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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA Plaintiff, v. JAMES CORNELL HARROD, Defendant.	NO. CR1995-009046-001 **PETITION FOR POST-CONVICTION RELIEF** **(Capital Case)** (Assigned to the Hon. Douglas Rayes)

Petitioner, James Cornell Harrod, by and through counsel undersigned hereby submits this Petition pursuant to Rule 32, A.R.C.P. He alleges error in the following particulars:

1. Testimony and argument as to the certainty of fingerprint evidence denied Petitioner due process of law in both trials.

1A. Pat Wertheim committed perjury when he testified he made identifications of Petitioner's fingerprints.

2. Unduly suggestive identification procedures violated due process.

2A. Failure to include this issue in the direct appeal was ineffective assistance of counsel.

3. There has been a significant change in the law by Arizona's adoption of the *Daubert* standard on 1-01-12.

4. Gruesome and inflammatory photographs violated due process.

5. There was prosecutorial misconduct in both trials.

6. The selective granting of immunity to witnesses violated due process.

7. The trial court exhibited judicial bias.

8. The burden of proof and persuasion were conflated in 2005.

9. Instructing the jury they must impose death invaded the province of the jury.

10. The voir dire process in 2005 invaded the province of the jury.

11. 2005 voir dire "follow the law" arguments invaded the province of the jury.

12. There was ineffective assistance of counsel at both trials.

13. The reasonable doubt instruction both lowered and shifted the burden of proof.

14. Mitigation evidence was improperly restricted in 2005.

15. Actual innocence.

FINGERPRINT ARGUMENT

1. **Studies published since 2006 reveal that key claims made by latent print examiners in this case were untrue and scientifically unsustainable, thereby denying Petitioner due process of law at both his 1997 trial and 2005 retrial.**

2. **Pat Wertheim testified falsely when he claimed to have made comparisons of the 18 latent prints and Mr. Harrod's inked exemplar, denying Petitioner due process of law in his 1997 trial.**

STANDARD OF REVIEW

Structural error. Errors that create "defects . . . in the trial mechanism" itself affect the "entire conduct of the trial from beginning to end" damage "the framework within whcih the trial proceeds" and are therefore not subject to harmless error analysis. *Arizona v. Fulmanante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 1265 (1991); *State v. Anderson*, 197 Ariz. 314, 323 4 P.3d 369, 379 (2000).

In 2009 the National Academy of Sciences published the results of its two year study of forensic science; Strengthening Forensic Science in the United States: A Path Forward. Its report was highly critical of the practices of forensic laboratories, including those of friction ridge analysis, as fingerprint examination is formally known. The study found that the core claims of fingerprint analysis, such as 100% accuracy and an error rate of zero were unsustainable and not supported by scientific examination.

The NAS report unequivocally proposed that latent print examiners be precluded from making such objectively unsupportable assertions. NAS Report, p. 142[1]

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[1] [28] J.L. Mnookin. 2008. The validity of latent fingerprint identification: Confessions of a fingerprinting moderate. *Law, Probability and Risk* 7:127. See also the discussion in C. Champod. 2008. Fingerprint examination: Towards more transparency. *Law Probability and Risk* 7:111-118.

The NAS report went on to note that claims that friction ridge analysis "have zero error rates are not scientifically plausible." (*Id*). Not only are such claims "not scientifically plausible", they are demonstratively false. Both Professor Simon A. Cole[2] and Drs. Ralph and Lyn Haber[3] have documented twenty two erroneous in court identifications based on fingerprints from 1920 to 2004.[4] Historically, the latent print examination community has explained away fingerprint misidentifications as the work of inexperienced or untrained examiners. The Brandon Mayfield case exploded that myth. The Shirley Mckie case in Scotland verified this. Presciently, Justice Stanley Feldman anticipated problems with fingerprints in the original Harrod direct appeal Opinion.[5]

In May, 2004 the Federal Bureau of Investigation (FBI) misidentified Brandon Mayfield, an Oregon attorney, as involved in the terrorist attacks on commuter trains in Madrid in March 2004.[6] Mayfield had been identified by the FBI as the source of a fingerprint found on a bag of detonators in Madrid (*Id.*). The Spanish National Police identified an Algerian and the FBI withdrew its identification of Mayfield (*Id.*). The Office of the Inspector General (OIG) then initiated an investigation into the misidentification (*Id.*).

The FBI examiners were among the most experienced and skilled available to the FBI. A

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[2] Cole, S.A. (2001) "Suspect Identities: A history of fingerprinting and criminal identification." Cambridge, MA.: Harvard University Press; Cole, S.A. (2005) "More than zero: Accounting for error in latent print identifications." J. Criminal Law and Criminology 95, 985-1078.

[3] Haber L. And R.N. Haber (2004) "Error rates for human latent fingerprint examiners." In N.Ratha and R. Bolles (Eds) "Automatic Fingerprint recognition," pps. 339-360. New York, Springer Verlag.; Haber, L. And Haber R.N. "Scientific validation of fingerprint evidence under *Daubert." Law, Probability and Risk*, 17, 87-102.

[4] Haber & Haber "Challenges to fingerprints (2009, p. 139).

[5] [FN4] It appears, also, that there may be some question as to the great weight we have placed on fingerprint evidence. *See,* Malcolm Ritter, Fingerprints May Face Challenge as Unscientific. Arizona Daily Star, April 8, 2001 at ¶ 5. *State v. Harrod*, 200 Ariz. 309, 323, 26 P.3d 492, 507 (2001).

[6] U.S. Department of Justice, Office of the Inspector General: A Review of the FBI's Handling of the Brandon Mayfield case. Unclassified Executive Summary, January 2006, p. 1.

computer search generated 20 potential matches. It identified the print (LFP 17) on March 16, 2004, as a match to Brandon Mayfield (*Id.*).

Because the investigation generated publicity (Executive Summary p. 2). The court appointed an independent expert of similar qualifications to those of the FBI examiners, Kenneth R. Moses (*supra*, Ch. 2, p. 80). He agreed with the identification. Following the SNP notification, the FBI re-examined LFP 17 and withdrew its identification of Mayfield on May 24th (Executive Summary, p. 3). The FBI then convened an International Panel to determine the primary causes of the misidentification (*supra*, Ch. 4, p. 127). That panel reached the following conclusions concerning the misidentification:

> - Failure to follow the Analysis, Comparison, Evaluation and Verification (ACE-V) steps in fingerprint examination. In particular, Green failed to conduct a complete analysis of LFP 17 before conducting the Integrated Automated Fingerprint Identification System (IAFIS) search, which in turn caused him to disregard important differences in appearance between LFP 17 and Mayfield's known print's.
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> - The power of the IAFIS match and the pressure of working on a high profile case influenced Green's initial judgment and created a mind-set in which his examination became biased by an expectation that the prints were a match.
>
> - The subsequent examinations by Massey and Wieners were "tainted" by knowledge of Green's conclusion.
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> *Id.* at p. 128.

