, his estate was worth approximately $8 million. His will provided that each of his children would receive $200,000, which would be distributed in monthly payments of $1,500. Jeanne received certain real estate, stock, and personal property listed in the will. The remainder of Ed Sr.'s estate was put into a trust. The terms of the trust entitled Jeanne to all the income from the trust during her lifetime, and the trustees were permitted to invade the corpus of the trust for her benefit; upon her death, the trust would pass to Ed Sr.'s three children. At the time of Jeanne's death, the trust had an estimated worth of nearly $4 million.

Harrod III, at ¶ 3.

In 1987, Jeanne began to receive phone calls from a man identifying himself as Gordon Phillips. *Harrod I*, at ¶ 3. Phillips claimed he worked as a "stringer"

for Time Life Publications and was interested in her late husband's experiences as a WW II prisoner of war. *Id.* Jeanne was suspicious of Phillips and asked a friend, who was a retired CIA agent, to investigate him, but the investigation was fruitless. *Id.*

On July 11, 1987, Jeanne, her daughter Debbie, and Debbie's husband met with Phillips in San Diego. *Harrod III*, at ¶ 4; *Harrod I*, at ¶ 4. They spoke for 30–45 minutes. *Harrod I*, at ¶ 4. "Phillips led Debbie to believe he had been a soldier in Vietnam,[1] but he did not seem interested in the World War II related books Debbie and [Jeanne] had brought. Debbie became suspicious of Phillips and called security after he left." *Harrod III*, at ¶ 4.

Shortly before 1:00 a.m. on April 1, 1988, a burglar alarm went off at Jeanne's home in Phoenix. *Harrod III*, at ¶ 2; *Harrod I*, at ¶ 5. Police found that the window above the kitchen sink had been removed and placed on a chair on the patio. *Harrod III*, at ¶ 2; *Harrod I*, at ¶ 5. An arcadia door was open. *Id.* The police found Jeanne, dead in her bed. She had been shot five times in the head. *Harrod III*, at ¶ 2; *Harrod I*, at ¶ 5. "Several drawers from a jewelry case had been removed and set on furniture, and Jeanne's purse had been emptied on the kitchen counter. The rest of the house appeared undisturbed." *Harrod III*, at ¶ 2.

"Although the house was protected by more than one burglar alarm, the window above the kitchen sink was the only point of entry that was not connected to an alarm. The police determined that the alarm had been set off when the intruder left through the arcadia door." *Harrod I*, at ¶ 6.

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[1] Several of Harrod's friends testified that Harrod claimed to have served in Vietnam, although Harrod later admitted to lying about his military service. *Harrod III*, at ¶ 4, n. 2.

"Immediately after Jeanne's death, Debbie told the police about Gordon Phillips." *Harrod III*, at ¶ 5. When Debbie's husband was subsequently cleaning Jeanne's home, he found a micro-cassette tape on which there were two phone messages from Phillips. *Harrod III*, at ¶ 5; *Harrod I*, at ¶ 7. He gave the tape to police. *Harrod I*, at ¶ 7.

Four years later, the national television show Unsolved Mysteries aired a piece on Jeanne's murder. *Harrod III*, at ¶ 6; *Harrod I*, at ¶ 8. "During the segment, one of the telephone messages from Phillips was played." *Harrod III*, at ¶ 6.

> Harrod's then brother-in-law, Curt Costello, recognized the voice as Harrod's. Curt taped a rerun of the episode and sent copies to his brother Mark Costello, and his sister, Anne Costello (Harrod's wife at the time). He also sent a copy to Jeff Fauver, a friend who was a former FBI agent and who was then working as a criminal investigator for the United States Department of Defense. All three of the recipients knew Harrod well and recognized the voice on the tape as Harrod's. Fauver called the police anonymously on December 9, 1993.

Harrod I, at ¶ 8.

> In September 1995, the police arrested Harrod for his involvement in the murder of Jeanne Tovrea. At this point, investigators had gathered considerable evidence against Harrod, including bank records showing large money transfers from [Hap] to Harrod, telephone records showing calls between [Hap] and Harrod[2], and statements regarding the jewelry and credit cards that were missing. In addition, after being offered immunity, Anne Costello, Harrod's ex-wife informed police that: (1) Harrod told her that he had been hired by [Hap] to coordinate a hit on Jeanne for $100,000; (2) Harrod said

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[2] "Telephone records showed that during the months preceding the murder over 1,500 phone calls had been made between Harrod and Hap, and that 52 of those calls took place the day before the murder." *Harrod I*, ¶ 10.

> that he had posed as Gordon Phillips to interview Jeanne; (3) when Harrod left their house on March 31, 1988, he told Anne he was going to supervise the murder and let her know that it was done when he returned the next morning; (4) Harrod spoke to [Hap] on the telephone the morning of April 1, 1988; (5) Harrod and Anne suddenly had large, unaccounted-for sums of money; (6) Harrod received Fed-Ex boxes full of cash from [Hap]; and (7) Harrod kept Jeanne's jewelry and credit cards in their house for a time before burying them in the desert. Police also found numerous latent fingerprints from Jeanne's kitchen counter, the outside of the window pane, the inside of the window pane, and a gate on her property that matched Harrod's fingerprints.

Harrod III, at ¶ 7.

Further evidence included: (1) At a live line-up, Debbie positively identified Harrod as the man posing as Gordon Phillips (*Harrod I*, at ¶ 10); (2) "Hap [had] told Harrod that he and his sisters hated Jeanne because she had limited their access to [their father] during his final illness and was depleting the remaining assets [of the trust] with her new boyfriend" (*Harrod I*, at ¶ 11, n. 1), and; (3) Harrod told Anne that he was familiar with Jeanne's security system and knew that the kitchen window was not on the system (*Harrod I*, at ¶ 11, n. 2).

> Harrod testified in his own defense, stating that he never posed as Gordon Phillips, met Jeanne, left messages on her answering machine, or broke into her home. He denied murdering Jeanne or participating in the murder in any way. He also suggested that the fingerprints at the scene identified as his had been created with a prosthetic fingerprint glove. He claimed that his relationship with Hap involved business ventures in China. He denied ever discussing the murder with his wife, Anne Costello.

Harrod I, at ¶ 11.

B. PROCEDURAL BACKGROUND.

At his 1997 trial, Harrod was represented by Michael Bernays and Tonya McMath. A Maricopa County jury convicted Harrod of first-degree murder and

felony murder. *Harrod I*, at ¶ 12. The sentencing judge found the existence of the A.R.S. 13–752(F)(5) (hereinafter "(F)(5)")(pecuniary gain) aggravating factor, found that the mitigation was not sufficiently substantial to warrant leniency, and sentenced Harrod to death. *Id.*

On appeal, Harrod raised 6 issues. (*Id.*) The Arizona Supreme Court upheld Harrod's convictions and death sentence. *Harrod I*, ¶ 66.

Subsequently, the United States Supreme Court, in *Harrod v. Arizona*, 536 U.S. 953 (2002), vacated Harrod's death sentence and remanded the case for further consideration in light of *Ring v. Arizona*, 536 U.S. 584 (2002). The Arizona Supreme Court subsequently remanded Harrod's case to the trial court for a resentencing proceeding consistent with Arizona's statutory change to jury sentencing. *State v. Harrod* (*Harrod II*), 204 Ariz. 567, 569, ¶ 11, 65 P.3d 948, 959 (2003).

Harrod was resentenced in 2005. The penalty retrial jury found the existence of the (F)(5) (pecuniary gain) aggravating factor. *Harrod III*, at ¶ 10. Subsequently, the jury determined that the mitigating circumstances were not sufficiently substantial to call for leniency and sentenced Harrod to death. *Harrod III*, at ¶ 10.

On direct appeal, Harrod raised 7 issues, including sub-issues regarding the jury instructions. (*Id.*) The Arizona Supreme Court found no reversible error. It also independently reviewed Harrod's sentence and upheld the aggravating circumstance. *Id.* at ¶¶ 55–56. Assessing the aggravating factor and the proffered mitigation,[3] the Arizona Supreme Court concluded that the mitigating

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[3] The Arizona Supreme Court summarized this mitigation as "uncharged co-perpetrator; impact of execution on defendant's family and friends; lack of criminal history; mental abuse by father during childhood; alcoholic father; past
(continued ...)

circumstances were not sufficiently substantial to call for leniency and affirmed Harrod's death sentence. *Harrod III*, at ¶ 64.

On December 3, 2012, Harrod lodged the instant PCR petition with this Court.

II. APPLICABLE LAW.

A. THE LIMITED, STATUTORY [4] RIGHT TO POST-CONVICTION RELIEF.

Rule 32 is a post-conviction remedy "designed to accommodate the unusual situation where justice ran its course and yet went awry." *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984). The post-conviction Rules do not contemplate a second appeal, and a defendant may not employ the rule to unnecessarily delay the rendition of justice or add a third day in court when fewer days will provide substantial justice. *Id.*, 143 Ariz. at 145, 692 P.2d at 994. Moreover, there is no constitutional right to a petition for post-conviction relief. *Id.*

The scope of post-conviction proceedings is strictly limited to the specific grounds for relief enumerated in Rule 32.1. *Id.*, 143 Ariz. at 146, 692 P.2d at 995 ("It is the petitioner's burden to assert grounds that bring him within the provisions of the Rule in order to obtain relief."). In sum, Rule 32 "allows a defendant to

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(... continued)

good conduct and character; absence of other violent acts; commission of the offense was out-of-character; educational accomplishments; good behavior during pre-trial incarceration; good behavior during post-sentencing incarceration; good conduct during trial; love for and of family; and divorced parents." *Harrod III*, at ¶ 57.

[4] The statutes setting forth the right to bring a proceeding to secure post-conviction relief are set forth in A.R.S. §§ 13–4231 through 13–4239. Rule 32 tracks the language of these statutes precisely. For the sake of convenience, this Response will refer only to the Rules.

raise issues unknown or unavailable at trial" which, if proven, would demonstrate that "the conviction or sentence was obtained in disregard of fundamental fairness, which is essential to our concept of justice." *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

B. PRINCIPLES OF PRECLUSION.

Rule 32.2(a) is designed to preclude relief on several grounds "to prevent endless or nearly endless reviews of the same case in the same trial court." *State v. Shrum*, 220 Ariz. 115, 118, ¶ 12, 203 P.3d 1175, 1178 (2009) (quoting *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 11, 46 P.3d 1067, 1071 (2002)).

> By requiring that all post-conviction claims be raised promptly, Rule 32.2(a) not only serves the important principles of finality, but also allows any relief to be issued at a time when the interests of justice, from the perspectives of the defendant, the State, and the victim, can be best served.

Id. (internal citations omitted).

