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

Attorney for Defendant

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

STATE OF ARIZONA Plaintiff, vs. JAMES CORNELL HARROD, Defendant.	NO. CR1995-009046-001 **SUPPLEMENTAL BRIEF** **(CAPITAL CASE)** (Assigned to the Hon. David B. Gass)

The Defendant, James Harrod, by and through counsel undersigned hereby submits, pursuant to this Court's Order of June 14, 2013, this supplemental brief on whether it was ineffective assistance of counsel to present to the *Ring*-remand sentencing jury the fact that Petitioner had previously been sentenced to death in this very case.

PROCEDURAL HISTORY

Petitioner was arrested on September 14, 1994 for the April 1, 1988 murder of Jeanne Tovrea. He was convicted and sentenced to death in 1995. His death sentence was vacated in 2002 pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). In the 2005 retrial of the penalty phase it was disclosed to the jury during the direct examination of two mitigation witnesses that Petitioner had been previously sentenced to death on this very case. (R.T. 10-19-05 a.m., pp. 11-12); (R.T. 10-19-05 p.m., pp. 25, 31, 49), (R.T. 10-19-05 p.m., pp. 25, 31, 38), (10-19-05 a.m., pp. 13-14), (R.T. 10-19-05 p.m., p. 41) and on redirect (R.T. 10-19-05 a.m., pp. 14-15).

LAW AND ARGUMENT

The sentencing retrial formally began on September 19, 2005. The State proved the pecuniary gain aggravator, A.R.S. 13-751(F)(5) and trial proceeded to the penalty phase. One of the mitigators sought to be proven by the defense was good behavior while incarcerated. *See, Skipper v. Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986). As noted by the Court in its 6/06/13 Minute Entry, they succeeded in proving that his behavior was excellent (MEO 6-06-13, p. 19).

The questioning of the first witness to establish Petitioner's exemplary institutional performance went well at first. That witness was an Arizona Department of Corrections Classifications Officer who had personally classified Petitioner six times (R.T. 10-19-05, pp. 3-8). The witness testified that Petitioner had, and consistently held the most favorable classification possible (*Id.*, p. 7-8). At that point the goal of establishing excellent behavior while incarcerated had been accomplished and questioning should have ceased. Instead, the questioning wandered off into a discussion of various privileges inmates might enjoy such as "store privileges" (*Id.*, p. 11). This prompted the following disastrous exchange:

Q. So an inmate on level 5-1 is not eligible for working a job?

A. As a 5-1, if there was work available, we used to have an outside work group.

Q. I'm sorry?

A. They did, at one point, they had an outside work group of death-row inmates that were on level 1.

Q. And what did it require the inmate do in order to participate?

A. Again, based on his institution score, his disciplinary history and evaluation of his work.

Q. And at SMU-2, I'm assuming all the inmates were a level 5.

A. Death-row inmates are P-5.

Q. P-5?

A. Yes, ma'am.

Q. Would the jobs be available to any of them?

A. We had outside work group for death-row – Okay. All inmates that are assessed to do death row penalty are P-5s. P-5 is your public risk score.

R.T. 10-19-05, pp. 11-12.

At no time did the defense attorney move to strike any reference to death row. Rather, the defense attorney feebly tried to defuse the damage by using the gentler term "condemned row" (Id.).

Cross examination was brutally short. In only eight questions, the prosecutor managed two more references to "death row" and the fact that the work program discussed on direct had been terminated when a woman attempted to help her husband escape, resulting in both being shot. No objection was made to this highly inflammatory irrelevant exchange which had been invited by the maladroit direct examination. Counsel's performance is fairly characterized as proceeding "from blunder to blunder with disastrous consequences." *Berryman v. Morton,* 100 F.3d 1089, 1096 (3rd Cir. 1996). Eliciting damaging evidence without sound strategy is deficient performance, and ineffective assistance if there is prejudice. *People v. Dalessandro*, 165 Mich. App. 569, 612-614; 419 N.W.2d 609 (1988); *White v. McAninch*, 238 F.3d 988, 997-998 (6th Cir. 2000). On redirect, the attorney abandoned all pretense and she herself used the term "death row" twice, eliciting it once in response *(Id.,* pp. 14-15). Two more witnesses from DOC were called and testified to Petitioner's peaceful nature without incident (*Id.*, p. 16, *et. seq.*, p. 19, *et. seq.*)

In the afternoon session however, things again went awry. A witness was unavailable so her video deposition, taken the day before, was played to the jury (R.T. 10-19-05 p.m., p. 24). For reasons unknown, the attorney plunged directly into trouble by asking "What sort of inmate is housed at the Eyman Complex SMU-2?" (*Id.*, p. 25) the location where the witness was employed. Predictably, the answer was: "They are inmates that are sentenced to condemned row [and others who are security or disciplinary risks]"