The OIG then conducted its own investigation. The OIG review concluded that the panel's first finding above was a correct assessment of the primary cause of the misidentification. They summarized their findings on this issue thusly:

> We determined that the unusual similarity of details on the fingers of Mayfield and the true source of the print, Ouhnane Daoud, confused the FBI Laboratory examiners, and was an important factor contributing to the erroneous identification. Ten of the "points" in LFP 17 that the examiners used to identify Mayfield were also later used by different FBI examiners to identify Daoud as the source of the print. These features formed a constellation of points in LFP 17 that was generally consistent with the known fingerprints of *both* Mayfield and Daoud in location, orientation, and intervening ridge counts. This degree of similarity between prints from two different people is an extremely unusual circumstance ...
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> *Id.*, at p. 191 (emphasis in original)

The importance of ten "points" in LFP 17 forming a constellation of features that was identical in *both* Mayfield and Daoud's fingerprints cannot be overstated. This is not a situation

where an examiner misread or misperceived these ten points. Rather, these ten points are identical between both Mayfield and Daoud and formed the basis for the identification of *both* men.

Likewise, the import of two persons having a constellation of ten identical points cannot be overstated for its impact on this particular case. Karen Jones, the LPE who made the identification of James Harrod in this case, had a standard of not making an identification of a latent print on anything less than eight points of agreement (R.T. 10-30-97, p. 66). The Mayfield case demonstrates conclusively that a reliance on a standard of only eight points presents a clear hazard of misidentification. That James Harrod was misidentified in this case cannot be discounted, the Mayfield case demonstrates this conclusively.

The *Mayfield* report takes note of other factors, such as "circular reasoning"[7] *(supra*, ch. 4, p. 191) and the pressure of a high profile investigation (*Id.*, p. 192) which may contribute to a misidentification. Both of these factors were present in the Tovrea investigation. The *Mayfield* report found that Mr. Green committed methodological errors in his examination.

> First, the initial examiner (Green) applied circular reasoning. Having found as many as 10 points of unusual similarity, he began to reason backward and "find" additional features in LFP 17 that were not really there, but rather were suggested to him by features in the Mayfield exemplar prints.
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> *Mayfield* Review, Ch. 4, p. 191

Karen Jones' examination of Mr. Harrod's exemplar suffered from just such a methodological error. She testified in the 2005 trial that she examines both the latent and known print simultaneously. (R.T. 9-20-05, p. 62.)

She mentions nothing about identifying sufficient features in the latent print to begin the comparison before she begins examining both prints simultaneously.

This is contrary to accepted practices. Pat Wertheim teaches that the latent print must be examined first: (FIR Appendix Exhibit SG0530, Transcript of Pat Wertheim's 5/11/99 Testimony in *HMA v. Mckie*, p. 145).

The procedure of starting the examination with the latent print is universally accepted within

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[7] Which occurs when an examiner begins finding features in the exemplar print and then "finds" corresponding features in the latent, rather than using the correct obverse method.

the LPE community. "After gathering all of the data available from the unknown (latent) print, the examiner also analyzes the known print (FBI Laboratory Services, forensic Sciences Communications; Latent Prints: A Perspective on the State of the Science. Oct. 2009, Volume 11, Number 4, P. Peterson *et. al.*).

Using the procedure employed by Ms. Jones can result in "seeing" points that aren't actually there. As Mr. Wertheim testified in *HMA v. Mckie*:

> [Q] Does that mean that there is a danger of actually talking yourself into seeing a point? [A] Yes, sir.
>
> (*Id.*, 5-11-99, pp. 166-67)

The *Mayfield* Review also acknowledged the role that the pressure of a high profile investigation may play in a misidentification (*supra,* Ch. 4, p. 193). Such pressure was present in the Tovrea case from its very inception.

The case was of such high profile that in 1997, some nine and a half years after the crime, Fred Carmack, a LPE for the Phoenix Police Department was able to testify:

> Q. Why do you remember this particular scene?
> A. Because this was a crime scene of high priority, shall we say. ... and it probably is one scene in my career that I will never forget.
>
> R.T. 10-22-97, p. 69

Likewise, on 10-23-97, Joanne Scheffner, a crime lab supervisor testified:

> I learned that there was a major high profile crime scene and that several of my people had been called in early to respond...
>
> R.T. 10-23-97, p. 7

Despite this pressure, the processing of the crime scene was substandard. Foremost, the pane of kitchen window glass which the police surmise was the point of entry was not impounded (R.T. 10-22-97, p. 63-65). Rather, a replica was created for courtroom demonstrative purposes (*Id.*, p. 79). This prejudiced Petitioner by his being unable to cross-examine Mr. Carmack on the actual locations of latent lifts with the object itself and instead had to take Mr. Carmack at his word that the replica was accurate. For additional errors in scene processing see the Affidavit of Drs. Haber, (Appendix Item 1).

It was undoubtably a black eye for the Phoenix Police Department to be unable to solve the murder of one of its most prominent citizens. On September 14, 1995 Karen Jones was presented

with the exemplar card of a suspect then in custody in the very same building, presenting her with the opportunity to "solve" this high profile cold case from 1988. The OIG, in the Mayfield Review expressly acknowledged that the pressure to make an identification in a high profile case can lead to an erroneous conclusion (*supra,* Ch. 4, p. 193).

The misidentification of latent print evidence committed by highly skilled and experienced latent print examiners (LPE) in the *Mayfield* case was shown to not be an isolated anomaly when, in December 2011, a Scottish commission convened by the Government released its report on the causes of the misidentification of a Scottish Police Constable, Shirley Mckie.[8]

Briefly stated, in January 1997 Ms. Marion Ross was found dead in her home in Kilmarnock, Scotland (The Fingerprint Inquiry Report, Ch. 1, para 1.1, p. 31; hereinafter FIR) Detective Constable Ms. Shirley Mckie, was part of the initial investigative team (*Id*). The scene yielded 428 fingerprints which were examined by the fingerprint bureau of the Scottish Criminal Record Office (SCRO) (*Id.*, para 1.2). SCRO identified one of the latent prints ("marks" in Scottish parlayance) in Ms. Ross's house (Y7) as that of Ms. Mckie (*Id.*, 1.3). A mark on a gift tag in the house (XF) was identified as that of Mr. David Asbury, who was later charged with the murder (*Id.*). Mr. Asbury was convicted of the murder in June 1997, (*Id.*, 1.4). Ms. Mckie testified at the Asbury trial, disputed that Y7 was her print and denied that she had gone into the house beyond the porch (*Id.*, 1.5). Following Mr. Asbury's trial, Ms Mckie was prosecuted for perjury. She was tried in 1999 with American fingerprint expert Mr. Pat Wertheim disputing the identification of Y7 as being Ms. Mckie's print. The jury found Ms. Mckie not guilty (*Id.*, 1.6). That Mr. Wertheim testified for the defense in that case is of particular relevance here, in that Mr. Wertheim testified for the State in Mr. Harrod's 1997 trial. (R.T 11-06-97, p. 88, *et. seq.*).