Accordingly, under Rule 32.2(a), a defendant is precluded from post-conviction relief based upon any ground: (1) still raisable on direct appeal or on a post-trial motion; (2) finally adjudicated on the merits on appeal or in any previous collateral proceeding; (3) that was waived at trial, on appeal or in any previous collateral proceeding. Thus, Rule 32.2(a)(3) precludes relief on a claim that could have been raised on direct appeal. *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178. To avoid the preclusion of claims a defendant failed to raise on appeal, "a defendant must show a constitutional right is implicated, one that can only be waived by a defendant personally." *State v. Swoopes*, 216 Ariz. 390, 399, ¶ 28, 166 P.3d 945, 954 (App. 2007) (citing *Smith*, 202 Ariz. at 450, ¶ 12, 46 P.3d at 1071). Only few claims will meet this standard and include waiver of the right to counsel, waiver of the right to jury trial, and waiver of the right to a twelve-person jury. *Swoopes*, 216 Ariz. at 399, ¶ 28, 166 P.3d at 954. "An alleged violation of

the general due process right of every defendant to a fair trial, without more, does not save that belated claim from preclusion." *Id.*

"If the merits were to be examined on each petition, Rule 32.2 would have little preclusive effect and its purpose would be defeated." *Smith*, 202 Ariz. at 450, ¶ 11, 46 P.3d at 1071. Thus, prior to adjudicating a Rule 32 petition, this Court must make a claim-by-claim finding as required by Rule 32.6(c), i.e., this Court must individually "identify all claims that are procedurally precluded under this rule." Collateral relief cannot be granted on precluded claims. *See State v. Wallace*, 160 Ariz. 424, 426, 773 P.2d 983, 985 (1989) (PCR proceedings cannot be used to attack matters finally adjudicated on direct appeal); *Carriger*, 143 Ariz. at 147, 692 P.2d at 996 (issues not raised on appeal are deemed waived and are precluded under Rule 32).

C. THE REQUIREMENT OF A COLORABLE CLAIM.

After disposing of procedurally precluded claims, this Court should summarily dismiss a Rule 32 petition if it finds "that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief." Rule 32.6(c). To obtain an evidentiary hearing on non-precluded claims presenting a material issue, a petitioner must make a "colorable" claim that requires further factual development. *See* Rule 32.6, Ariz. R. Crim. P.; *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985); *Watton*, 164 Ariz. at 328, 793 P.2d at 85. A colorable claim consists of factual allegations that, if true, would have changed the outcome of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *State v. Schurz,* 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993); *Watton*, 164 Ariz. at 328, 793 P.2d at 85.

A defendant is required to support his claims with affidavits, records, and other evidence, and a trial court is not required to grant an evidentiary hearing on unsubstantiated claims or mere generalizations. *See* Ariz. R. Crim. P. 32.5 ("Facts

within [the defendant's] personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available to the petitioner supporting the allegations of the petition shall be attached to it."). If a post-conviction claim proceeds to an evidentiary hearing, the defendant bears the burden of proof by a preponderance of the evidence, and the Arizona Rules of Evidence apply. Ariz. R. Crim. P. 32.8(b, c).

D. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Ineffective assistance of counsel (IAC) claims are evaluated pursuant to the Supreme Court's opinion in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on an IAC claim, the defendant must show that: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Id.* at 687–88.

The Supreme Court has "declined to articulate specific guidelines for the deficient performance prong and instead has emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). The allegedly deficient performance must be evaluated "'from counsel's perspective at the time,'" so that "'every effort [is] made to eliminate the distorting effects of hindsight. . .'" *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). Reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *State v. Nash*, 143 Ariz. 392, 397–98, 694 P.2d 222, 227–28 (1985).

Moreover, in order to prove deficient performance, a petitioner must overcome "the presumption that, under the circumstances, the challenged action

might be considered sound trial strategy." *Strickland*, 466 U.S. at 689; *See also Wiggins*, 539 U.S. at 533 (*Strickland* does not require counsel "to present mitigating evidence at sentencing in every case"). Disagreements in trial strategy will not support an ineffective assistance of counsel claim, "provided the challenged conduct has some reasoned basis." *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) (citing *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985)). Courts afford "[w]ide latitude . . . to the tactical choices of counsel," *State v. Atwood*, 171 Ariz. 576, 600, 832 P.2d 593, 617 (1992), and a defendant must specify the acts and omissions of counsel constituting ineffective assistance. *State v. Walton*, 159 Ariz. 571, 592, 769 P.2d 1017, 1038 (1989). This is because proof of deficient performance must be a "demonstrable reality rather than a matter of speculation." *State v. Santana*, 153 Ariz. 147, 149, 735 P.2d 757, 760 (1987). In short, "[t]he test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Strickland*, 466 U.S. at 687–88.

The United States Supreme Court, as well as the Arizona Supreme Court, have specifically rejected the argument that failure to follow the ABA Guidelines amounts to *per se* deficient performance under *Strickland*:

> *Strickland* stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition. We have since regarded them as such. What we have said of state requirements is *a fortiori* true of standards set by private organizations: '[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'

Bobby v. Van Hook, ___ U.S. ___, 130 S.Ct. 13, 17 (2009) (quoting *Roe v. Flores-*

Ortega, 528 U.S. 470, 479 (2000)) (other internal citations and footnote omitted); *See also State v. Kiles*, 222 Ariz. 25, 35, n. 13, 213 P.3d 174, 184 (2009):

> Although this Court has subscribed to the ABA Capital Standards under Arizona Rule of Criminal Procedure 6.8(b)(1)(iii), the comment to the rule itself makes clear '[a] deviation from the guidelines . . . is not per se ineffective assistance of counsel. The standard for evaluating counsel's performance continues to be that set forth in *Strickland*. . . .'

In addition to proving deficient performance, a petitioner must affirmatively prove prejudice. *Strickland* 466 U.S. at 693. To prove the prejudice prong of the *Strickland* test, a petitioner must show that counsel's errors were so serious that they deprived him of a fair trial. *Strickland*, 466 U.S. at 687; *Nash*, 143 Ariz. at 398, 694 P.2d at 228. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. A petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. With regard to a petitioner's burden of proof, 'a reasonable probability' is more than a "mere possibility;" rather, it is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Nash*, 694 P.2d at 228. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) ("Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . . .)."

The reviewing court need not analyze alleged deficient performance before analyzing prejudice. *See Strickland*, 466 U.S at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed").

E. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

It is also strongly presumed that appellate counsel provided effective assistance. *State v. Bennett*, 213 Ariz. 562, 567, ¶ 21, 146 P.3d 63, 68 (2006). "Appellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal." *Id.* Appellate counsel need not and should not raise every nonfrivolous claim, but should instead winnow out weaker arguments and focus on one—or at most a few—key issues. *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983). Thus, the presumption that appellate counsel's performance was effective is overcome only if he ignored issues that were clearly stronger than the ones he selected for appeal. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). In order to establish prejudice, a petitioner must establish a reasonable probability that the appellate issue counsel did not raise would have succeeded. *Bennett*, 213 Ariz. at 568, ¶ 25, 146 P.3d at 69. In other words, prejudice only exists if the Arizona Supreme Court would have reversed petitioner's conviction had the unraised appellate issue been raised. *Id.* at 569, 70, ¶ 30.

III. ARGUMENT.

A. HARROD'S CLAIMS REGARDING THE FINGERPRINT EVIDENCE ARE PRECLUDED AND MERITLESS.

1. *Facts.*

Usable latent prints were recovered from a number of surfaces at Jeanne Tovrea's home by at least four different latent print examiners. Eighteen[5] of those prints were later identified to Harrod. Mark Hatcher recovered latent prints from the kitchen counters (Exhibits 137, 138, 139, 140). (R.T. 10/20/97, at 18-25.)

[5] There were 17 latent print cards marked as Exhibits 137-153. One of the cards, Exhibit 146, reflected a "double lift" or "double print." (R.T. 10/30/97, at 35.)

Fred Carmack recovered latent prints from both sides of the window glass that was removed to gain entry to the home (Exhibits 141-151). (*Id.* at 66-76.) He also recovered latent prints from the north gate between the back patio and side yard (Exhibit 152). (*Id.* at 77-78.) Mitchell Small recovered latent prints from the weather stripping from the kitchen window (Exhibit 153). (*Id.* at 118-122.) Karen Jones recovered latent prints from Jeanne's master bedroom and bath area. (R.T. 10/30/97, at 38.)

Over seven years, Jones compared the latent prints to the prints of 45 to 50 people, including suspects. (*Id.* at 62.) She identified prints to Jeanne, to Jeanne's housecleaner, to her gardener, and to one of the responding officers, but not to any suspects. (*Id.* at 39-41; R.T. 10/20/97, at 82; R.T. 10/28/97, at 52, 75.)

On September 14, 1995, a records clerk took Harrod's palm and fingerprints (Exhibits 154, 155, 156). (R.T. 10/30/97, at 14-16.) Jones then compared Harrod's prints to the usable prints recovered from Jeanne's home. (*Id.* at 28.) She testified at the 1997 trial that, through her comparison, many of the recovered prints were "identified to" Harrod: (1) four prints from the kitchen counters were identified to Harrod's right palm and right and left index fingers; (2) twelve prints from the kitchen window glass were identified to Harrod's right middle finger and thumb and left palm and index, ring, and middle fingers; (3) one print from the north gate was identified to Harrod's left palm, and; (4) one print from the window weather stripping was identified to Harrod's right palm. (*Id.* at 31-36.) Harrod did not object to this testimony.[6]

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[6] Jones similarly testified at the 2005 penalty retrial that various latent prints were "identified as" the prints of Harrod. (R.T. 9/20/05, at 56-60.) Jones 2005 testimony cannot be used to support a Rule 32 claim that Harrod's conviction was in violation of the constitution (*See* Ariz. R. Crim. P. 32.1(a)) because Harrod's conviction arises from his 1997 trial. Joe Silva did not testify in 2005, but Jones (continued ...)

Jones also testified in 1997 that a large number of usable latent prints were unidentified, including prints left on the kitchen window glass, kitchen counters, north and south gates, master bedroom and bath areas, and Jeanne's acrylic jewelry box. (*Id.* at 37-42.)