(*Id*). There is an isolated reference to "death row" at page 30 and the attorney then elicits not only was Petitioner on "condemned row" but also that he was not there for any disciplinary reason, or mental health reason (*Id.*, p. 31). If there was any doubt Petitioner had been sentenced to death, the prosecutor quickly cured that on cross-examination, asking if "condemned row" was "death row" and establishing that Petitioner had been on death row for the entirety of his incarceration (*Id.*, p. 41). The balance of his cross-examination is spent eliciting security risks associated with medium security, for which Petitioner might earn his way to, if he were sentenced to life (*Id.*, p. 42, *et. seq.*). On recross the prosecutor abandoned subtly and elicited the highly inflammatory and irrelevant tale of two medium security inmates who recently attempted to escape, raping a female correctional officer they were holding hostage in the process. (*Id.*, at pp. 46-47) No objection was made to this irrelevant and incredibly inflammatory testimony.

It bears emphasizing that this was testimony by video deposition taken the day before the live testimony. The use by this witness of the awkward locution "condemned row" strongly suggests that defense counsel at least had an inkling of how damaging this information was and persuaded the witness to use the putatively gentler phrase "condemned row"; it is an awkward phrase and first used by defense counsel during that morning's live testimony. The evidence of Petitioner's excellent behavior while incarcerated could have been elicited without any reference to "death row". While defense counsel may have had an inkling this area was highly problematic, that she nonetheless proceeded strongly suggests she had no real appreciation for how devastating it actually was. She could have completely avoided the area with the live witness in the morning. She made no attempt to redact the recorded deposition of the second witness before it was played to the jury.

No curative instruction to limit this damage was sought, again suggesting that trial counsel was virtually oblivious to how prejudicial this irrelevant and inflammatory information was.

Any factor which lessens the jury's sense of responsibility in making the "ultimate determination of death . . . presents an intolerable danger that the jury will in fact choose

to minimize the importance of its role." *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985), at 333.

There is no doubt that the dismal performance of counsel prejudiced Petitioner. Allowing the resentencing jury to know that Petitioner had been previously sentenced to death *for this very crime* could only have lessened their sense of responsibility in reaching its decision on the appropriate sentence in this case. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985) the Supreme Court stated:

> This case presents the issue whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case. In this case, a prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court.
>
> *Caldwell, v. Mississippi at* 323.

Later, the Court held:

> On reaching the merits, we conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.
>
> *Id.* at 328-329.

> "Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others *presents an intolerable danger* that the jury will in fact choose to minimize the importance of its role."
>
> (*Id.*, at 333, 2641-2642). (Emphasis added)

The instant case presents the identical issue, though it arrives there by a different route. Here the diminution of the juror's sense of responsibility resulted from the maladroit questioning by defense counsel and the resultant "piling on" by the prosecutor, not from the prosecutor's argument alone. The argument for error in this case is even stronger than that in *Caldwell.* Here, the resentencing jury had self-evident proof that their decision to impose death was not "final" but rather was reviewable; they were retrying the sentencing phase of a case for which Petitioner had been previously sentenced to death, by

definition, their decision would be reviewed. This presented the very diminution in the jury's sense of responsibility decried in *Caldwell*. As they stated:

> Writing on this kind of prosecutorial argument in a prior case, Justice STEVENS noted another reason why it presents an intolerable danger of bias toward a death sentence: Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to "send a message" of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely "err because the error may be corrected on appeal." *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983) (concurring in judgment).
>
> *Id.*, at 331.

The *Caldwell* court reversed the death sentence based on the bias and prejudice resulting from the violation of the 8th Amendment.

> This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S., at 998-999, 103 S.Ct., at 3452. Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).
>
> *Id.*, at 329.

The harm is the suggestion that the "responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." (*Id.*, at 333). The *Caldwell* opinion contains a compendium of State Supreme Court opinions which "almost uniformly have strongly condemned the sort of argument offered by the prosecutor here." (*Id.*, p. 333).