While the *Mckie* case bears many similarities to the progression and resolution of the *Mayfield* case some important distinctions must be observed. First, she was not plucked from an AFIS database as was Brandon Mayfield. She had been at the scene of the murder. A second distinction is that it is not unheard of for an investigating officer to inadvertently leave a latent

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[8] The Fingerprint Inquiry Report, Sir Anthony Campbell, Chairman.

print at a crime scene. Her superiors considered her print at the scene "not a huge deal, as such" (*Id.*, p. 7.10, p. 127). Her continued insistence that the print was not hers ultimately jeopardized her career and ultimately her liberty, as the perjury charge clearly showed. At any time, certainly early on, she could have "admitted", albeit falsely, that she had entered the Ross house against orders. Little would have been made of it. Instead, she knew the truth and insisted, to her great peril, that the truth be told. Mr. Harrod is similarly situated to Ms. Mckie. He could have, at any time, escaped the death sentence by offering to testify, albeit falsely, that he conspired with Edward Tovrea, Jr., to murder Jeanne Tovrea. He chose not to for the same reason Ms. Mckie continued to insist the Y7 mark was not her left thumb print.

Returning to the FIR we see, as with the *Mayfield* case, the use of the best fingerprint examiners available to the Scottish police. (*supra*, Ch. 7, p. 136, para. 7.6). They performed the second comparison of Y7 after Ms. Mckie disputed its accuracy (*supra*, p. 149, para. 7.140). This retesting of an identification was "unprecedented" (*Id.*, p. 127, para. 7.14). The man directing the retesting, Mr. Heath, had never before in his 20 years of service questioned a SCRO identification (*Id.*). As put in the report:

> As far as he was aware the identification of a fingerprint had never been wrong. In the years since 1997 it had become evident, he observed, that it was evidence of opinion and that opinions can differ, but at the time one of the core beliefs that "was drummed into you" was "that fingerprint evidence is infallible. No-one has the same fingerprint."
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> FIR, Ch. 7, p. 127, para. 7.14

Marion Ross was found murdered in January 1997. Mr. Harrod's trial began in October 1997. These two untested core beliefs, infallibility and that no two persons have the same fingerprint, were as fervently believed in Phoenix, Arizona at that time as they were in Scotland. Neither proposition had ever been empirically tested, though the claim to infallibility was utterly destroyed by the *Mayfield* and *Mckie* cases. While the proposition that no two persons have the same fingerprint[s] remains open to empirical testing, the proposition that no two persons may leave the "same" *latent fingerprint* does not. The *Mayfield* case demonstrates this most emphatically, with the latent print LFP 17 having 10 identical points of identification shared both by Mayfield and Daoud.

The Fingerprint Inquiry made key findings and recommendations. (FIR, Ch. 42, p. 739). Its Chairman also found that mark "Q12 Ross" was "misidentified as the fingerprint of Miss Ross" (*Id.*).[9] Based upon his findings Sir Anthony made 86 recommendations, the first two of which are the most definitive and have the greatest impact on this case:

> 1. Fingerprint evidence should be recognized as opinion evidence, not fact, and those involved in the criminal justice system need to assess it as such on its merits.
> 2. Examiners should discontinue reporting conclusions on identification or exclusion with a claim to 100% certainty or on any other basis suggesting that fingerprint evidence is infallible.
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> FIR, Ch. 43, p. 740.

These two recommendations would have come as no surprise to Mr. Wertheim; he testified to as much in the 1999 perjury trial of Shirley Mckie. His testimony at that trial is replete with references to fingerprint expert's "opinion" but the most succinct exchange was as follows:

> [Q] Do you accept that to a large extent the evidence of fingerprint experts is indeed all about opinions? [A] **By definition, sir, this is opinion testimony.**
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> FIR Appendix, Exhibit SG30 Transcript of Pat Wertheim's 5-12-99 Testimony in *HMA v. Mckie*, p. 233. (Emphasis added).

It would certainly come as a surprise to the jurors of Mr. Harrod's 1997 trial to learn that statements of identification made by fingerprint examiners are expressions of opinion and not of fact. The identification of Mr. Harrod as the donor of 18 latent prints from the Tovrea house was presented as absolute fact, with 100% certainty. LPE David Hatcher said:

> Q. Are fingerprints unique?
> A. Yes, they are.
> Q. In what way?
> A. There has been a lot of studies. No two individuals have ever been found to have the same fingerprints. Even identical twins who share the same genetic makeup do not have identical, do not have identical ridges or minutia.
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> R.T. 10-22-97, p. 8.

Contrary to Mr. Hatcher's assertion, there hadn't been "lots of studies" documenting that no two persons have the same fingerprints. There had been no studies. This core tenet has never been

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[9] An earlier inquiry (the Mackay report) raised questions about the evidence in the trial of Mr. Asbury. He was released from prison pending the hearing of his appeal of his conviction. (FIR, Ch. 1, p. 31). The Crown did not oppose Mr. Asbury's appeal and his conviction was quashed (*Id.*, p. 32).

empirically proven and is simply an article of faith in the LPE community.

LPE Karen Jones, who made the identification of Mr. Harrod said:

> A. It's the uniqueness. It is how they are arranged that makes them unique. Every fingerprint on everyone is unique.
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> R.T. 10-30-97, p. 29.

> Q. When you say "unique," what exactly do you mean?
> A. Well, one of the bases of fingerprint identification is uniqueness. No individuals have ever been found to have the same fingerprints. That is one of the bases of fingerprint identification.
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> R.T. 10-30-97, p. 30.

Again, this core tenet has never been empirically proven. That *latent prints* are not necessarily unique to a particular person was shown by the *Mayfield* and *Mckie* cases. LPEs do not examine fingers themselves. They examine *fingerprint impressions,* whether as a latent print or as a known inked impression. These impressions are always subject to some degree of distortion.

See: Latent prints: A Perspective on the State of the Science. P. Peterson *et. al.,* Forensic Science Communications, (*supra*). "Because of the pliability of friction ridge skin, no two impressions from the same finger will be identical in every detail." *See also*:

> Uniqueness and persistence are necessary conditions for friction ridge identification to be feasible, but those conditions do not imply that anyone can reliably discern whether or not two friction ridge impressions were made by the same person. Uniqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused, or that two impressions made by the same finger will also be sufficiently similar to be discerned as coming from the same source. The impression left by a given finger will differ every time, because of inevitable variations in pressure, which change the degree of contact between each part of the ridge structure and the impression medium.
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> NAS Report, p. 144.

Ms. Jones gave no indication of this finely nuanced nature of latent print impressions.

In the trial of Mr. Harrod, Ms. Jones presented her conclusions as:

> Q. Okay. Can you tell us the results of your comparison?
> A. The result was, that the latent on Exhibit 153 was compared and identified to the right palm of James Harrod.
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> R.T. 10-30-97, p. 31.