Jones's work was verified by Joe Silva, who also compared Harrod's prints to the recovered latent prints. (*Id.* at 87-88.) Like Jones, he testified in 1997 that the recovered latent prints, Exhibits 137-153, were "identified to" Harrod. (*Id.*)

Confronted with this evidence, Harrod's defense team was forced to mount a novel defense. His 1997 trial counsel argued in opening statement that fingerprints are "absolutely fakeable." (R.T. 10/20/97, at 78.) To counter this defense, the State presented the expert testimony of Pat Wertheim, who testified about his study of and experiments with forged[7] fingerprints. Wertheim testified that each latent print identified to Harrod was consistent with a natural touch between skin and the surface on which the print was deposited, and he saw nothing that was characteristic of a forged print rather than a natural print. (R.T. 11/6/97, at 117-18.) Despite defense counsel's thorough cross-examination—through which he

(... continued)

testified that he had reviewed her work. (R.T. 9/20/05, at 68.) Pat Wertheim also did not testify in 2005.

[7] Wertheim explained the difference between fabricated and forged prints. (R.T. 11/6/97, at 128-129.) Fabricated prints never actually existed in the location police claimed to have found them. Instead, they were located elsewhere, and the police lied about where they were found. Forged fingerprints actually existed where police claimed to have found them. The prints were not deposited there, however, by the person to whom they were later identified. This would typically occur where a criminal leaves forged prints to mislead the police. (*Id.* at 128.) This could be attempted through the use of a plastic or silicone mold, a photo-engraved rubber stamp, or transfer with tape. (*Id.* at 98-99.)

tried to show that the latent prints could have been left by a prosthetic glove—Wertheim maintained his opinion that a prosthetic glove could not have left the prints identified to Harrod. (*Id.* at 150; R.T. 11/7/97, at 60.)

Wertheim also testified about the results of his comparison of the 18 recovered latent prints to Harrod's inked prints. (R.T. 11/6/97, at 151.) Wertheim testified that his conclusion was "[e]ach of those 18 prints was made by Mr. Harrod." (*Id.* at 152.) Wertheim's testimony concluded with the following exchange:

> Q. Final question is this: In your opinion, whose prints are those that you examined on those 18 lift cards?
>
> A. All 18 of the prints represent original touches between skin and the surface from which they were lifted, and all 18 of them have been identified previously and verified by me as having been made by Mr. Harrod.

(R.T. 11/7/97, at 61.)

2. *Argument.*

a. Harrod's claim that the fingerprint testimony and argument violated due process is precluded and meritless. (Harrod's Claim 1).

Harrod argues that certain testimony by the latent print examiners in the 1997 trial was inadmissible and that portions of the prosecutor's opening statement and closing argument in 1997 were improper. (*See PCR Resp.* at 9:18-22, 10:3-7, 10:21-25, 11:8-9, 11:12-17, citing R.T. 10/22/97, at 8; R.T. 10/30/97, at 29, 30, 31; R.T. 10/20/97, at 55; R.T. 11/17/97 at 24, 54.) At trial, Harrod did not object to the testimony, opening statement, or argument he now claims was objectionable. Harrod also did not raise any appellate issue that the fingerprint testimony, opening statement, or argument was violative of due process, or constituted prosecutorial misconduct. Thus, this claim is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166

P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

Relying primarily on a 2006 Department of Justice Report (the Mayfield case), a 2009 National Academy of Science Report, and a 2011 Scottish Fingerprint Inquiry Report (the Mckie case), Harrod argues that some of the fingerprint testimony and argument here was unfounded or overstated. That testimony and argument characterized fingerprints as unique and asserted that 18 latent prints here were "identified to" Harrod. Harrod concedes, however, that the belief that fingerprints were unique and could be identified with 100% reliability was "then conventional wisdom" in 1997. (*PCR Pet.*, at 13:9; *see also* 11:20-23.) Harrod provides no legal authority for the proposition that this Court may revisit past testimony and argument through the prism of subsequent studies, cases, or reports. He does not argue that the 2006 report, 2009 report, 2011 report, or any other reports or articles are newly discovered evidence. *See* Ariz. R. Crim. P. 32.1(e). In fact, such an argument would be without merit. *See State v. Sanchez*, 200 Ariz. 163, 166-167, ¶ 11, 24 P.3d 610, 613-614 (App. 2001) (newly discovered evidence must have been in existence at the time of trial; procedural change occurring after trial did not constitute newly discovered evidence). He does not cite any new law regarding the admissibility of fingerprint evidence that is retroactively applicable to his case. *See* Ariz. R. Crim. P. 32.1(g). He also does not claim that trial counsel were constitutionally ineffective by failing to challenge the fingerprint testimony on the basis of these later reports.[8] Such a claim would be meritless. *See Strickland,* 466 U.S. at 688 (effective representation is judged on

[8] Instead, Harrod claims that trial counsel were constitutionally ineffective by ineptly cross-examining Pat Wertheim, and thus "permitting Wertheim to testify falsely that he had identified [Harrod] from his fingerprints. (*See PCR Pet.* at 72:1-4.) This claim is addressed under claim (III)(K)(1)(b) below.

the basis of prevailing professional norms.)

Presumably in support of his actual innocence claim (Claim 15), Harrod has abandoned his 'fingerprints are fakeable' defense presented at trial. *See* Ariz. R. Crim. P. 32.1(h). He now suggests that Karen Jones, Joe Silva, and Pat Wertheim each misidentified all 18 latent prints as Harrod's. Harrod offers no evidence, however, to support his charge of misidentification (*e.g.* an affidavit from an expert who has compared the latent prints to Harrod's prints and concluded they are dissimilar). This is not surprising given the unlikelihood three latent print examiners would each misidentify the same 18 latent prints.

Moreover, Harrod's suggestion the examiners' conclusions were influenced by pressure to solve a high profile case is contradicted by the record. Prior to comparing the latent prints to Harrod's inked prints, Karen Jones had compared the recovered latent prints to the prints of 45 to 50 people over seven years. (R.T. 11/6/97, at 62.) Despite the pressure to solve a high profile case over those seven years, she did not identify the prints to any suspects. (*Id.* at 39-43.) Further, Jones testified that she was unable to identify numerous usable prints left at the scene and identified others as being left by the victim or known persons who were not suspects. (*Id.*) Harrod fails to explain what would influence Jones to mistakenly identify 18 of the prints as Harrod's, but not others. Certainly if Jones were influenced by the desire to solve the case, she would have been influenced to identify prints found closer to victim's body as Harrod's. Instead, she identified prints on the north gate, the kitchen window, and the kitchen counter as Harrod's, but she did not identify prints in Jeanne's bedroom, on her phone, or on her acrylic jewelry case as Harrod's. (*Id.* at 31-43.)

Harrod makes other arguments in an effort to discredit the testimony of the latent print examiners, but his arguments are unavailing. Harrod has provided no evidence that the 18 latent prints were misidentified. Further, as discussed below,

the evidence presented at trial—independent of the fingerprint evidence—amply supported Harrod's conviction. Thus, Harrod has not demonstrated by clear and convincing evidence that no reasonable fact finder would have found him guilty. *See* Ariz. R. Crim. P. 32.1(h)

b. There is no support for Harrod's claim that Pat Wertheim committed perjury. This claim is precluded and meritless (Harrod's Claim 1A).

Harrod contends that Wertheim committed perjury when he testified that he compared the 18 latent prints in Exhibits 137-153 to Harrod's inked prints. Again, Harrod fails to clearly state how, even if this were true, it would establish a colorable claim under Rule 32.[9] The material Harrod contends supports his claim of perjury—Wertheim's pretrial defense interviews and trial testimony—was available at the time of trial. Neither trial counsel nor appellate counsel claimed Wertheim committed perjury. As noted above, Harrod does not explain how this claim is exempt from preclusion. He does not claim newly discovered evidence or a retroactive change in the law. Presumably, Harrod's arguments are intended to support his claim of actual innocence (Claim 15.)

Harrod's contention that Wertheim committed perjury is unsupported by the

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[9] Harrod's cited authority does not exempt his claim from preclusion and is otherwise unavailing. He cites *Napue v. Illinois*, 360 U.S. 264 (1959) (*See PCR Pet.* at 22:8-11), but does not allege the State withheld any evidence. He argues the State knew fingerprint comparison was a matter of opinion rather than fact (*See Id.* at 23:23), but the State elicited Wertheim's comparison testimony as opinion. (R.T. 11/7/97, at 61.) He argues that the State's knowing presentation of perjured testimony results in reversal if there is any reasonable likelihood the false testimony could have affected the verdict (*See PCR Pet.* at 23:26-24:3), but the State did not knowingly present perjured testimony, and Wertheim's comparison testimony would not have affected the verdict because: (1) two other latent print examiners identified the prints as Harrod's, and; (2) the defense did not dispute the identification of the prints but instead argued the prints were forged.

record. Harrod first argues that because Wertheim did not say he did a comparison of the prints during his April 24, 1997 or August 18, 1997 defense interviews, the comparison never happened. In the August defense interview, however, Wertheim said he would be doing further work. (*PCR Appendix*, Item 6, at 12.) This was borne out by Wertheim's testimony. Defense counsel asked Wertheim about his preparation of Exhibit 259. (R.T. 11/6/97, at 113.) Wertheim testified that he had not prepared Exhibit 259 during his first examination but "*at a later time.*" (*Id.*) Harrod suggests that preparing Exhibit 259 was the extent of Wertheim's work conducted after the defense interviews, but Wertheim repeatedly testified that he examined Harrod's inked prints, and he compared the 18 latents and the inked prints. (R.T. 11/6/97 at 114, 151-52; R.T. 11/7/97, at 61.) Tellingly, the defense did not object when Wertheim testified about the comparison. (*Id.*) Nor, did the defense indicate it was surprised by his testimony that he had conducted a comparison. (*Id.*) The defense was quick to claim they had been surprised by other fingerprint testimony. (*See* R.T. 10/30/97, at 50; 53-55 (Counsel objected and moved for a mistrial regarding allegedly surprise testimony from Jones).) Presumably they would have made the same arguments about Wertheim's comparison testimony if it had come as a surprise.