> FN4, *See, e.g., Hawes v. State*, 240 Ga. 327, 333, 240 S.E.2d 833, 839 (1977) (setting aside death sentence in spite of counsel's failure to object to prosecutor's argument); *Fleming v. State,* 240 Ga. 142, 146, 240 (S.E.2d 37, 40 (1977) (setting aside death sentence in spite of curative instruction); *State v. Willie*, 410 So.2d 1019, 1034-1035 (La. 1982) (use of this argument by prosecutor calls for setting aside death sentence even in the absence of other improprieties); *State v. Jones,* 296 N.C. 495, 498-499, 251 S.E.2d 425, 427 (1979) (ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though there was no contemporaneous

> objection); *State v. White,* 286 N.C. 395, 404-405, 211 S.E.2d 445, 450 (1975) (ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though trial judge gave curative instruction); *State v. Gilbert,* 273 S.C. 690, 696-698, 258 S.E.2d 890, 894 (1979) (setting aside death sentence in spite of defendant's failure to raise issue on appeal).
>
> FN5. *See, e.g., People v. Morse*, 60 Cal.2d 631, 649-653, 36 Cal.Rptr. 201, 212-215, 388 P.3d 33, 44-47 (1964); *Pait v. State*, 112 So.2d 380, 383-384 (Fla. 1959); *Blackwell v. State,* 76 Fla. 124, 79 So. 731, 735-736 (1918); People v. Johnson, 284 N.Y. 182, 30 N.E.2d 465 (1940); *Beard v. State,* 19 Ala.App. 102, 95 So. 333 (1923). See generally Annot., *Prejudicial Effect of Statement of Prosecutor that if Jury Makes Mistake in Convicting It Can Be Corrected by Other Authorities* , 3 A.L.R.3d 1448 (1965); Annot., Prejudical Effect of Statement of Court that if Jury Makes Mistake in Convicting It Can Be Corrected by Other Authorities, 5 A.L.R.3d 974 (1966).

Id., at 334.

Whether the harm results from a prosecutor's improper comment or results from a defense attorney's maladroit questioning of witnesses the end result is the same: the danger that the jury's sense of responsibility for its decision is diminished. The lessening of the jury's sense of responsibility in reaching its sentencing decision is the "intolerable danger" which *Caldwell* protects against.

Building on this foundation, the overwhelming number of courts have found prejudice and reversible error when this lessened sense of responsibility results from a jury retrying the penalty phase of a capital case learn that the defendant has previously been sentenced to death *on this very case.*

In *State v. Britt,* 288 N.C. 699, 220 S.E.2d 283 (1975), the Supreme Court of North Carolina found that such a development was "incurably prejudicial." (*Id.*, at 713, 292). There, the prosecutor elicited that information while cross examining the defendant during retrial (*Id.,* at 707, 289). Here the information was elicited by defense counsel but was no less incurably prejudicial. In *Britt* both the conviction and death sentence had been reversed so the retrial was "entirely new." (*Id.*, at 708, 289). Here, the error was even more clearly prejudicial because only the sentencing phase was being retried and the jury was operating under a directed verdict of guilt. It is inestimable how greatly this directed verdict of guilt diminished the jury's sense of responsibility in reaching its verdict. Here,

the jury was not deciding the single most important issue in a criminal trial; guilt or innocense. Forced to accept Petitioner's guilt by directed verdict as the correct verdict, it is hard to imagine that they would not also accept the sentence of death as correct once they learned that it had been previously imposed. As stated by the Court in *Britt:*

> A fair consideration of the principles established and applied in these cases constrains us to hold that no instruction by the court could have removed from the minds of the jurors the prejudicial effect that flowed from knowledge of the fact that defendant had been on death row as a result of his prior conviction of first degree murder in this very case. The probability that the jury's burden was unfairly eased by that knowledge is so great that we cannot assume an absence of prejudice. *State v. Hines, supra.* We hold the challenged questions by the district attorney were highly improper and incurably prejudicial.
>
> *Id.*, at 713, 292

The *Britt* court found this knowledge so prejudicial that not even a sustained contemporaneous objection and a curative instruction were sufficient to dispel the damage. Here, we had neither. The jury had no guidance whatsoever in assessing this irrelevant and highly prejudicial information.

State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983) followed in *Britt's* footsteps. This case was a sentencing retrial of a double murder for which Oliver had been sentenced to death on both counts. On trial together with co-defendant Moore, a witness familiar with defendant Moore made a statement about "death row inmates" (*Id.*, at 367, 330). An objection to this portion of the testimony as unresponsive was overruled and no Motion to Strike was made (*Id.*). The *Oliver* court found that, even though *Britt* was distinguishable, the harm caused by the reference to death row required reversal of the death sentence because the danger was too great that the remark "would unfairly ease the second jury's burden in deciding to impose the death sentence." (*Id.*, at 368, 331). The *Oliver* court went on ". . . we must caution prosecutors to scrupulously avoid any reference to death row or death row inmates . . ." (*Id.*).