This is presented by her ascertain scientific fact, not an expression of her opinion. The 1997 jury was not given the faintest hint that Ms. Jones' testimony was anything other than rock solid scientific fact. The state presented the jury with a false certainty of the strength of its

evidence. Once the fingerprint evidence was presented in this manner, it became dispositive. No other evidence mattered.

The State had available to it the knowledge of the proper method to present such evidence in Pat Wertheim. It is obvious from his testimony in 1999 in the *Mckie* case that his position that fingerprint identification is a matter of opinion and that experts could differ was a proposition he had long believed in and was common knowledge in the profession.

Despite this, the State chose to over-state its evidence, violating Mr. Harrod's due process rights. The State set the stage for this abuse in its opening by stating "The evidence in this case will be uncontroverted that those **in fact** are the finger and palm prints of James Harrod." (R.T. 10-20-97, p. 55) (emphasis added).

Likewise in closing, the State continued to overstate its evidence. Referring to the latent prints on the window it stated: "Without any doubt, without any question, 100 percent, those are his." And again: "Fourteen identified to James Harrod, unquestionably. No doubt, hundred precent." (R.T. 11-17-97, p. 24). The State then compounded its error, stating

> We have got three different examiners: Karen Jones, Joe Silva and Pat Wertheim[10] who looked at these prints and who have said, without any doubt – we are not talking about reasonable doubt here. We are talking about 100 percent certainty – those are his prints. That's him. (R.T. 11-17-97, p. 54.)

Such claims of 100% certainty are exactly what the NAS report found to be unsustainable and not supported by scientific examination. All three reports demonstrate such claims to be unwarranted and are misrepresentations.

Such claims of 100% certainty were thoroughly refuted by the FIR. Prior to the Inquiry, fingerprint identification evidence was thought to be "100% reliable" (FIR, Ch. 10, para. 10.20, p. 193). Fingerprint evidence was believed to be "infallible" (*Id.*, para. 10.21, p. 193). Proving such beliefs untrue was the primary finding of the FIR.

> 38.9 There have been claims to infallibility and even in the trial in *HMA v. McKie* Ms. McBride advanced a variant that it was not possible for a combination of five examiners to make a mistake. The claim to infallibility is wrong because

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[10] Whether Mr. Wertheim actually compared the 18 latent prints to an inked exemplar will be addressed below.

> fingerprint evidence is opinion evidence and there have been instances of erroneous identifications. Even where multiple examiners have been involved in verification an error can be made. The first interpretation of '100% certainty' is not one that can be justified.
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> FIR, Ch. 38, para 38.9, p. 683.

The FIR found that the core tenet of fingerprint identification; that a particular print was made by only one person and none other in the world, has never been scientifically validated.

> 38.13. The ability of any examiner to "individualize" without the potential for any error at the claimed level of one person in the whole of human history is not scientifically validated. Fingerprint examiners do not presently base their conclusions on validated statistics of the incidence of variation in friction ridge details in the population. Their opinions on 'sufficiency' are derived from personal assessments founded in training and personal experience. The second proposition is, accordingly, one that cannot be substantiated.[11]
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> *Id.*, para. 38.13, p. 683.

The report went on to note that "individualization is not achievable on a scientific basis" (*Id.*, para 38.16, p. 684). The report flatly states "The claim to '100% certainty' cannot be substantiated and should not be made" (*Id.*, para. 38.18, p. 684). What Mr. Harrod's jury was told in 1997 about the fingerprint evidence was wrong, depicted the evidence falsely and cannot be undone but for the granting of a new trial.

That a criminal trial must be fundamentally fair is the *sine qua non* of due process. The Supreme Court has repeatedly stated that the Eighth Amendment requires a heightened degree of reliability in any case where a state seeks to take a defendant's life.[12] It was fundamentally unfair for the State to present fingerprint identification as reliable to a 100% degree of scientific certainty when, even then, the State knew fingerprint identification was a matter of opinion. The jury could not possibly render a fair decision when it was misinformed about this critical evidence. This misrepresentation offends the 5th, 6th, and 8th Amendments and mandates a new trial.

Karen Jones performed the comparison of the latent prints to the exemplar of James Harrod,

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[11] The examiner himself is 100% sure that his conclusion is correct.

[12] *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 328-329, 105 S.Ct. 2633, (1985); *California v. Ramos*, 463 U.S. 992, 998-999, 103 S.Ct. 3446, (1983); *Beck v. Alabama*, 447 U.S. 625, 637-638, 100 S.Ct. 2382, (1980); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, (1978) (plurality opinion).

concluding it was an identification on September 14, 1995, the day of his arrest. Her expectational bias and circular methodology has been discussed above. Nothing more can be said of her methodology because Ms. Jones took absolutely no bench notes. (March 18, 1997 Interview of Karen Jones, p. 44. (Appendix Item 2). It is, and always will be impossible to know which features or points she relied upon in reaching her conclusions, making it equally impossible to reproduce her work or check its accuracy.

In 1997, Ms. Jones employed the numerical method of comparison which involves counting the number of "points" shared by the latent and the known inked impression. (R.T. 10-30-97, p. 66). Ms. Jones subscribed to the then conventional wisdom of uniqueness in all the world, she also based her identification on only ten points. We know not just from the *Mayfield* case that two persons can share ten identical points in common. Her examination is, on its face, inadequate.

She also provided two more critical parts to her methodology.

> M ... did you take any notes regarding the points of comparison that match when you're making a comparison, or do you simply put on the card this was an identified print?
> J I just put on it what finger it was identified to. *(Id.*, p. 29)

That Ms. Jones labeled each latent card with the digit that she believed made it is critical information when evaluating Pat Wertheim's claim, made during trial, that he made "comparisons" of the latent prints to the exemplar in this case. Joseph Silva was a latent print examiner for the City of Phoenix (R.T. 10-30-97, p. 85). He verified the identifications made by Karen Jones in this case (*Id.*, p. 87). There is no record of his having made any bench notes during this verification process, did not prepare an examination report, nor is there any record of his having been interviewed prior to trial in 1997. The record is silent on whether his verification was "blind" but it is fair to assume it was not, based on Pat Wertheim's testimony in the Mckie trial.

Pat Wertheim was employed as a fingerprint identification technician for the Arizona Department of Public Safety for the eight years prior to his testimony in this matter (R.T. 11-6-97, p. 88). He was active in teaching fingerprint examination since 1986 (*Id.*, p. 90). As a result, he was familiar with the practices of various law enforcement agencies throughout Arizona. In the *Mckie* case, he described the verification process, common to his practice, in which a third party

is given a latent and an inked print, told that an identification had been effected, and asked to verify. (FIR Appendix SG30, Transcript of Pat Wertheim's testimony, 5-12-99, *HMA v. Mckie*, p. 225).