Harrod next contends that Wertheim testified he did his comparison with a *photocopy* of Harrod's inked prints, rather than the actual inked prints. (*See PCR Pet.*, at 17:5-6; 22:12-13, n. 17.) Harrod argues this shows the comparison did not occur because conducting a comparison with a photocopy would have violated Wertheim's standards. Harrod misreads Wertheim's testimony. The photocopy Wertheim referenced was used to illustrate a different aspect of his testimony than

comparison.[10] The photocopy was Exhibit 259,[11] which Wertheim described as "a photo copy of the right palm print and fingers that was given to me as representing Mr. Harrod's palm prints." (R.T. 11/6/97, at 114.) On that photocopy, Wertheim drew the outline of a hand and numbered the location of each latent print to demonstrate specifically where on Harrod's palms and fingers each one of the 18 latent prints came from. (*Id.*)

The record does not reflect that Wertheim used the photocopy when comparing Harrod's prints to the 18 latent prints. When Wertheim testified about his comparison of the 18 latent prints and Harrod's inked prints, he did not reference Exhibit 259 or a photocopy. (*Id.* at 151; R.T. 11/7/97, at 61.) Instead, his testimony referred to comparing the 18 latent prints with Harrod's *inked prints.* (R.T. 11/6/97, at 151.) In fact, Wertheim was asked, "You compared the latent prints that you had before you with the known inked prints of the defendant James Cornel Harrod?" Wertheim answered, "Yes, sir. I did." (*Id.*)

Harrod offers no motivation for Wertheim to lie about conducting a comparison. Two other witnesses had already identified the 18 latent prints as Harrod's, thus rendering Wertheim's comparison testimony unnecessary. Wertheim was clearly not a pawn of law enforcement as he had previously accused a police officer of latent print fabrication, and he had studied, written, and lectured extensively about how to identify instances of police fabricated print evidence. (R.T. 11/6/97, at 93-96; 127-128.) Harrod's speculation that Wertheim lied is based on Wertheim's defense interviews that were conducted months before his

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[10] Even if Wertheim testified that he conducted the comparison with a photocopy of Harrod's prints, however, it does not prove the comparison never occurred.

[11] Harrod mistakenly refers to the exhibit as Exhibit 256 in his petition. (*See PCR Pet.*, at 22, n. 17.)

testimony and Wertheim's testimony on a different subject. This speculation does not establish that Wertheim lied.

B. HARROD'S CLAIMS REGARDING IDENTIFICATION ARE EITHER PRECLUDED OR MERITLESS.

1. *Harrod's claim that the 1997 trial court erred by admitting Debbie Luster's out-of-court and in-court identifications is precluded (Harrod's Claim 2).*

At the 1997 trial, Harrod moved to preclude Debbie Nolan Luster's out-of-court and in-court identifications on two grounds: (1) the State's identification procedures were unduly suggestive and the identifications were therefore unreliable, and; (2) Debbie's identification(s) were made after she had been hypnotized. (P.I., Items 136, 137.) After a hearing, the trial court denied Harrod's motions, finding: (1) the identification procedures were not "unduly suggestive to the point that there [was] a substantial likelihood of irreparable misidentification," and; (2) Debbie "was not hypnotized." (R.T. 10/10/97, at 111-114; 127; M.E. 161.)

On appeal, Harrod claimed that the trial court erred when it denied his motion to preclude the identifications on the grounds that they were made after Debbie was hypnotized. (*Harrod I*, at ¶¶ 13, 26.) The Arizona Supreme Court rejected this claim. To the extent that Harrod re-urges it, it is precluded. *See* Ariz. R. Crim. P. 32.2(a).

On appeal, Harrod did *not* claim that the trial court erred when it denied his motion to preclude the identifications on the grounds that the identification procedures were unduly suggestive. Harrod therefore waived this claim, and it is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

2. *Harrod's claim that appellate counsel were constitutionally ineffective because they did not challenge the trial court's ruling on appeal is meritless (Harrod's Claim 2A).*

Harrod claims that appellate counsel were constitutionally ineffective when they did not challenge the trial court's admission of Debbie's out of court and in court identifications. This claim can be easily disposed of by analyzing it under the prejudice prong of ineffective assistance of counsel.[12] Harrod bears the burden of establishing a reasonable probability that had appellate counsel raised the issue, the Arizona Supreme Court would have found that the trial court abused its discretion when it admitted the identifications, thus resulting in reversible error. *See Bennett*, 213 Ariz. at 568, 569, ¶¶ 25, 30, 146 P.3d at 69, 70.

The trial court did not abuse its discretion when it found Debbie's identifications were sufficiently reliable to be admitted. *See State v. Moore*, 222 Ariz. 1, 7, ¶ 17, 213 P.3d 150, 156 (2009) (admissibility of identifications reviewed for abuse of discretion). And even assuming the trial court erred, the error was not reversible because it was harmless. *See State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969).

a. Facts.

Harrod moved to preclude evidence that Debbie picked Harrod out of a live line-up as resembling a man who met with her mother and identified himself as Gordon Phillips. (P.I., Item 136.) Harrod also moved to preclude any in-court

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[12] Respondent does not concede that appellate counsel performed deficiently when they did not raise the issue on appeal. Because the issue was not clearly meritorious, they did not perform deficiently. *See Bennett*, 213 Ariz. at 567, ¶ 21, 146 P.3d at 68.

identification, arguing that it was tainted by the pretrial identification procedures. (*Id.*) The trial court held a *Dessureault* hearing on October 1 and 3, 1997.[13]

Preliminarily, in resolving this issue, this Court must consider what the appellate court would have done. *See Bennett*, 213 Ariz. at 568, 569, ¶¶ 25, 30, 146 P.3d at 69, 70. The appellate court's review would have been based solely on the evidence presented at the *Dessureault* hearing and would have been limited to consideration of the trial court's application of the *Biggers*[14] factors. *See Moore*, 222 Ariz. at 7, 8, ¶¶ 17, 23, 213 P.3d at 156, 157. Harrod relies primarily on trial testimony, testimony from a hearing on his hypnosis motion, and defense counsel's arguments, rather than on testimony from the *Dessureault* hearing. (*See PCR Pet.* at 24:25-28; 25:1-8; 25:13; 25:15-25; 26:5-15, 27:8-9; 27:19-28:1; 28:16, citing 10/20/97, 10/21/97, and 10/27/97 trial testimony, 10/1/97 and 10/3/97 hypnosis hearing testimony, and 10/10/97 arguments of defense counsel.) In deciding this issue, this Court should disregard any facts that were not adduced at the *Dessureault* hearing.[15]

At the *Dessureault* hearing, Debbie testified that Jeanne had agreed to meet with Gordon Phillips. (R.T. 10/1/97, at 46–48.) Phillips said he wanted to speak with Jeanne about her late husband's experiences as a prisoner of war. (*Id.*)

A few days later, in July 1987, Debbie was staying with her mother at an

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[13] Testimony regarding the hypnosis motion was also intermittently received on these days.

[14] *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

[15] To the extent that Harrod presents material from books or articles as supporting facts, rather than support for his arguments, that material should also be disregarded. (*See e.g. PCR Pet.* at 26, n. 20, 27, n. 22 and 23.)

apartment in California. (*Id.* at 50–51.) There, her mother introduced Debbie to Gordon Phillips, and they shook hands, coming within two to three feet of each other. (*Id.* at 55–56.) Debbie continued to speak with Phillips at a distance of approximately four feet in a well-lit room. (*Id.* at 56–57.) Debbie was in Phillips' presence for a total of about 30 minutes. (*Id.* at 61.) This included a conversation with him in the entry hall for about 10 to 15 minutes from a distance of two feet. (*Id.* at 61–62.) During this conversation, Phillips said and did things that caused Debbie to find him odd and suspicious. (*Id.* at 65–67.) Because of her suspicions, Debbie watched as Gordon Phillips walked away. (*Id.* at 68.) She noticed that he walked with small, quick steps. (*Id.*) Debbie's suspicions caused her to have her mother call security after Phillips left. (*Id.* at 69.)

Several months later, in October, Debbie's mother told her that Phillips had called again and insisted on meeting with her at her Phoenix home. (*Id.* at 70.) Debbie was very upset by this. (*Id.* at 71.) Six months after that, Jeanne was murdered. (*Id.*) The day after her mother's murder, Debbie told the police about Gordon Phillips and gave them a description. (*Id.* at 72.) She said he was a white male in his mid-thirties with short, light brown hair. (*Id.*; R.T. 10/3/97, at 19–20.) She said that he was not chubby, but he had a round, stocky, un-muscular build and that he was 5'9" to 5'10" tall. (R.T. 10/1/97, at 72; R.T. 10/3/97, at 19–20.) His face was ordinary, in the sense that he did not have chiseled features. (R.T. 10/1/97, at 72.)

Debbie's husband subsequently located a tape from Jeanne's answering machine. (*Id.* at 73.) On the tape was a message from Gordon Phillips. (*Id.*) Debbie gave the tape to the police. (*Id.*)

A month after Jeanne's murder, on May 2, 1988, Debbie provided information for the drawing of a composite sketch of Phillips. (*Id.* at 74.) Debbie was subsequently shown two photo line-ups in 1991 and 1995. (*Id.* at 74, 97.)

Debbie worked as a portrait photographer, and described the pictures she was shown as fuzzy and flat, with little contrast. (*Id.* at 98 121.) The first line-up did not include a photograph of Harrod. (R.T. 10/3/97, at 5.) The second line-up included a photograph of Harrod obtained from a January 1986 passport application, which described Harrod as having blond hair. (R.T. 10/1/97, at 123–24; R.T. 10/3/97, at 10.) Debbie did not make a positive identification from either line-up. (R.T. 10/1/97, at 74, 97.)

On December 19, 1996, Debbie viewed a live line-up. (*Id.* at 75.) Upon Debbie's request, the police had the participants walk by her in profile and had them speak. (*Id.* at 77.) Also upon Debbie's request, two of the participants, number 2 and number 5, stepped forward to the glass so Debbie could view them more closely. (R.T. 10/3/97, at 43.) Debbie told police that she "very much felt" that the man in position number five—Harrod—resembled the man she met as Gordon Phillips. (R.T. 10/1/97, at 77; R.T. 10/3/97, at 39) At the *Dessureault* hearing, Debbie testified that she was certain that number five was the man she met as Phillips. (R.T. 10/1/97, at 78.) The live line-up process was videotaped, and the videotape was played for the trial court. (*Id.* at 130.)

The trial court found that the line-up procedures were not unduly suggestive but it nonetheless considered and applied the *Biggers* factors and found: (1) Debbie had a good opportunity to view Harrod at the time she met him as Gordon Phillips; (2) her degree of attention and concentration was heightened by her suspicions, and; (3) Debbie's description of Phillips was "fairly accurate as to height, weight, build, hair color, facial structure and the like." (M.E., Item 161.) The trial court acknowledged that Debbie's certainty of identification at the live line-up and the length of time until the live line-up were the weakest factors, but at the live line-up, Debbie "very much felt" that Harrod resembled Phillips. (*Id.*) The trial court

therefore found that under the totality of the circumstances, Debbie's identification at the live line-up was admissible. (*Id.*)

The trial court allowed Debbie to make an in-court identification and to testify regarding her out-of-court identification. At trial, she testified that she recognized a man in the live line-up as the man she had met as Gordon Phillips. (R.T. 10/27/97, at 63.) She said that she was certain of that identification. (*Id.*) She testified that Harrod was the same person she identified in the live line-up. (*Id.* at 64.) Trial counsel thoroughly cross-examined Debbie about her observations, description, and identification. (*Id.* at 79–92; 103–126.) Debbie also made an in-court identification of Harrod. (*Id.* at 46–47.) She pointed out Harrod and identified him as the man she met as Gordon Phillips in July 1987. (*Id.*)

b. Argument.