People v. Davis, 97 Ill. 2d 1, 452 N.E.2d 525 (1983) found that the prejudice was so great, when the jury was advised of a previous death sentence *in another case,* as to require the death sentence be vacated and remanded. The court noted that, in order to

prove the statutory aggravator of the defendant having been convicted of two or more murders, the State needed to prove a conviction for a prior murder (*Id.*, at 24, 536). The State did so by introducing a certified copy of Davis' conviction for murdering one Charles Biebel (*Id.*, at 25, 536). This document, as did clerks minute docket, also stated that he had been sentenced to death for the offense *(Id.*, at 25, 536-537). The court noted the fact "that the defendant received the death sentence for a prior murder has absolutely no relevance to the issue of whether he is eligible to receive that penalty for the instant offense." (*Id.*, at 26, 537, emphasis added). The court went on to say:

> More importantly, as noted by defendant, introduction of this evidence may well have improperly influenced the jury's decision in two respects. In determining his eligibility for the death penalty, the jury was aware that another jury had previously resolved the identical issue adversely to defendant. If a juror was uncertain as to whether defendant was qualified for the death sentence, the knowledge that 12 other people determined he was could have swayed the juror's verdict in favor of death.
>
> Further, the jury's awareness of defendant's prior death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision. Assuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would.
>
> *Id.*, at 26, 537.

This case illustrates the legal adage that if a fact is irrelevant, its admission *is by definition* prejudicial. Petitioner's prior death sentence was irrelevant, therefore its admission was, by definition, prejudicial. This was not some trivial, harmless fact. This was a fact that went to the very heart of the single most important decision the jury had to make: whether to impose life or death.

People v. Hope, 116 Ill.2d 265, 508 N.E.2d 202 (1986) follows *Davis'* path. This case involved pretrial publicity which revealed that the defendant had been sentenced to death in another case. As in *Davis,* the State needed to prove the aggravating factor of having been convicted of two or more homicides (*Id.*, at 271, 204). The *Hope* opinion relied heavily on *Davis*, including verbatim the quote set forth herein immediately above. The *Hope* case represents an extension of the "prejudice/diminution of responsibility"

argument in that it does not rely on only what happened in the courtroom, but includes publicity as well. It is a matter of record that the instant case generated enormous publicity. The *Hope* opinion flatly stated:

> The possibility that the jury, even one member, may have sentenced the defendant to death on the basis of an irrelevant, highly prejudicial and nonstatutory aggravating factor constitutes reversible error.
>
> *Id.*, at 274, 206

The other contribution of the *Hope* opinion is its recognition the disclosure of a prior death sentence may function as a nonstatutory aggravator, which is a violation of due process.

Another case from another jurisdiction, *Atkins v. Commonwealth,* 272 Va. 144, 631 S.E.2d 93 (2006), likewise held that disclosure to the jury by the trial court that the defendant had previously been sentenced to death on that very case was prejudicial and required reversal of the sentence. The factual footing of this case is a bit complex, as this opinion followed an earlier reversal by the Supreme Court, *Atkins v. Virginia,* 534 U.S. 809, 122 S.Ct. 29 (2001), which held that the execution of mentally retarded persons violated the Eighth Amendment. It differs from cases previously cited in that it was the court itself which advised the jurors that the death penalty had been previously imposed. The court did so in the course of advising the jurors that if they found Mr. Atkins to be mentally retarded, he could not be executed (*Id.,* at 156, 99). The jury was only determining the sentence indirectly: if they found he was mentally retarded, his sentence would be commuted to life in prison, if they found he was not, the previous jury's determination that he be executed would go forward (*Id.*, at 156, 99). It is notable that the Virginia Supreme Court gave such wide berth to disclosing to jurors a previous death sentence that it reversed his death sentence, even though that jury was not directly deciding the issue of life or death. That court found this disclosure to be so prejudicial that, even when a finding of mental retardation would have only the effect of "nullifying another jury's verdict to sentence Atkins to death.", it was reversible error. Even at such a distance, such disclosure is prejudicial and reversible error.

The overwhelming majority of jurisdictions which have addressed the issue presented herein, including those compiled in *Caldwell*, have held that it is prejudicial reversible error to disclose to a resentencing jury that the defendant had previously been sentenced to death in that very case. Those few cases which do not so hold (two) found that the reference to death row was but a single, inadvertent passing reference. This Court has already noted that this case presents references to death row which are "far more extensive than some off hand comments by one witness." (M.E.O. 6-6-13, p. 19). In *State v. Adams*, 347 N.C. 48, 490 S.E.2d 220 (1997) the North Carolina Supreme Court distinguished *Britt* for a case that involved a single, inadvertent reference to death row (*Id.*, at 65, 228). There, as in the instant case, the defense called an employee of the State Department of Corrections to establish good behavior while incarcerated (*Id.*, at 63, 228). On cross-examination, the witness was asked "So you saw him?" and unresponsively replied "When he was on death row, yes ma'am." *(Id.)*. A motion for mistrial was denied, with the trial court finding that the answer had not been elicited by the State and the reference had been made in a "fairly off-hand way without the intent to emphasize it to the jury." (*Id*). Those facts are, as the court has already noted, easily distinguishable from the instant case.