He described "blind" verification as providing the "heaviest weight" to the validification of an identification, but noted that "in most cases in the police environment I would suggest that that is not a practical method to use" (*Id.*, p. 226). Further, substantiation that the "verification" in this case was not "blind" was provided by Mr. Wertheim in his testimony in *HMA v. Mckie*:

> [Q] And then when you moved on to Arizona, what was the position there? [A] The same.
> [Q] Checked by one other examiner? [A] Yes.
> [Q] BY THE COURT: And would that examiner know the result of the first examination? [A] Yes, sir.
> [A] That is not the standard that is used anywhere in the United States as a practice.
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> FIR Appendix SG30, Transcript of Pat Wertheim's 5-12-99 testimony *HMA v. Mckie*, pp. 284-285).

This is "institutional bias", resulting from the practicalities of day to day police work as recognized by Mr. Wertheim (at p. 226). As neither Karen Jones nor Joseph Silva made bench notes, and Mr. Silva prepared no examination report, it is impossible to tell whether they examined the same features, compared the same features in the latent print to the inked print, nor what level of "tolerance" they each employed in effecting their identifications. Silva could have made his identification on points rejected by Jones and vice versa. While they both employed the ACE-V method (Analysis, Comparison, Evaluation and Verification) there is no uniformity in its application and every step involves subjective judgments.[13]

> Note that the ACE-V method does not specify particular measurements or a standard test protocol, and examiners must make subjective assessments throughout. In the United States, the threshold for making a source identification is deliberately kept subjective, so that the examiner can take into account both the quantity and quality of comparable details. As a result, the outcome of a friction ridge analysis is not necessarily repeatable from examiner to examiner.
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> NAS Report, p. 139

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[13] We report a range of existing evidence that suggests examiners differ at each stage of the method and the conclusions they reach. To the extent they differ, some conclusions are invalid. (NAS, p. 143); L. Haber and R.N. Haber 200 Scientific validation of fingerprint evidence under *Daubert*. Law, Probability and Risk. 7(2): 87-109.

This lack of reproductability does not just undermine their conclusions, it calls into question the very admissibility of their testimony.

> In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts. *See Untied States v. Addison*, 162 U.S. App.D.C. 199, 498 F.2d 741 (1974); *Untied States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *United States v. Stifel*, 433 F.2d 431 (6th Cir. 1970).
>
> *Untied States v. Baller*, 519 F.2d 463, 466 (1975)

The NAS Report concluded:

> ACE-V provides a broadly stated framework for conducting friction ridge analyses. However, this framework is not specific enough to qualify as a validated method for this type of analysis. ACE-V does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results.
>
> NAS Report, p. 142

Mr. Silva was no less susceptible to the biasing effect of a high profile case than was Ms. Jones. Moreover, there was the additional bias of knowing Ms. Jones had concluded that the prints "matched". The biasing effect of this knowledge cannot be overstated. In a research study by I.E. Dror and D. Charleton[14] it was shown that experienced examiners could reach the opposite conclusion of what they had previously concluded in examining the very same latent print they had previously examined if biasing information was presented with the latent print card. The latent lift cards contained extraneous false information such as "suspect confessed to the crime" on latent prints the examiner had previously excluded or, "suspect was in prison at the time of the crime" on latent cards they had previously identified. The Habers summarized the results of the study:

> From each of six examiners' past casework, they picked pairs in which half of the pairs had been previously identified and half excluded. The pairs were presented anew to the same examiners who had compared them five years ago (none recognized the pairs as familiar), but with extraneous information that served to confirm or contradict the examiner's former conclusion. The information given influenced the examiners' current conclusions in predictable ways. Two thirds of the examiners changed their previous conclusion.

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[14] I.E. Dror and D. Charlton 2006. Why experts make errors. Journal of Forensic Identification. 56(4): 600-616.

> In both experiments, Dror's results show that examiners can be made to disagree with themselves by extraneous information given to them when they repeat the examination years later. Disagreements or changes in decisions about the same pair indicate that at least once, the examiner made an error on that pair.
>
> L. Haber and R.N. Haber 2009 Challenges to Fingerprints, pp. 147-148.

If experienced examiners can reach the opposite of what they had previously concluded as a result of biasing information, such information certainly could have influenced the conclusions of Jones and Silva. Their lack of bench notes prohibits any concrete conclusion to the contrary.

Pat Wertheim Methodology

Pat Wertheim testified in *State v. Harrod*, (R.T. 11-06-97, p. 88, *et. seq.*). Mr. Wertheim also testified in *HMA v. Mckie* (FIR Appendix SG30, p. 123, *et. seq.*). In each case he was retained to testify as to fingerprint forgery and fabrication, not identification.[15] The discrepancies between his testimony in *State v. Harrod* and *HMA v. Mckie* follows.

The single most glaring discrepancy is his "identification" of Mr. Harrod as source of the latent prints in this case and its foundation and his far more circumspect foundation for his exclusion of Ms. Mckie as the source of Mark Y7. In *State v. Harrod,* his direct examination concluded with the following exchange:

> Q. You compared the latent prints that you had before you with the known inked prints of the defendant James Cornel Harrod?
> A. Yes, sir. I did.
> Q. And you did that as part of your work on this case, is that correct?
> A. Yes, sir.
> Q. What is your conclusion regarding all 18 of those lift prints?

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[15] Q. During the last few months, have you had occasion to examine latent prints in the case of *State v. James Harrod* to determine the presence or absence of forgery and fabrication:
A. Yes, I have.

R.T. 11-06-97, pp. 105-106

* * *

A. ... I was looking for signs of forgery, not doing a comparison to make an identification.

R.T. 11-07-11, p. 21

* * *

[A] I was asked to examine the mark on the piece of wood for evidence of forgery.
[Q] So initially you were not asked to do a comparison exercise? You were asked to have regard to the question of tampering or transference of a print? [A] Yes.

FIR Appendix SG30, 5-12-99, p. 291

A. Each of those 18 prints was made by Mr. Harrod.
MR. CULBERTSON: That's all the questions I have. (R.T. 11-06-97, pp. 151-152)

The problem with this testimony is twofold:[16] first, the claim that Mr. Wertheim "compared" the latent prints to Mr. Harrod's known inked prints is extremely dubious and second, his "identification" of Mr. Harrod, based on a *photocopy* of an inked exemplar, *which he did not participate in making,* violated his own standards and casts doubt on his integrity.

Addressing the comparison issue first, Mr. Wertheim was interviewed by the defense prior to the 1997 trial and the scope of his anticipated testimony was addressed.

B Did you compare them to known inked prints of James Harrod?
W No.
B Okay. So you're not at this point, in any event, prepared to testify as to whose prints those are?
W That's correct. I was not asked to.

. . .

W Yeah, sure. No, I did not do any comparisons.
Appendix Item 3, Defense Interview 4-24-97, p. 11.