Harrod argues that the pretrial identification procedures were unduly suggestive creating a substantial likelihood of irreparable misidentification. Although the trial court judge said that the live line-up "wasn't the best in the world," he also said that he had seen "a heck of a lot worse," and the trial court found that it was not unduly suggestive. (R.T. 10/10/97, at 111, 112.) Harrod argues that the persons in the live line-up were too different in appearance, but "there is no requirement that the accused be surrounded by nearly identical persons." *State v. Gonzales*, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995). Harrod appeared in both the second photo-lineup and the live line-up. Although "making a defendant the only common person in both a photo spread and a live lineup can be unduly suggestive," it is not necessarily so. *State v. Lehr*, 201 Ariz. 509, 520-21, ¶ 47, 38 P.3d 1172, 1183. Here, the trial court found that the photo line-up did not taint the live line-up or render it unduly suggestive. (R.T. 10/10/97, at 111-112.)

Regardless, even if pretrial identification procedures are unduly suggestive, an out-of-court identification is admissible if it is nonetheless reliable. *See Moore*, 222 Ariz. at 8, ¶ 16, 213 P.3d at 157. Because the trial court believed the line-up was not unduly suggestive, it found it unnecessary to address the *Biggers* factors, but it did so nonetheless. (R.T. 10/10/97, at 112, 114.) The trial court correctly applied the *Biggers* factors and did not abuse its discretion when it determined that despite imperfect pretrial identification procedures, the identification was sufficiently reliable to be admitted. Because the out-of-court identification comported with due process, the in-court identification was also properly admitted. *See Lehr*, 201 Ariz. at 521, ¶ 52, 38 P.3d at 1184.

Harrod argues that the passage of time between when Debbie met Gordon Phillips and the live line-up renders the identification so unreliable that it was inadmissible.[16] (*PCR Pet.* at 30:28-31:2.) No one factor, however, is dispositive on the question of reliability. *Raheem v. Kelly*, 257 F.3d 122, 135 (2nd Cir. 2001). Instead, the trial court must look at the totality of the circumstances. *Biggers*, 409 U.S. at 199. An identification may be sufficiently reliable despite the passage of a significant amount of time if other factors demonstrate reliability. *See United States v. Hill*, 967 F.2d 226 (6th Cir. 1992). Here, under the totality of the circumstances, evidence of Debbie's statement after the live line-up that she "very much felt" Harrod resembled Gordon Phillips was sufficiently reliable to allow its admission.

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[16] Harrod asserts that the time between the Gordon Phillips meeting and the live line-up was 129 months. (*PCR Pet.* at 30:5-6.) At the *Dessureault* hearing, Debbie testified that she met Phillips on July 12, 1987. (R.T. 10/1/97, at 50.) The live line-up was on December 19, 1996. (*Id.* at 127) The time between the two events was therefore 113 months and 7 days.

Even assuming the trial court abused its discretion, the appellate court would have reviewed any error for harmlessness. *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. The fact that Harrod posed as Gordon Phillips was established by more than Debbie's testimony. Gordon Phillips left messages on Jeanne Tovrea's answering machine. Six people—Curt Costello, Patricia Maillie, Elizabeth Costello, Mark Costello, Anne Costello, and Jeff Fauver—who had known Harrod well for many years, each identified Gordon Phillips' voice on Jeanne's answering machine as Harrod's. (R.T. 10/28/97, at 110-112; 155; 167; 188; R.T. 10/29/97, at 61-63; R.T. 11/5/97, a.m., at 37-38.) Moreover, Anne Costello testified that Harrod told her he had posed as Gordon Phillips in his dealings with Jeanne Tovrea.[17] (R.T. 11/14/97, at 12-13.)

Regardless, even if Debbie's identification had been the only evidence that Harrod was Gordon Phillips, any error would still be harmless. Debbie was not an eyewitness to her mother's murder. She identified Harrod as Gordon Phillips, a man who met with Jeanne Tovrea more than 8 months *before* the murder. Thus, Debbie's testimony that Harrod was the man she met as Gordon Phillips did not establish Harrod's guilt for murder.

Instead, Harrod was convicted because of the other overwhelming evidence of his guilt including: (1) Harrod told Anne Costello that Hap Tovrea hired him to "coordinate" the murder of Jeanne with a promised payment of $100,000 (R.T. 11/14/97, at 16); he also told Anne the kitchen window at Jeanne's house was not protected by the alarm system (*Id.* at 18-19); (2) on the night of the murder, Harrod left his home carrying a duffle bag at 9 p.m. and did not return until approximately

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[17] Harrod and Anne Costello had been married. After Harrod effectively waived marital privilege by testifying that he had never admitted his involvement in Jeanne's murder to Anne Costello, Anne was permitted to testify about their marital communications in the State's rebuttal case. *Harrod I*, at ¶ 37.

2 a.m. the next morning when he told Anne, "it's over" (R.T. 10/29/97, at 35-37; R.T. 11/14/97, at 12); (3) the guns Harrod kept in his home were missing after he left on the night of the murder (RT 10/29/97, at 42); (4) Harrod had large amounts of cash in the time before and after the murder (R.T. 10/29/97 at 45-48); (5) Between 1987 and 1991, Harrod received packages from Hap Tovrea that contained cash or checks (R.T. 10/29/97, at 26-28; (6) between May 1988 and September 1990, Hap paid Harrod over $35,000 through wire transfers, checks, and cashier's checks (R.T. 11/6/97, at 16-26); (7) phone calls between Hap's and Harrod's phones peaked in the month before the murder with 52 phone calls, including 9 on March 31, 1988, the day before the murder; there were 5 more calls between their phones on April 1, 1988, the day after the murder, after which the number of monthly calls dropped drastically (R.T. 11/6/97, at 48-51, 54, 56; R.T. 11/5/97, p.m., at 7); (8) Harrod told Anne he kept Jeanne's jewelry and credit cards for a time after the murder; he told Elizabeth and Mark Costello stories about finding these same possessions buried in the desert (R.T. 10/28/97, at 165; 184-85; R.T. 11/14/97, at 18), and; (9) Harrod's fingerprints were at the crime scene, including on the north gate, the inside and outside of the kitchen window glass, the window weather stripping, and the kitchen counters (R.T. 10/30/97, at 31-36).

Had appellate counsel challenged the admissibility of Debbie's identifications, it would not have resulted in a reversal of Harrod's conviction. Thus, Harrod has failed to establish the prejudice prong of *Strickland*. *See Bennett*, 213 Ariz. at 569, ¶ 30, 146 P.3d at 70.

C. HARROD'S CLAIMS REGARDING ADMISSION OF POLYGRAPH EVIDENCE AND RETROACTIVE APPLICATION OF THE *DAUBERT*[18] STANDARD ARE MOOT, PRECLUDED AND MERITLESS. (HARROD'S CLAIM 3).

1. *Harrod's claims that the trial court erred by precluding the results of a polygraph test are moot and precluded.*

a. 1997 proceedings.

Harrod moved for admission of polygraph results at his 1997 aggravation/mitigation hearing before the sentencing judge, but not in the guilt phase of his trial. Harrod argued that the polygraph results were relevant to any residual doubt the sentencing judge had about his guilt. *Harrod I*, at ¶ 38. The sentencing court precluded the polygraph results, pronounced it had no residual doubt about Harrod's guilt, and sentenced Harrod to death. (M.E., Item 156; P.I., Item 258, at 12-13, 15-16, 17.) Harrod's death sentence was vacated, however, in *Harrod II*. Harrod's 1997 capital sentence no longer exists. Thus, this claim, as it relates to Harrod's 1997 sentencing proceeding, is not reviewable under Rule 32 and is moot. *See* Ariz. R. Crim. P. 32.1(a) (relief available where sentence is in violation of the federal constitution); *see also State v. Walden*, 126 Ariz. 333, 335, 615 P.2d. 11, 13 (App. 1980) (sentencing claim was moot where sentence had expired).

Moreover, assuming this claim is not moot, it is precluded. *See* Ariz. R. Crim. P. 32.2(a). Harrod raised this issue on appeal and it was rejected. *Harrod I*, at ¶¶ 38, 39.

b. 2005 proceedings.

In 2005, Harrod moved that the polygraph results be admitted at his resentencing. *Harrod III*, ¶ 37. Harrod also wanted to make statements professing

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[18] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

his innocence. *Id.* The trial court precluded this residual doubt evidence. Harrod challenged the trial court's ruling on appeal. The Arizona Supreme Court rejected Harrod's arguments finding:

> Harrod did not have a constitutional or statutory right to present residual doubt evidence at his resentencing proceeding. Thus, it was not error for the trial court to rule that Harrod could not present residual doubt evidence, including the results of a polygraph examination and assertions of innocence during allocution.

Harrod III, at ¶ 46. Because Harrod raised this issue on appeal, it is precluded. *See* Ariz. R. Crim. P. 32.2(a).

c. Harrod's arguments regarding application of the *Daubert* standard to the 1997 and 2005 trial court rulings are meritless.

Harrod suggests that this Court review the correctness of the 1997 and 2005 trial court rulings precluding the polygraph evidence under a "substantial change in the law" analysis. (*See PCR Pet.* at 34.) Respectfully, this Court cannot review a claim arising from the 1997 sentencing proceeding because the claim is moot. Although Harrod does not cite Arizona Rule of Criminal Procedure 32.1(g), it is the provision under which a petitioner may obtain relief based on a "significant change in the law." Claims based on a significant change in the law are not subject to preclusion. *See* Ariz. R. Crim. P. 32.2(b). Harrod cannot obtain relief under Rule 32.1(g).

Pursuant to Rule 32.1(g), a PCR petitioner can obtain relief if "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." Harrod fails to explain how the amendment to Arizona Rule of Evidence 702 from the *Frye*[19]

[19] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

standard to the *Daubert* standard constitutes a "significant change in the law" under Rule 32.[20] He also fails to explain how the amended rule is retroactively applicable to his case.

A significant change in the law requires a transformative event. *State v. Shrum*, 220 Ariz. 115, 119, ¶ 15, 17, 203 P.3d 1175, 1179 (2009). "The archetype of such a change occurs when an appellate court overrules previously binding case law" or a statute or the constitution is amended "representing a definite break from prior law." *Id.* at ¶ 16. Harrod cites no authority for the proposition that an evidentiary rule amendment constitutes a "significant change in the law" under Rule 32.