A second case, *Jones v. State,* 332 S.C. 329, 504 S.E.2d 822 (1992) reached the same conclusion as did the Court in *Adams* for essentially the same reason. Therein, an inmate at the State prison, called by the defense, made a statement that on one occasion Jones was standing by him in a common area and Jones "was supposed to be on death row" and those on death row are not supposed to mingle with the general population. (*Id.*, at 341, 828). The *Jones* court found that there was only a passing reference from which the jury might have inferred Jones was on death row and may have been so for a different crime. (*Id.*, at 342, 828). That court cited *Romano v. Oklahoma,* 512 U.S. 1, 114 S.Ct. 2004 (1994), which held it was not error to disclose to a jury that the defendant was on death row on a different case, and found that *Jones* had failed to prove prejudice under *Strickland (Id.)*. This court has already taken note that *Jones* contains only a passing

reference to death row. (M.E.O. 6-6-13, p. 20). Here, there is no ambiguity that Petitioner was on death row on this very case, as noted by the court (*Id.,* at 20). Unlike the *Jones* case, this information was "formally introduced" by virtue of the prosecutor's cross-examination and closing argument.

Rather than extend the bias/prejudice aspect of the Eighth Amendment analysis of the foregoing cases, *Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004 (1994) focused solely on the narrower issue of whether any misrepresentation had been made to the jury. That case granted *certiorari* solely on the question: "Does the admission of evidence that the capital defendant already has been sentenced to death *in another case* impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?" (*Id.*, at 6, 2008, 2009). (Emphasis added) That court held that since there had been no misrepresentation to the jury this did not violate the Eighth Amendment and affirmed the death sentence (*Id*).

The *Romano* court could have, but chose not to, also certified the question of whether admitting the fact that the defendant planned to appeal his conviction and sentence could have had the same effect of undermining the jury's sense of responsibility. By not certifying this question for *certiorari,* the *Romano* court avoided the question that was central to *Caldwell:* did the prosecutor's remarks that the jury's sentence was not the "final" decision impermissibly diminish the jury's sense of responsibility?

Although not certified as a question for *certiorari,* the issue was addressed, at least in the State's brief:

> FN6. The State argues that any *Caldwell* problems were resolved, because the "Judgment and Sentence" form stated that Romano "gave notice of his intention to appeal from the Judgment and Sentence herein pronounced," App. 7, and because the trial judge told the jury, when the form was admitted, that "[Romano] has been convicted but it is on appeal and has not become final," Tr. 45 (May 26, 2987). See Brief for Respondent 19-22.
>
> *Id.,* at 24, 2018, Justice Ginsberg, with whom Justices Blackmun, Stevens and Souter join, dissenting.

The *Romano* court expressly avoided asking, or answering the question central to *Caldwell* by not granting *certiorari* on this issue. The *Romano* court expressly acknowledged this, saying "That infirmity identified in *Caldwell* is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process." (*Id.,* at p. 9, 2010). The *Romano* court simply defined the issue away by not certifying the question. Had they done so, the issue central to *Caldwell,* the lack of "finality" to the jury's verdict, would have been squarely before the court. Here the issue of the lack of finality was squarely before the jury. The Petitioner's presence was living, breathing proof that death sentences are not necessarily final and, the inept questioning of mitigation witnesses by trial counsel, and subsequent cross-examination drove the point home.

The fact that the *Romano* court defined away the issue limits its applicability for two other reasons. First, *Romano* involved the disclosure of a death sentence having been previously imposed in a different case, not in the same case as is at issue here. Second, the disclosure was made by the prosecutor in the course of having to prove statutory aggravators, prior conviction of a violent felony and presenting a continuing threat to society (*Id.,* at 4, 2007). Neither factor in the latter distinguishing factor is present here. Petitioner had not been previously convicted of a violent felony and "continuing threat to society", sometimes called "future dangerousness" is not an aggravating factor statutorily recognized in Arizona. Thus, the very rationale for introducing these records in *Romano* is absent here. The prejudicial impact of disclosing that the defendant had been previously sentenced to death in this case can scarcely be exaggerated. The resentencing jury, already told that a previous jury had "gotten it right" by virtue of the directed verdict of guilt, would be strongly biased to also accept that the death sentence had also been "gotten right" by (what they assumed to be) a previous jury which had heard all the facts.