Later, the following exchange occurred:

B Correct. And my question on this is: is that a conclusion that you reach simply by examining the latents and recognizing something about it or did you have to do some comparison to the . . .
W **No, no, no. Did not do any comparison to the ink.** That's based solely on an examination of the latent print and nothing else.
B Okay. And the reason I ask is that your notes indicate that you had the ...
W Yes, they gave them to me, but they also requested to determine whether the latents were forged or were original touches. They gave me the ink prints. **Frankly, I never looked at them. That wasn't part of the request.**
Appendix Item 3, Defense Interview, 4-24-97, p. 28. (emphasis added)

This is a dramatic departure from his ultimate testimony at trial. Mr. Wertheim's work product is consistent with his assertion that he never compared the latent prints with the inked exemplar of Mr. Harrod. He issued a Scientific Examination Report on January 22, 1997 (Appendix Item 4). That report documents only the examination of latent prints, notes that he was required to examine them for signs of forgery, found none and concludes that all 18 latent prints were "original touches". (Appendix Item 4). Eleven pages of Mr. Wertheim's bench notes

[16]The separate issue of the testimony being offered as absolute scientific certainty, rather than an opinion, while equally problematic, has already been addressed above.

documenting his step-by-step methodology were disclosed (Appendix Item 5). Having extensive contemporaneously prepared bench notes is also consistent with his work habits in *HMA v. Mckie*. Pursuant to his testimony before the Fingerprint Inquiry Commission, Mr. Wertheim prepared several documents. Inquiry witness statement of Pat A. Wertheim 12-Oct.2009, Document ID FI_0118). In his written statement Mr. Werthein says, once he examined mark Y7 and Ms. Mckie's exemplar, he quickly concluded that it was a misidentification (*Id*). He invited the commission to examine his notes: "For a more detailed discussion of my examination, see my examination notes *taken concurrently* with my examination. (Appendix B)." (*Id.*, emphasis added). When one does go to Appendix B, one discovers 18 pages of densely detailed notes and drawings documenting his work in support of his conclusion of exclusion. (*Id.*).

During the second interview on August 18, 1997, on the brink of trial, Mr. Wertheim did disclose that he had been requested to perform one more task.

> B Have you done any other reports or write ups in connection with this case, for example, since last time we met, that I may not have yet received?
> W I have not. I will be doing one more based on the photographs that I got this morning and the notes I took this morning I'm gonna go back and do a supplementary report which I'll be providing prosecution. I'm sure they'll give you a copy.
>
> Defense Interview, 8-18-97 Appendix Item 6, p. 12

Mr. Wertheim did produce an additional report, dated August 20, 1997, directed to Karen Jones (Appendix Item 7). The results of his examination were described as: "The locations of the latents as represented on the skin surface of the inked prints were plotted" (Appendix Item 7). He did not describe his work as comparing the latent prints to an inked exemplar for purposes of making an identification, he merely plotted the locations of the latent prints on photocopies of the inked exemplars. Given that Karen Jones had labeled each latent print card with the location she believed it came from (see page 13, this petition) it would have been childs-play to plot their locations. It is certainly not the robust, documented, methodical comparison conducted by experts when doing a comparison for purposes of performing an identification. Nor does Mr. Wertheim's work product reflect that he conducted a robust, detailed examination. Unlike the eleven pages of detailed bench notes he created when he was examining the latent prints for signs of forgery, his bench notes for his August, 1997 examination consists of two crude drawings of a pair of hands

with latent locations indicated, a brief quarter page of notes indicating that he was again examining the latents for indications of forgery, and a photocopy of a left and right full hand impression with the locations of the latent prints circled and numbered. (Appendix Item 8).

There is not a single mention of performing a comparison for purposes of identification. Rather, his notes indicate he only did "plotting". (Appendix Item 8). The quarter page of notes first discusses that certain latents were in locations on the hand where they could not have been left by a prosthetic glove, then addresses the absence of indications of fabrication (Appendix Item 8). There is not a single word about comparisons for identification. The photocopies of "5 prints and palms R&L" are of such poor quality as to be completely useless for comparison purposes. One circle, #27, is completely void of detail; it is blank, white paper. (Appendix Item 8). It is inconceivable and impossible for Mr. Wertheim to have made identifications or verifications from this material. Further proof that Mr. Wertheim did not perform any comparisons nor make any identifications is found in his own testimony. When testifying as to his examination of the latent prints for evidence of forgery or fabrication, he said "I think I spent probably 11 or 12 hours that particular day working with these things under a microscope" (R.T. 11-07-97, p. 24). That resulted in his January 22, 1997 report which was supported by 11 pages of bench notes (Appendix Items 4 & 5). By his own testimony, we know that "11 or 12 hours of work" resulted in Mr. Wertheim generating 11 pages of bench notes, roughly one hour per page. Using that as a guide, that scant quarter page of bench notes in support of his August 20, 1997 report would indicate that he spent 15 minutes or less "plotting" the locations of the latent prints. It is impossible to believe that Mr. Wertheim would have spent 15 minutes or less making 18 comparisons of latent prints to a poor photocopy of an exemplar for purposes of making identifications.

Turning to the second problem, the discrepancy between the foundation for Mr. Wertheim's "identification" of Mr. Harrod and his far more circumspect handling of the foundation for the exclusion of Y7 as the left thumb of Ms. Mckie, an absolute night and day variance is found. Mr. Wertheim never took his own set of James Harrod's inked prints. In the *Mckie* case, after comparing Y7 to the inked prints of Ms. Mckie taken by the Scottish Police for "a couple of minutes" (FIR Appendix SG30, 5-12-19, p. 196), he requested to be permitted to make his own

set of her inked prints, "so that I would be certain that I was dealing with the true print from my own personal knowledge in this case" (*Id.*, p. 197). When pressed about the reasons for wanting to take his own set of prints he explained:

> It was my personal practice, sir, through (sic) work from my own ink impressions wherever possible. If a person was available to me so that I could take my own prints, I want desperately to do that. For one thing, because I have a piece of paper with ten fingerprints on it and the name Shirley McKie is written on that piece of paper. **I have no way of knowing if these are actually Shirley McKie's prints if I didn't take them myself.** I want to take my own prints, that is my personal preference, sir.
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> FIR Appendix SG30 5-12-99, p. 213. (Emphasis added)

What happened to that preference in *State v. Harrod*? Mr. Harrod was readily available in custody. Why was he comfortable that the piece of paper with ten finger prints on it and the name James Harrod written on it, were actually James Harrod's fingerprints? Is the answer that he didn't actually make any comparisons whatsoever?

This was not a new preference for Mr. Wertheim, developed after the 1997 trial of Mr. Harrod but before the Mckie trial in 1999. He had written an article in 1997 which, among other things, advised examiners to protect their integrity. Under the heading "Protecting One's Own Credibility he wrote:

> Recognizing that a problem exists leads everyone to the need to document his or her own work so it can withstand an attack on individual integrity. As ethical examiners, everyone needs to use all the techniques at his or her disposal to authenticate the evidence.
>
> * * *
>
> An examiner comparing latents submitted by another person should only report or testify to personal knowledge. For example, when both the latent and inked prints have been supplied by a third person, the report should read: "The latent print lift labeled 'interior rear view mirror' contains an impression made by the same finger represented in the right thumb position on the inked print card bearing the name Tom Smith", instead of: "The fingerprint on the rear view mirror was made by Tom Smith's right thumb."
>
> Pat Wertheim. 1994 Journal of Forensic Identification 652/44(6).