Regardless, even assuming the amendment to Arizona Rule of Evidence 702 constitutes a "significant change in the law," the change is not retroactive, and Harrod cannot therefore obtain relief under Rule 32.1(g). The amendment to Rule 702 was made effective January 1, 2012. It was not made retroactive. Ariz. R. Crim. P. 702; *See also State v. Towery*, 204 Ariz. 386, ¶14, 64 P.3d 828 (2003) (setting forth requirements for retroactivity; change in law requiring jury to find capital aggravators not retroactive).

Finally, even if the amendment to Rule 702 constituted a significant and retroactive change in the law, Harrod's argument still fails. Applying the *Daubert*

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[20] In *State v. Bible*, 175 Ariz. 549, 580, 858 P.2d 1152, 1183 (1993), the Arizona Supreme Court reaffirmed the use of the *Frye* standard. Harrod cites the following language from *Bible* for the proposition that the change from the *Frye* to the *Daubert* standard is a "significant change in the law:" "[W]e resolve this case without significant change in existing evidentiary law." (*PCR Pet.* at 34.) The use of the phrase "significant change" in *Bible* is dicta. Moreover, because the *Bible* court was not addressing whether a change from *Frye* to *Daubert* was a "significant change in the law" *under Rule 32*, it is unavailing.

standard to Harrod's polygraph evidence would not "probably overturn [his] conviction or sentence." *See* Ariz. R. Crim. P. 32.1(g).

First, the fact that Arizona courts may now *apply* the *Daubert* standard to polygraph evidence does mean that polygraph evidence will *meet* the *Daubert* standard. It merely means the trial court may exercise its discretion in determining whether the particular polygraph evidence is sufficiently reliable to be admitted. *See* Ariz. R. Crim. P. 702; *United States v. Cordoba* (*Cordoba I*), 104 F.3d 225, 228 (9th Cir. 1997); *United States v. Cordoba* (*Cordoba II*), 991 F. Supp. 1199, 1203 (C.D. Cal. 1998) (precluding polygraph evidence after conducting a *Daubert* hearing); *State v. Rodriguez*, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996) (whether Arizona applies *Daubert* or not, polygraph evidence is unreliable as a matter of law). Thus, applying *Daubert* to Harrod's polygraph evidence does not show that the evidence would have been admitted. *A fortiori*, applying *Daubert* to Harrod's polygraph evidence would not have probably overturned his sentence.

Second, as Harrod concedes, the Rules of Evidence do not apply to the penalty phase of a capital trial. (*PCR Pet.* at 33, citing *State v. Hampton*, 213 Ariz. 167, 178, ¶ 46, 140 P.3d 950, 962 (2006)). Thus, whether polygraph evidence meets the *Daubert* standard is not dispositive on the question whether polygraph evidence should have been admitted in the penalty phase of Harrod's trial. Even if polygraph evidence meets the *Daubert* standard, it may still be precluded in the penalty phase. Harrod's polygraph evidence, offered in the penalty phase, constituted improper evidence of residual doubt. *See Harrod III*, at ¶¶ 40, 46; *see also State v. Moore*, 222 Ariz. 1, 20, ¶ 108, 213 P.3d 150, 169 (2009).

Additionally, under *State v. Zuck*, 134 Ariz. 509, 514, 658 P.2d 162, 167 (1982),[21] polygraph evidence is inadmissible absent a stipulation. Finally, polygraph evidence may be precluded under Arizona Rule of Criminal Procedure 26.7(b), which requires evidence presented at a sentencing hearing to be reliable and relevant. Thus, even assuming Harrod's polygraph evidence was admissible under the *Daubert* standard, the trial court had—and would still have—grounds to preclude it. Thus, applying *Daubert* to Harrod's polygraph evidence would not have resulted in its admission or in a different sentence.

D. HARROD'S CLAIM THT THE TRIAL COURT ERRED BY ADMITTING CRIME SCENE AND AUTOPSY PHOTOGRAPHS AT THE 1997 TRIAL IS PRECLUDED.

HARROD'S CLAIM THAT THE TRIAL COURT ERRED AT THE 2005 RESENTENCING BY ADMITTING EVIDENCE RELEVANT TO HARROD'S GUILT, INCLUDING TWO PHOTOGRAPHS, IS ALSO PRECLUDED (HARROD'S CLAIM 4).

At the 1997 trial, the State sought to introduce 3 crime scene photographs and 3 autopsy photographs: Exhibits 63, 64, 65, 67, 68, and 69. (R.T. 10/21/97, at 3-8.) Harrod objected to the photographs or requested that they be cropped. (*Id.*) The trial court ordered that the photographs would be admitted but that one photograph, Exhibit 64, be cropped. (*Id.* at 5.) On appeal, Harrod did *not* claim that the trial court erred when it admitted the photographs. *Harrod I*, ¶ 13. Thus, Harrod waived this claim, and it is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166

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[21] The State concedes *Zuck* relied on *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962), which applied the *Frye* standard to polygraph evidence. Even applying the *Daubert* standard, however, polygraph evidence can be precluded as unreliable or irrelevant or because its probative value is outweighed by the danger of unfair prejudice. Polygraph evidence is irrelevant to the penalty phase of a capital trial. *See Harrod III*, ¶¶ 37-46.

P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

At the 2005 penalty retrial, Harrod moved to preclude evidence relevant to his guilt. (P.I., Item 381.) The trial court denied this motion. (M.E. 425, at 4.) Two of the photographs that had been admitted over objection in 1997 were admitted at the 2005 penalty retrial: Exhibit 64 and Exhibit 69. (P.I. Item 638, at page 4.) On appeal, Harrod neither claimed that the trial court erred when it admitted evidence relevant to his guilt nor when it admitted Exhibits 64 and 69, and he therefore waived these claims. *Harrod III.* Thus, these claims are precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

E. HARROD'S CLAIMS ALLEGING PROSECUTORIAL MISCONDUCT IN THE 1997 TRIAL AND 2005 RESENTENCING ARE PRECLUDED (HARROD'S CLAIM 5).

Harrod claims there were two instances of prosecutorial misconduct in the 1997 trial and four instances of prosecutorial misconduct in the 2005 penalty retrial. On appeal from the 1997 trial, Harrod did not allege prosecutorial misconduct. *Harrod I*, ¶ 13. On appeal from the 2005 penalty retrial, Harrod made a single allegation of prosecutorial misconduct different than the allegations made here. *Harrod III*, ¶ 34. Harrod waived these claims when he did not raise them on appeal. These claims are therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

F. HARROD'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE 2005 TRIAL COURT DID NOT GRANT HAP TOVREA IMMUNITY IS PRECLUDED (HARROD'S CLAIM 6).

Harrod subpoenaed Hap Tovrea as a witness at the 2005 resentencing. Tovrea invoked his Fifth Amendment right not to testify. *Harrod III*, ¶ 18. Harrod

claims that his due process rights were violated at the 2005 penalty retrial when the prosecutor declined to offer Tovrea immunity and the trial court thereafter did not grant Tovrea immunity. (*PCR Pet.* at 47-54.)

On appeal, Harrod claimed that the trial court erred when it excused Tovrea from testifying based on his Fifth Amendment invocation. *Harrod III*, ¶¶ 17-23. The Arizona Supreme Court rejected this claim. *Harrod III*, ¶ 23. To the extent that Harrod is re-urging this claim, it is precluded. *See* Ariz. R. Crim. P. 32.2(a). Assuming Harrod's claim regarding immunity is different than the claim presented on appeal, it is precluded because it was not raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071). Harrod's claim that trial counsel were ineffective for failing to move the court to compel the State to grant Hap immunity is addressed in section (III)(K)(2)(a) below.

G. HARROD'S CLAIM THAT THE 1997 TRIAL COURT JUDGE WAS BIASED IS PRECLUDED (HARROD'S CLAIM 7).

Citing the 1997 trial court's numerous rulings, which were either unchallenged or upheld on appeal, Harrod claims that the trial court judge was biased. Harrod could have raised judicial bias as an issue on appeal and did not. *Harrod I*, ¶ 13. This claim is therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

H. HARROD'S CLAIM THAT THE LAWYER'S STATEMENTS DURING THE 2005 VOIR DIRE IMPROPERLY SUGGESTED THAT HARROD HAD A BURDEN TO PROVE THE MITIGATION WAS SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY IS PRECLUDED AND MERITLESS (HARROD'S CLAIM 8).

Harrod claims that questions during voir dire, primarily posed by the prosecutor, incorrectly described the burden of proof in the penalty phase. Harrod

waived this claim when he did not raise it on appeal. *Harrod III*. It is therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

Moreover, Harrod concedes that the trial court correctly instructed the jury that neither side has the burden of proving that the evidence is or is not sufficiently substantial to call for leniency. (*See PCR Pet.* at 65, citing P.I. 633, at 5.) Jurors are presumed to follow their instructions. *State v. Nelson*, 229 Ariz. 180, 190, ¶ 45, 273 P.3d 632, 642 (2012). Thus, assuming there was any error created by the prosecutor's voir dire questions, it was cured by the trial court's instruction.

I. HARROD'S CLAIM THAT THE 2005 TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY IS PRECLUDED AND MERITLESS (HARROD'S CLAIM 9).

Harrod claims that the trial court incorrectly instructed the jury that if it found the mitigation was not sufficiently substantial to call for leniency, they must impose the death penalty. (*PCR Pet.* at 65, citing P.I., Item 633, at 5) Harrod waived any claim about the specific language he complains of here when he did not challenge it on appeal, and the claim is therefore precluded. *See Harrod III*, ¶ 47-53; Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

Furthermore, the instruction was correct. *See Harrod III*, ¶ 51("under our sentencing scheme, … a juror must vote to impose a sentence of death if he or she determines there is no mitigation at all or none sufficiently substantial to warrant a sentence of death") (quoting *State v. Tucker*, 215 Ariz. at 318, ¶ 74, 160 P.3d at 197.) Although the Arizona Supreme Court was not asked to address the specific language Harrod complains of here, its opinion regarding the penalty phase instructions as a whole is dispositive on this issue. *See Id.*

J. HARROD'S CLAIM THAT ERROR WAS CAUSED BY THE STATE'S 2005 VOIR DIRE QUESTIONS IS PRECLUDED (HARROD'S CLAIM 10 AND 11).[22]

Harrod claims that the prosecutor's voir dire questioning of three subsequently selected jurors created error. Harrod waived this claim when he did not raise it on appeal. *Harrod III.* It is therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

K. INEFFECTIVE ASSISTANCE OF COUNSEL (HARROD'S CLAIM 12).

1. *1997 trial.*

a. Counsel's alleged failure to adequately prepare mitigation evidence.