Even the *Romano* court had to acknowledge that, even when the jury is not misled as to its responsibility, a reversal of a death sentence is required where a prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a violation

of due process." (*Id.*, at 12, 2012), *quoting Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974). As previously noted by the Court, what occurred here was far more extensive than a mere off-hand remark (M.E.O. 6-06-13, p. 10). There were repeated references by both parties to Petitioner having been on death row in this very case and a final repetition by the prosecutor in closing. There was not a single reference to this fact being completely irrelevant, either by the parties or the court. There was no objection and no curative instruction. Nothing was done to convey to the jurors that this fact was irrelevant and not to be considered by them in their deliberations. It is hard to conceive that it was not.

The *Romano* opinion concludes with ambivalence over the impact on the jury of the prior capital sentence.

> Even assuming that the jury disregarded the trial court's instructions and allowed the evidence of petitioner's prior death sentence to influence its decision, it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less included to do so. Either conclusion necessarily rests upon one's intuition.
>
> *Id.*, at 12, 2012-13

Empirical research sharply contradicts this assertion. The Capital Jury Project conducted an extensive research project which was published in 1995 in the Indiana Law Journal, Vol. 76, Number 4. The study included interviews of persons who actually sat on a capital jury. Judges, prosecutors and defense attorneys were interviewed as well. The study revealed some disturbing findings; "many jurors make their punishment decisions prematurely, well before the sentencing phase of the trial; that many misunderstand the judges sentencing instructions in ways that favor the imposition of the death penalty; **and that many jurors are unwilling to accept primary responsibility for their punishment decisions."** (*Id.,* at 1044) (emphasis added). As illustrated by the following table, which contains the responses of 605 actual jurors in capital cases, a meager 6.4% believe that the individual juror is most responsible for the sentencing decision. The corollary figure, that individual jurors are the least responsible, is 23.6%. This is disturbing indeed, as the entire

jury-based capital sentencing concept is predicated upon the premise that individual jurors are 100% responsible for their individual sentencing decision.

> *Rank the following from "most" through "least" responsible for [the defendant's] punishment. [Give 1 for "most" through 5 for "least" responsible.]*

TABLE 10[232]

	Most<---------- ----------->Least					
	1	2	3	4	5	(N=)
Defendant - Because of his conduct determined punishment	46.1%	10.7%	6.4%	7.6%	29.1%	(605)
Law - states what punishment applies	34.4%	39.2%	7.8%	11.2%	7.4%	(605)
Jury - votes for sentence	8.8%	23.3%	38.8%	25.5%	3.6%	(605)
Individual Juror - since jury's decision depends upon the vote of each juror	6.4%	13.7%	26.8%	29.4%	23.6%	(605)
Judge - who imposes the sentence	4.5%	12.9%	20.2%	26.1%	36.4%	(605)

> Unmistakably, jurors placed responsibility for the defendant's punishment elsewhere. Eight out of ten jurors feel that the defendant or the law is the most responsible for the defendant's punishment. More jurors believe that the greatest responsibility lies with the defendant than with the law. The idea that the defendant's punishment is his own responsibility may be especially attractive because it blames the culprit for what the jury must do.
>
> *Id.*, at 1094

This study reveals that the "intolerable danger" decried in *Caldwell* of a juror's belief that the ultimate responsibility for the determination of death lies elsewhere than the individual juror, is rampant or rather, systemic. This only highlights that any factor which diminishes the juror's sense of individual responsibility for the sentencing decision much less one so powerful as disclosing to the jury that the defendant has been previously

sentenced to death on this very case, must be scrupulously avoided. Failing to do so, even in the absence of an objection, must result in an automatic reversal. See State case law compiled in *Caldwell.*

In determining whether there has been a denial of constitutional due process, it is proper and necessary to have an "examination of the entire proceedings." (*Id.*, at 12, 2012). This is consistent with this Court's ruling that the references to "death row" the "statements must be considered in context." (MEO, p. 20). This would necessarily entail examining even those arguments which the court has found to be precluded on other grounds. Considered in the greater context of the aggravation phase retrial, the evidence of prejudice is stark. The most clearly relevant claims in the context of the instant argument are: (11) "follow the law" voir dire; (9) "must impose death" instruction; (8) conflation of the burdens of proof and persuasion; (5.b.2) presenting (F)(6) evidence and (4) the (F)(6) evidence itself namely, the gruesome and inflammatory photographs. The "follow the law" voir dire (11), and "must impose death" (9) instruction both operate to lead jurors to believe that the ultimate responsibility for imposing death lies elsewhere. This is the very harm caused by disclosing to the jury that death had already once been imposed in this case. The conflation of the burden of proof and persuasion (8) likewise provided the jury with an opportunity to distance themselves from the decision to impose death; it was the defendant's failure to persuade them that the mitigation was sufficient to call for leniency, not some failure of their own. The gruesome photos (4) in the service of the foreclosed effort to depict the murder as especially cruel provided an inflammatory backdrop to the presentation of the rest of the evidence.