Mr. Wertheim disregarded his own advice in the Harrod case, calling into question his own credibility and integrity. It is Mr. Wertheim himself who recognizes that testifying as he did in the Harrod case calls into question his integrity. When he testified "each of those 18 prints was made by Mr. Harrod" (R.T. 11-06-97, p. 152), he compromised his own integrity, even had he not theatrically pointed across the courtroom at Mr. Harrod as he did so.

In all likelihood, the State would not have elicited testimony from Mr. Wertheim about his

"identification" had the defense attorney not blundered into the issue. Mr. Wertheim had testified on direct examination on 11-06-97 addressing solely the issue of whether there was any evidence of forgery or fabrication of the 18 latent prints. (R.T. 11-06-97). It was not until the last two questions on direct examination that the prosecutor solicited Mr. Wertheim's testimony about identification (R.T. 11-06-07, pp. 151, 152).

Prior to this, as the State was having marked the two photocopies of (presumably) Mr. Harrod two ten-point exemplars, the defense attorney decided that he needed to voir dire Mr. Wertheim on their foundation and the following disastrous colloquy ensued.

> BY MR. BERNAYS:
> Q. ... you had been talking about how you had assessed the anatomical position of the prints simply from looking at the latents?
> A. Yes, sir.
> Q. Are the drawings that you are about to talk about here, created solely from that or are they also done with an examination of known inked prints so that you can confirm location on a hand?
> A. Okay. Yes. These drawings were prepared, not on the occasion of my first examination. These drawings were prepared by me at a later time using the, using the inked prints of Mr. Harrod to very accurately and specifically designate from which area of the finger they came.
> Q. **So it entailed your expertise as a comparison, fingerprints comparison expert?**
> A. Well, yes. That did come into play there.
>
> R.T. 11-06-97, pp. 113, 114. (Emphasis added)

Mr. Wertheim's hesitant, tentative initial responses indicate that he did not anticipate this line of questioning. "Okay. Yes." and "Well, yes. That did come into play there." are scarcely the sort of response one would expect from him had he actually performed the robust, detailed examination required to make comparisons of the latent prints to inked exemplars required to testify as to an identification. Again, Mr. Wertheim's work product generated by this task belie his testimony. His report speaks of "plotting" the latent prints on the photocopied exemplars, not of having made identifications. (Appendix Item 7). His bench notes, a mere quarter page, addressing only evidence of fabrication, not comparison show that he did not anticipate being asked to testify about identifications, as do his responses during the defense interview (Appendix Item 8; Appendix Item 6, p. 12).

Emboldened by the defense blunder, the State, knowing that the defense hadn't the faintest idea of what such a comparison entailed only then solicited Mr. Wertheim's testimony regarding

identification (R.T. 11-06-97, pp. 151-152).

The prosecutor, continued to press his advantage over his hapless colleague, eliciting yet another identification from Mr. Wertheim, presented a unqualified scientific fact. (R.T. 11-07-97, p. 60). For Mr. Wertheim to characterize his plotting of the locations of the latent prints as a "verification" is perjurious. This was a casual, hastily done bit of child's play. The latent cards were marked by Karen Jones as to her belief of their specific locations on Petitioner's hands. It would take only the most cursory glance at them, if that, to plot their locations.

> First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.
> *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173 (1959). (citations omitted)

Mr. Wertheim put his own integrity into question by disregarding the same advice he gives to others and made an in-court identification of Mr. Harrod from an exemplar, actually a photocopy of an exemplar[17], he did not participate in making. His advice to others in those circumstances is that the latent matches the inked exemplar labeled John Doe, rather that saying it is John Doe's fingerprint.

One final issue regarding Mr. Wertheim is his testimony that there was nothing inconsistent about the latent prints from the counter top with the State's theory that entry was made through the kitchen window (R.T. 11-07-97, p. 60). These latent lifts were numbers 9, 11, 13 and 16 (*Id.* at p. 59). Given the State's theory of entry through the kitchen window and palm prints on the counter top immediately below the absent window, the assailant would have had to bear his weight on his hands as he drew his torso through the empty window frame. This results in the latent being deposited with considerable pressure, which is observable in the latent by the broadening of the ridge lines (R.T. 11-07-97, p. 15; 11-06-97, p. 177). Yet all four of these latent prints were found by Mr. Wertheim to have been made with light to medium or moderate pressure (R.T. 11-07-97, p. 19-23. This testimony is consistent with the bench notes made contemporaneously by Mr.

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[17] Q: I am showing you Exhibit 256 again. Now it has an evidence tag on it. Can you tell us again what it is? A. Yes. This is a *photocopy* of the right palm print and fingers *that was given to me* as representing Mr. Harrod's palm prints. (R.T. 11-06-97, p. 114 emphasis added).

Wertheim with his examination of the latent lift cards in January, 1997. Light to medium pressure with minimal distortion for palm prints deposited when the assailant was entering through the window and bearing his weight on his hands is not "consistent" with the State's theory. Testifying that there was nothing inconsistent about them appears to be yet another example of Mr. Wertheim's bias and lack of objectivity.[18]

CONCLUSION

Scotland gave fingerprint identification as a forensic tool to the world. (FIR, Ch.2 p. 42). That Scotland now urges caution in its limitations is a warning with a 300 year old provenance. What Mr. Harrod's jury was told about fingerprint evidence in 1997, that it was 100% certain, there was a zero percent error rate, essentially that fingerprints were infallible, violated his due process rulings under the 5th, 6th and 14th Amendments to the United States Constitution. The danger of this testimony was aptly stated by Justice Blackman in dissent in *Barefoot v. Estelle*:

> Indeed, unreliable scientific evidence is widely acknowledged to be prejudicial. The reasons for this are manifest. "The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny." Gianelli, the Admissibility of Novel Scientific Evidence: *Frye v. United States*, a Half-Century Later, 80 Colum.L.Rev. 1197, 1237 (1980) (Gianelli, Scientific Evidence). [FN8] Where the public holds an **exaggerated opinion of the accuracy of scientific testimony, the prejudice is likely to be indelible.** *See United States v. Baller*, 519 F.2d 463, 466 (CA4), *cert. denied*, 423 U.S. 1019, 96 S.Ct. 456, 46 L.Ed.2d 391 (1975).
>
> *Barefoot v. Estelle*, 463 U.S. 880, 926-927 (1983). (emphasis added)

That these beliefs may have been widely held at the time makes them no less erroneous.

It is reasonable to believe the prosecution knew that its manner of presenting and arguing the fingerprint evidence was unwarranted and unjustified and violated Mr. Harrod's right to a fair trial. After all, Pat Wertheim was their expert and, as he showed in *HMA v. Mckie*, he was intimately aware that fingerprint identification testimony is a matter of opinion, not fact.