Harrod contends that it was with regard to "preparation of mitigation evidence" that Harrod's 1997 counsel performed deficiently. (*PCR Pet.* at 71:23, 72:5-14.) The preparation of mitigation in 1997 relates only to Harrod's 1997 death sentence, but the Arizona Supreme Court vacated that sentence and remanded for resentencing. *Harrod II*, ¶ 11. Thus, this claim is not reviewable under Rule 32 and is moot. *See* Ariz. R. Crim. P. 32.1(a) (relief available where sentence is in violation of the federal constitution); *see also Walden*, 126 Ariz. at 335, 615 P.2d. at 13 (sentencing claim was moot where sentence had expired).

b. Counsel's alleged failure to effectively voir dire and cross-examine Pat Wertheim.

Harrod claims that his 1997 counsel were ineffective in their voir dire and cross-examination of Pat Wertheim and that this resulted in "permitt[ing] Mr.

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[22] At page 2 of his PCR petition, Harrod lists his claims including claim 10: "The voir dire process in 2005 invaded the province of the jury" and claim 11: "2005 voir dire 'follow the law' arguments invaded the province of the jury." These appear to be the same claim, and only one claim is raised on pages 68-71 of the petition.

Wertheim to testify falsely that he had identified [Harrod] from his fingerprints." (*PCR Pet.* at 72:1-4.) Karen Jones identified 18 latent prints to Harrod, and her work was verified by both Joe Silva and Wertheim. In the face of this compelling evidence, trial counsel made the reasonable strategic choice to defend the fingerprint evidence by arguing the fingerprints were forged; in other words, the prints matched Harrod, but they had been placed there by the killer in an attempt to frame Harrod. A defense that the prints were misidentified would have been inconsistent with the defense theory that they were forged. Once counsel reasonably chose the forgery theory, they had no duty to pursue a conflicting misidentification theory. *See Bean v. Calderon*, 163 F.3d 1073, 1082 (9th Cir. 1998). Moreover, as explained in section (III)(A)(2)(b), there is no evidence to show that Wertheim testified falsely when he testified that he compared the 18 latent prints to Harrod's known inked prints. This claim is therefore not colorable.

c. Counsel's alleged failure to call witnesses to rebut evidence of pecuniary gain.

Harrod contends that his 1997 counsel performed deficiently by failing to subpoena Hap Tovrea or anyone from the MECA Board of Directors to testify with regard to the State's allegation that the murder was committed for pecuniary gain. (*PCR Pet.* at 72:15-17.) The Arizona Supreme Court vacated the 1997 finding that the pecuniary gain aggravating factor had been proven, and Harrod received a resentencing that included a new trial on aggravating factors. *Harrod II*, ¶ 11. Thus, this claim is not reviewable under Rule 32 and is moot. *See* Ariz. R. Crim. P. 32.1(a) (relief available where sentence is in violation of the federal constitution); *see also Walden*, 126 Ariz. at 335, 615 P.2d. at 13 (sentencing claim was moot where sentence had expired).

Assuming Harrod is suggesting that counsel should have called these same witnesses to rebut evidence of motive in the guilt phase, the claim is not colorable.

Trial counsel presented the testimony of Jason Hu to corroborate Harrod's testimony that during 1988 and 1989, he and Hap Tovrea worked on developing sulfur resources in China through MECA. (R.T. 11/10/97, at 24-35, 40-54; R.T. 11/10/97, at 140-143, 146-154, 161-165.) Counsel also introduced corroborating documents through Hu. (*Id.*) Harrod fails to show what testimony Hap Tovrea or a witness from MECA would have given or that their testimony would have added significantly to the evidence presented. Claims must be supported by affidavits containing the testimony witnesses not called at trial would have offered. *See Borbon*, 146 Ariz. at 399, 706 P.2d at 725. Because Harrod fails to support this claim, it is not colorable.[23]

d. Counsel's alleged failure to call witnesses to contradict Debbie Nolan Luster.

Harrod claims that his 1997 counsel were ineffective by failing to call witnesses to contradict Debbie's testimony that her mother called security after Gordon Phillips left their vacation apartment at the Balboa Bay Club. (*PCR Pet.* at 72:17-24). Claims must be supported by affidavits containing the testimony witnesses not called at trial would have offered. *See Borbon*, 146 Ariz. at 399, 706 P.2d at 725. In support of this claim Harrod has submitted an August 3, 1988 police report he asserts shows "there was no record of . . . security guards having been called by Ms. Tovrea." (PCR Pet. 72:23-24.) Harrod's assertion is incorrect. The police report makes no mention of whether there was a record of security

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[23] Jason Hu and Harrod also testified at the 2005 resentencing. (R.T. 9/27/05, at 85-144; R.T. 9/29/05, at 34-160.) A claim that counsel were ineffective by failing to call Hap or someone from the MECA Board of Directors at the 2005 resentencing would also not be colorable because Harrod fails to show what testimony Hap or someone from the MECA board would have given, or that it would have significantly added to the 2005 testimony of Hu and Harrod. *See Borbon*, 146 Ariz. at 399, 706 P.2d at 725.

being called. (*PCR Appendix*, Item 14.) The police report indicates that there was no record of Gordon Phillips visiting the property, but that is consistent with Debbie's testimony that Phillips told her he parked off-site and would therefore not have checked in with the guard gate. (R.T. 10/27/97, at 40.) Harrod does not show what witnesses should have been called, what testimony they would have given, or how their testimony would create a reasonable probability of a different outcome.

Moreover, as noted in section (III)(B)(2)(b), Debbie's testimony that Harrod was the man she met as Gordon Phillips was not the only evidence that Harrod posed as Phillips. Six witnesses listened to an answering machine message left by Phillips and testified that the voice on the message was Harrod's. (R.T. 10/28/97, at 110-112; 155; 167; 188; R.T. 10/29/97, at 61-63; R.T. 11/5/97, a.m., at 37-38.) Anne Costello also testified that Harrod told her he had posed as Phillips. (R.T. 11/14/97, at 12-13.) Thus, even assuming witnesses would contradict Debbie's testimony that her mother called security, there is no reasonable probability of a different outcome. This claim is not colorable and should be denied.

e. Counsel's alleged failure to call an expert witness on identification.

Harrod further claims that 1997 counsel should have called an expert witness to testify regarding Debbie's identification. (*PCR Pet.* at 72:24-26). Harrod makes citations to reports, articles, and books about eyewitness identification. (*PCR Appendix*, Items 9-13). Significantly, however, Harrod has not provided an affidavit indicating what testimony an expert witness on identification would give *in this case*. Because Harrod fails to support this claim, he has failed to make a colorable claim. *See Borbon*, 146 Ariz. at 399, 706 P.2d at 725. Therefore, this claim should be denied.

Furthermore, as described in section (III)(B)(2)(b), there was substantial other evidence that Harrod posed as Gordon Phillips. Therefore, Harrod fails to

demonstrate there is a reasonable probability of a different outcome if an expert witness on identification had testified.

2. *2005 resentencing.*

a. Counsel's alleged failure to request immunity for Hap Tovrea.

Harrod contends that his 2005 counsel were ineffective by failing to move for immunity for Hap Tovrea. (*PCR Pet.* at 47, 73:3, 73:7-9.) Tovrea's lawyer clearly stated that, on his advice, Hap would assert his Fifth Amendment rights and refuse to testify. (R.T. 3/22/05, at 23-24.) Nonetheless, Harrod claims that trial counsel were ineffective for failing to seek immunity for Hap and present his testimony. This claim is not colorable.

Harrod has failed to show that trial counsel would have been able to obtain immunity for Hap. Defendants have no right to obtain immunity for a witness. *State v. Fisher*, 141 Ariz. 227, 243, 686 P.2d 750, 766 (1984); *State v. Axley*, 132 Ariz. 383, 388, 646 P.2d 268, 273 (1982). A.R.S. § 13–4064 allows the trial court to compel testimony from a witness and for the witness to be given use immunity for his testimony, but *only upon the prosecutor's request.*

Citing *United States v. Morrison*, 535 F.2d 223, 227 (3rd Cir. 1976), *Government of Virgin Islands v. Smith*, 615 F.2d 964, 973 (3rd Cir. 1980), and *United States v. Straub*, 538 F.3d 1147, 1164 (9th Cir. 2009), Harrod suggests that counsel could have sought immunity for Tovrea under federal law. The majority of federal courts have rejected the proposition that a trial court has authority to require the State to give a witness immunity. *See, e.g. United States v. Serrano*, 406 F.3d 1208 (10th Cir. 2005), *United States v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990), *United States v. Capozzi*, 883 F.2d 608 (8th Cir. 1989), *United States v. Herrera-Medina*, 853 F.2d 564 (7th Cir. 1988), *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *Autry v. Estelle*, 706 F.2d 1394 (5th Cir. 1983), *United States v.*

Turkish, 623 F.2d 769 (2nd Cir. 1980). "Virtually all jurisdictions recognize that use immunity is a creature of statute which can be conferred only by the Executive Branch of the government." *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982) (overruled on other grounds, *United States v. Call*, 129 F.3d 1402, 1404 (10th Cir. 1997)).

Moreover, even under the *Morrison* and *Virgin Islands v. Smith* analysis, immunity will only be granted in circumstances where prosecutorial misconduct has caused a witness to withhold testimony or "where the government can present no strong countervailing interest" and the witness is "capable of providing clearly exculpatory evidence on behalf of a defendant. . .." *Morrison*, 535 F.2d at 227; *Smith*, 615 F.2d at 973–74. Similarly, under *Straub*, the State's denial of immunity must "impermissibly distort the fact-finding process." 538 F.3d at 1164. Those circumstances were not present here. There is no evidence of prosecutorial misconduct, the State's countervailing interest was in preserving a possible future case against Hap Tovrea, and there is no showing what testimony Hap would have given, let alone that it was clearly exculpatory or that its absence distorted the fact-finding process. *See Axley*, 132 Ariz. at 388, 646 P.2d at 273. Thus, defense counsel could not have obtained immunity for Hap and was not ineffective for not requesting it.

b. Counsel's alleged use of and failure to object to general fairness and follow the law questions in voir dire.

Harrod claims that 2005 counsel were ineffective by failing to object to the prosecutor's and trial court's voir dire questioning. (*PCR Pet.* at 73:11-21 incorporating 68:26-71:1.) More specifically, Harrod contends that the trial court, the prosecutor, and even defense counsel, asked improper 'follow the law' questions. Harrod cites no authority for his contention that asking prospective jurors whether they will follow the law is improper or objectionable. Harrod cites

three jurors as having been asked improper questions: Jurors 34, 87, and 93. (*PCR Pet.* at 70:9-11.) A review of their voir dire, however, reveals no impropriety. (*See* R.T. 9/13/05, at 173-177; R.T. 9/15/05, at 18-20, 53-55.) Moreover, the jurors were properly instructed regarding the assessment of aggravation and mitigation, and jurors are presumed to follow their instructions. *Nelson*, 229 Ariz. at 190, ¶ 45, 273 P.3d at 642; *Harrod III*, at ¶¶ 47-53. Harrod has not established a reasonable probability of a different outcome had the jurors been questioned differently, and has therefore failed to establish *Strickland* prejudice.

c. Counsel's alleged failure to object to voir dire questions that conflated the burden of proof and persuasion.