The context in which it was disclosed to the jury that Petitioner had previously been sentenced to death in this case was a cascade of events, all operating to diminish the jury's sense of responsibility for its sentencing decision. First and foremost was retrying the penalty phase with a directed verdict of guilt. The degree to which this diminishes the jury's sense of responsibility is incalculable. Certainly the legislature is free to enact any death penalty scheme it chooses, but that scheme is subject to the scrutiny of the courts and

must pass constitutional muster. It is well beyond the scope of this particular pleading to launch a frontal assault on the constitutionality of Arizona's death penalty scheme but permitting the retrial of only the penalty phase of a capital case under a directed verdict of guilt must be scrutinized for prejudicial impact. Imagine that you are an ordinary citizen called for jury duty and when you arrive, you are told that you will not be deciding the very thing you thought trials were about: guilt or innocence. You would be bewildered to say the least. Certainly this jury was since, much to the frustration of the Judge, it kept submitting questions related to guilt or innocence even though they had been "instructed that the defendant has been found guilty." (Petition, p. 38) (R.T. 9-26-05, p. 55). The jurors had entered an unfathomable new world in which they did not know the rules and could only look to authority, the judge and lawyers for guidance. That guidance, unfortunately, quickly came in the form of the "follow the law" questions in *voir dire*.

The diminution of the juror's sense of responsibility is no where better illustrated than by this claim. No doubt already confused by the peculiar task they had been assigned, the juror's were then hectored into further abandoning their own moral sense of when the death penalty was appropriate and instead accept that of the State (Petition, p. 69). As argued in the Petition, there was simply no predicate to ask these questions, these jurors were not opposed to the death penalty. The only thing these questions did was to further impress upon the jurors that they were in a strange land where they did not know the rules and their only option was to try to understand what they were being told to do and do their best to abide by it.

Despite the court's admonition that this "jury will not retry the issue of Defendant's guilt" (Inst. #425, p. 4) and the defense motion to preclude the introduction of guilt-phase evidence (Inst. #381) the State did exactly that, introducing gruesome, irrelevant post-mortem photos of Ms. Tovrea (R.T. 10-21-97, p. 3). It did so in service of its attempt to inflame the jury by showing the murder was especially cruel, despite the court ruling that it had failed to prove this aggravator in the 1997 trial (Inst. 258, p. 8). The introduction of these photos precipitated a flurry of jury questions (Inst. #535-548, 553-560, 564-570) all

regarding issues related to the issue of guilt. It was these questions which prompted the court's frustration over the jury's preoccupation with the issue of guilt (R.T. 9-26-05, p. 55). The jury was confused and bewildered as to what they were supposed to be doing.

It is not hard to imagine how the jurors then interpreted the "must impose death" instruction when it was read to them at the end of their long, strange journey. They had been told, essentially, that they didn't know the first thing about trials, that it was better to listen to the authorities, the last people who did this did and imposed death, so if you've understood what you have been told so far, you must impose death.

The revelation that Petitioner had previously been sentenced to death in this case all but guaranteed that he would be again sentenced to death. The cascade of events lessened the juror's sense of control and responsibility in progressively larger measure. They had been told that they were not to decide guilt or innocense, they were told the Petitioner was guilty. They were told they had to follow the law, not their own moral sense. They were told it was Petitioner's job to convince them he deserved life. They were told that if he did not persuade them he deserved to live they must impose death.

In this atmosphere, the introduction of the fact that Petitioner had previously been sentenced to death on this very case was catastrophically prejudicial which precluded a fair determination of the appropriate sentence. The sentence of death must be vacated and a new trial of the penalty phase ordered.

This Supplemental Brief is supported by the Affidavit of Robert Storrs attached as Exhibit "A"

RESPECTFULLY SUBMITTED this 14th day of August, 2013

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

The foregoing efiled and notification sent electronically this 14th day of August, 2013, to:

The Hon. David B. Gass
Maricopa County Superior Court
201 West Jefferson
Phoenix, Arizona 85003

Susanne Bartlett Blomo
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2997

/s/ Kimberly Rodriguez

EXHIBIT "A"

STORRS & STORRS, P.C.
Robert L. Storrs
Attorney At Law
1421 E. Thomas Rd.
Phoenix, AZ 85014-5722
Office: (602) 258-4545
Fax: (602) 200-8173
State Bar #002224
storrsandstorrs@gmail.com

AFFIDAVIT OF ROBERT L. STORRS

STATE OF ARIZONA,	**CASE NO. CR1995-009046**
Plaintiff,	
vs.	**AFFIDAVIT**
JAMES HARROD,	
Defendant.	