Harrod contends that questions during voir dire, primarily posed by the prosecutor, incorrectly described the burden of proof in the penalty phase and that his 2005 counsel were ineffective by failing to object. (*PCR Pet.* at 73:22-25 incorporating 63:6-65:6.) The State's voir dire was not objectionable. Many of the statements Harrod claims were improper explained that the defendant had the burden to establish the existence of mitigating circumstances by a preponderance of the evidence. This was a correct statement of law. *See* A.R.S. § 13-751(C). Where the State asserted that the defendant had the burden to prove the mitigation was sufficiently substantial to call for leniency, this was also not objectionable because there was no authority to the contrary. *State ex rel. Thomas v. Granville* (*Baldwin*, Real Party in Interest), 211 Ariz. 468, 472, ¶ 13, 123 P.3d 662, 666 (2005)—which held that the defendant did not have the burden of proving the mitigation was sufficiently substantial to call for life and the State did not have the burden of proving death was appropriate—had not yet been decided. Thus, counsel did not perform deficiently by failing to object to the State's voir dire.

Moreover, Harrod concedes that the trial court correctly instructed the jury that neither side had the burden of proving that the evidence was or was not

sufficiently substantial to call for leniency. (*PCR Pet.* at 65 citing P.I. 633, at 5.) As noted above, jurors are presumed to follow their instructions. *Nelson*, 229 Ariz. at 190, ¶ 45, 273 P.3d at 642. Thus, assuming there was any error created by the State's voir dire, it was cured by the trial court's instruction. There is, therefore, no *Strickland* prejudice.

d. Counsel's alleged failure to rehabilitate prospective anti-death penalty jurors.

Harrod claims that 2005 counsel were ineffective in jury selection by failing to rehabilitate or object to the State's motion to strike 7 prospective jurors (Jurors 4, 48, 58, 59, 62, 75, and 92). (*PCR Pet.*, at 73:26-74:7.) It is clear from the record that none of these jurors could have been rehabilitated. (R.T. 9/13/05, at 73-75 (death penalty is primitive; would automatically vote against it); R.T. 9/14/05, at 83 (a pastor "dictated by the church against the death penalty"); R.T. 9/14/05, at 114-115 (would automatically vote against the death penalty for religious reasons); R.T. 9/14/05, at 117-119 (could not vote for the death penalty no matter what); R.T. 9/14/05, at 128-129 (would not vote for the death penalty under any circumstances); R.T. 9/14/05, at 194 (could not participate in a death verdict; death would not be an option); R.T. 9/15/05, at 49-51 (could not vote for the death penalty under any circumstance). It was not deficient performance for counsel to concede these jurors were not qualified to serve when that fact was clear.

e. Counsel's alleged failure to adequately voir dire or move to strike pro-death prospective jurors.

Harrod claims that 2005 counsel were ineffective in jury selection by failing to adequately question or move to strike 6 allegedly pro-death prospective jurors (Jurors 16, 31, 43, 46, 53, 60). (*PCR Pet.* at 74:8-75:11). Of these 6 jurors, defense counsel peremptorily struck three of them (31, 46, and 53). As to those three jurors there can be no prejudice as they did not serve on the jury. As to the

other three (16, 43, and 60) all three indicated they could vote for a life sentence depending on what the evidence showed. (R.T. 9/13/05, at 136; R.T. 9/14/05, at 73; R.T. 9/14/05, at 125.) Thus none of them were "*Morgan*-excludable" or "mitigation impaired" as Harrod contends. It was not deficient performance to fail to move to strike qualified jurors. Nor was it deficient performance to fail to peremptorily strike them, particularly when there might have been other far more objectionable jurors to peremptorily strike.

f. Counsel's alleged deficient performance in her questioning of a mitigation witness.

Counsel called a corrections officer, who had been responsible for Harrod's classification in prison. (R.T. 10/19/05, at 5-6.) He explained that Harrod was classified as a P-5/I-1. (*Id.* at 7.) He explained that the P-5 was based on "the committing offense," and the I-1 meant he "was not an institutional threat." (*Id.*) The witness established that Harrod had not had any disciplinary infractions. (*Id.* at 8.) Counsel said, "And at SMU-2, I'm assuming all the inmates were a level 5?" (*Id.* at 12.) The officer did not confine his answer to the question and testified, "Death-row inmates are P-5." (*Id.*) There was then a discussion about what work programs were available to death row level 5 inmates and non-death row level 5 inmates. (*Id.*) On redirect, counsel had the officer reconfirm that anyone convicted of first degree murder would be a level 5 upon admission. (*Id.* at 15.)

Counsel did not elicit testimony that Harrod had been on death row. The corrections officer volunteered unsolicited information. Thus, counsel did not perform deficiently. Further, additional questioning left it unclear whether Harrod was a death row level 5 inmate or a non-death row level 5 inmate, and the thrust of the testimony was that Harrod was not considered an institutional threat and had had no disciplinary infractions. (*Id.* at 8, 12, 14-16.) There was therefore no *Strickland* prejudice.

L. HARROD'S CLAIM THAT THE 1997 TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON REASONABLE DOUBT IS PRECLUDED AND MERITLESS (HARROD'S CLAIM 13).

Harrod claims that the 1997 trial court's reasonable doubt instruction was erroneous. Harrod waived this claim when he did not raise it on appeal. *See Harrod I*, at ¶ 13. It is therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

Moreover, the instruction the trial court gave was made mandatory by *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). (P.I. 228, at 5.) While Harrod contends that the instruction was a "*variation* of the mandatory *Portillo* instruction," the instruction contained all the language required by *Portillo*. Harrod claims that two parts of the instruction were erroneous: (1) the use of "firmly convinced," and; (2) the phrase "if on the other hand, you think there is a real possibility the defendant is not guilty, ..." This language was required, however, by *Portillo*, and the Arizona Supreme Court has repeatedly rejected challenges to the *Portillo* instruction. *See State v. Dann* (*Dann II*), 220 Ariz. 351, 365, ¶65, 207 P.3d 604, 618 (2009); *Id.* Thus, the trial court did not err by giving the instruction.

M. HARROD'S CLAIM THAT THE 2005 TRIAL COURT'S INSTRUCTION ON MITIGATION WAS ERRONEOUS IS PRECLUDED AND MERITLESS (HARROD'S CLAIM 14).

Harrod claims that the 2005 trial court's instruction on mitigation limited the scope of the mitigation the jury could consider. Harrod waived this claim when he did not challenge the instruction on appeal. *Harrod III*. This claim is therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *Shrum*, 220 Ariz. at 118, ¶ 12, 203 P.3d at 1178; *Swoopes*, 216 Ariz. at 399, 166 P.3d at 954 (citing *Smith*, 202 Ariz. 446, ¶¶ 9, 12, 46 P.3d at 1071).

Furthermore, the instruction Harrod contends was improper was cited favorably in *Harrod III* when the Arizona Supreme Court decided that the jury instructions properly informed the jurors that they could find mitigating factors from anything presented during the resentencing. *See Harrod III*, at ¶ 49, n. 11. The same language was also later approved in *State v. Velazquez*, 216 Ariz. 300, 311, ¶ 44, 166 P.3d 91, 102 (2007). Thus the trial court did not err by giving the instruction.

Harrod also refers to the 2005 trial court's preclusion of residual doubt mitigation. (*PCR Pet.* at 78.) Harrod's challenge to this ruling was rejected on appeal. *Harrod III*, at ¶ 46. To the extent that he re-urges it here, it is precluded. *See* Ariz. R. Crim. P. 32.2(a).

N. ACTUAL INNOCENCE (HARROD'S CLAIM 15).

Claims of actual innocence brought in Arizona post-conviction proceedings are governed by Arizona Rule of Criminal Procedure 32.1(h). *See Swoopes*, 216 Ariz. at 404, ¶¶ 46–47, 166 P.3d at 959. In order to prevail under Rule 32.1(h), Harrod must establish "by *clear and convincing evidence* that the facts underlying [his] claim would be sufficient to establish that *no reasonable fact-finder would have found [him] guilty* of the underlying offense beyond a reasonable doubt." *See Swoopes*, 216 Ariz. at 404, ¶ 46, 166 P.3d at 959.

Respondent's recitation of facts in sections (I)(A), (III)(A)(1), and (III)(B)(2)(a) and arguments in section (III)(B)(2)(b) contain a thorough recitation of the evidence with record citations and citations to the Arizona Supreme Court opinions. In sum, Harrod's conviction was supported by evidence of his guilt beyond a reasonable doubt including: (1) he posed as Gordon Phillips to make contact with Jeanne Tovrea; (2) he confessed his involvement in Jeanne's murder to Anne Costello and made self-incriminating statements to Elizabeth and Mark Costello; (3) he had phone contact with Hap Tovrea the day before and the day

after the murder; (4) he received large sums of money from Hap by way of wire transfers, cashier's checks, and mailed packages of cash and checks; (5) his fingerprints were on Jeanne's north gate, the kitchen window glass and weather stripping, and the kitchen counters. Harrod has failed to meet his burden of establishing by clear and convincing evidence that no reasonable fact-finder would have found him guilty.

O. HARROD'S CLAIMS RAISED TO AVOID PRECLUSION IN FEDERAL HABEAS PROCEEDINGS.

In view of Harrod's concession that courts have previously rejected these claims and his failure to offer any argument or authority in their support, this Court need not consider them. *See State v. Anderson*, 210 Ariz. 327, 359, ¶ 146 (2005).

IV. CONCLUSION.

Harrod has not raised any claims that require further factual development. Based on the foregoing authorities and arguments, Respondent respectfully requests that Harrod's petition be denied.

DATED this 25th day of March, 2013.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 25th day of March, 2013, I electronically filed the foregoing with the Clerk of the Court for the Maricopa County Superior Court.

I have also on this date provided a copy of the foregoing document by mail or electronic means to:

Criminal Court Administration
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Case Summary	State Of Arizona Vs. James Harrod /
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Attorney Information	**Bar No.:** 014328 - **State:** AZ - **Email:** susanne.blomo@azag.gov
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Documents Attached to Filing

Document Title	Document Type
Response to Petition for Post-Conviction Relief	Response

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