I, Robert L. Storrs, upon oath, hereby attest to the following:

My name is Robert L. Storrs. I have been a member of the Arizona State Bar since 1968. I am a Certified Specialist by the State Bar in Criminal Law. I have been certified as a specialist since certification began in 1980.

I first represented a client where the state was seeking the death penalty in 1976. Since 1976 I have represented over sixty individuals where the state sought the death penalty. Of those cases, approximately twenty cases have actually gone to trial. Fifteen of those trials have been to the bench and five have been to a jury. All except one of these cases have been in Maricopa County. One client was charged in Yavapai County but the death notice was withdrawn early in the proceedings. I represented one client in the United States District Court in Arizona involving the death of three individuals, however, a death notice was never filed in that case against my

client. I have met the Arizona requirements to be lead counsel in death penalty litigation since those standards were established. I am currently representing two clients where the state is seeking the death penalty.

I am familiar with the American Bar Association Standards for Defense Representation in Capital Case. I am familiar with the Capital Jury Project and the studies on jurors' decision making process in capital cases. I am familiar with the case law regarding defense counsel conduct where damaging information is presented to the jury where defense counsel could have avoided presenting such information.

I have been requested by attorney Richard Gierloff to review an issue in the matter of State v. James Harrod, CR1995-009046. The issue arose in the 2005 retrial of the aggravation and penalty trial of Mr. Harrod. Defense counsel presented testimony to the jury regarding Mr. Harrod's good conduct in prison. During that testimony it was brought out that Mr. Harrod had been on death row for this case.

The question posed to me is whether, in my professional opinion, the defense introduction of this testimony amounts to ineffective assistance of counsel and provides a basis for granting Mr. Harrod a new trial.

It is my professional opinion that the introduction of this testimony fell below the standard set in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, for effective representation.

Defense counsel could have presented the testimony of Mr. Harrod's good conduct in prison without revealing to the jury that Mr. Harrod was on death row. The testimony was not a simple passing statement by the witness. During cross-examination the prosecutor made it clear that Mr. Harrod was on death row based on his conviction in this case.

Since at least 1985, with the United States Supreme Court decision in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, it has been the state of the law that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333. In such situations, death sentences are inherently unreliable.

> This problem is especially serious when the jury is told that the alternative decision-makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a "right" to make such an important decision than has the jury. Given that the sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great.

Id. See also People v. Morse, 60 Cal.2d 631, 649-653, 36 Cal.Rptr. 201, 212-215 (1964); *Pait v. State*, 112 So.2d 380, 383-384 (Fla. 1959); *Blackwell v. State*, 76 Fla. 124, 79 So. 731, 735-736 (1918); *People v. Johnson*, 284 N.Y. 182, 30 N.E.2d 465 (1940); *Beard v. State*, 19 Ala.App. 102, 95 So. 333 (1923).

In Mr. Harrod's case, the introduction of testimony that he was already on death row for the present case was devastating prejudical in two ways.

First, the jury knew that a prior decision maker had decided that a death sentence was appropriate for Mr. Harrod. The jurors knew that the prior decision maker had been given more information about the crime than they had received because these jurors only heard evidence regarding aggravation and penalty. These jurors were aware that the prior decision maker had heard evidence regarding the crime and determined that Mr. Harrod was guilty and sentenced him to death. This jury was likely more comfortable in making the decision to impose death because they knew a prior decision maker had already imposed a death sentence for the crime, and, that the prior decision maker imposed death with more information than they had been given, so that decision to impose death must have been correct. This information minimized the importance of this jury's role in the death-decision process.

Second, this jury was told that they, as decision makers, were responsible for the decision and that they should make the decision based on the expectation that a death sentence would be carried out. They were told that they were the final decision makers. However, in knowing that Mr. Harrod had previously been sentenced to death and that the death sentence had been set aside, they were aware that they were not the final decision makers. This knowledge by this jury minimized their individual responsibility for their decision because they would reasonably believe

that if the prior death decision had been set aside, then their decision would be reviewed by another authority and their decision was subject to being set aside just as the prior decision had been set aside. Someone else ultimately had the final decision on any death sentence, some authority above themselves.

DATED this 14th day of August, 2013.

By: Robert L. Storrs
Robert L. Storrs

Subscribed and sworn to before me this 14th day of August, 2013.

Kimberly Rose Rodriguez
Notary Public

2/24/2015
Commission Expires

KIMBERLY ROSE RODRIGUEZ
NOTARY PUBLIC - ARIZONA
MARICOPA COUNTY
My Comm. Exp.: February 24, 2015