Mr. Wertheim's claim of having made comparisons and identifications in the case were unfounded and perjurious.

FN7. The Court noted that "a conviction obtained by the knowing use of perjured

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[18] See also Haber Affidavit, p. 4 (Appendix Item 1)

testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs,* 427 U.S., at 103, 96 S.Ct., at 2397 (footnote omitted).

Kyles v. Whitley, 514 U.S. at 433, 433, 115 S.Ct. 1565

There is no remedy for these issues but for a new trial.

IDENTIFICATION ARGUMENT

THE PROCEDURES USED BY THE PHOENIX POLICE DEPARTMENT TO EFFECT AN IDENTIFICATION IN THIS MATTER WERE UNDULY SUGGESTIVE, CREATING THE SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION, DENYING PETITIONER DUE PROCESS OF LAW. IT WAS REVERSIBLE ERROR TO ADMIT STATEMENTS OF IN-COURT AND OUT OF COURT IDENTIFICATION.

STANDARD OF REVIEW

Suggestive identification procedures violate due process of law and it is reversible error to admit statements of identification resulting from suggestive procedures. *Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243 (1977).

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL BECAUSE THIS ISSUE WAS NOT INCLUDED IN THE BRIEF.

STANDARD OF REVIEW

Whether the attorney's conduct fell below the prevailing professional norms and, absent this conduct there was a reasonable probability the result of the [appeal] would have been different. It is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 688, 694, 104 S.Ct. 20-52, 2068 (1984).

The identification procedures used in this case were the subject of timely filed written motions. On September 19, 1997 Petitioner filed both a Motion to Preclude Identification Testimony and a Motion to Preclude Testimony of Hypnotized Witness (Inst. #134, #135). There was a lengthy evidentiary hearing held over several days, starting on October 1, 1997.

Jeanne Tovrea's late husband had been a prisoner of war during WWII (R.T. 10-01-97, p. 49). There was an individual (Gordon Phillips) who had contacted Ms. Tovrea several times asking to interview her about his experience as a prisoner of war (*Id.*, at p. 48).

On July 10, 1987, Ms. Tovrea received a call at her home, presumably from Gordon Phillips (R.T. 10-27-97, p. 25). Ms. Tovrea agreed to meet with him the following day, at the Balboa Bay Club in Newport Beach, California (*Id.*, p. 26). She, her daughter Debra and Debra's then boyfriend were vacationing there at a friend's apartment but had returned home for the day on July

10th (*Id.*, p. 30). Immediately after the call, Debra's demeanor was angry and distraught at her mother's decision (*Id.*, pp. 9-10). Because Ms. Luster was angry with her mother, it was her plan to remain in the guest bedroom with her boyfriend Mike during Gordon Phillips' visit and let her mother deal with him alone (*Id.*, p. 33). Ms. Luster eventually left the bedroom and was introduced to Mr. Phillips in the livingroom (*Id.*, p. 34). This is at variance with what she told Det. Reynolds in an earlier interview in which she said: "Jeanne was outside on the patio when he, Gordon Phillips, came walking up." (R.T. 10-27-97, p. 97). This variance suggests Ms. Luster's memory for this event is less than clear.

She estimated she was in his presence for 30 minutes (R.T. 10-01-97, p. 61). She stayed in the guest bedroom with Mike for 30 minutes before coming out to meet him (R.T. 10-01-97, p. 54). She directed his attention to the Vanity Press books on the parson's table (*Id*). His lack of interest in the books caused her to be suspicious of him (*Id*). Ms. Luster herself admits that she has a "vivid imagination" (R.T. 10-27-97, pp. 71-72). She also admits that normally she is "not very good at judging and remembering what people look like. . ." (R.T. 10-01-97, p. 68).

Ms. Luster met with Detective Lott on April 2, 1988, the day after Ms. Tovrea's death (R.T. 10-20-97, pp. 136-7). She spoke of the meeting with Gordon Phillips and provided a description of him, "White male, mid-30's, 5'9 to 5'10, stocky build, light brown hair" (*Id*).[19] In May, 1988, she prepared a composite drawing with the help of a police sketch artist (*Id.*, at pp. 155-157) (R.T. 10-27-97, p. 60) (R.T. 10-01-97, p. 95).

Detective Lott also met with James Harrod on 8-08-88 (R.T. 10-20-97, p. 147). He did not ask Mr. Harrod about Gordon Phillips because he did not match the description (*Id*).

A hypnosis session for Debra Luster occurred on March 14, 1990 (R.T. 10-01-97, p. 80). The hypnotist felt she was too upset to go into a hypnotic state, therefore no new composite drawing was made (R.T. 10-01-97, p. 81) (R.T. 10-03-97, p. 54). The Petitioner timely filed a Motion to Preclude Ms. Luster's testimony on the grounds that her memory had been tainted by the hypnosis

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[19] This description is a variance with that recorded on the composite drawing, which lists the height as 5'6 to 5'8 and does not list a weight (R.T. 10-20-97, p. 161). It was Debra Luster who provided that description on May 2, 1988 (R.T. 10-27-97, p. 84).

session (Inst. #135). After a lengthy hearing over several days, the court ruled that she had not been hypnotized and permitted her testimony (R.T. 10-10-97, p. 131).

Thereafter Ms. Luster was shown two photo lineups (R.T. 10-01-97, pp. 94-5). The first was on May 21, 1991, the second on January 27, 1995 (R.T. 10-01-97, p. 97). The 1991 line-up consisted of 6 photos fixed to a manila envelope (R.T. 10-21-97, p. 58). This was a simultaneous, rather than sequential, presentation. Decades of research has shown that the sequential procedure reduces mistaken identifications with little or no reduction in accurate identifications.[20] While Ms. Luster did not identify anyone in the first lineup, she "keyed on" photo number 4 (R.T. 10-21-97, p. 62).[21]

According to Detective Hamrick's notes, she singled out picture number 4 (Majors) saying the person was too old to be Gordon Phillips but, if he had had a hard life it might be Gordon Phillips (Instruments #135, p. 3; 180 Exhibit A; R.T. 10-01-97, p. 102; 10-21-97, p. 61) (R.T. 10-27-97, p. 87). Detective Hamrick himself noted the "strong resemblance" of photo #4 to the composite drawing (Inst. 180, Exhibit B) (R.T. 10-21-97, p. 66). The defense was precluded from eliciting this information from him on cross-examination (R.T. 10-21-97, p. 68)

Detective Reynolds showed Ms. Luster the second line-up in 1995 (R.T. 10-03-97, p. 5). That line-up had a photo of James Harrod (*Id*). This picture was in position #2 (Inst. 135, p. 3) (R.T. 10-03-97, p. 22). This photo line-up was also a simultaneous presentation. Ms. Luster "eventually" selected photo number 3 saying "he looked the most like Gordon Phillips but she was not sure because the hair is not the same" (Inst. #135, p. 3; R.T. 10-03-97, p. 27). She said nothing about photo #2 (R.T. 10-03-97, p. 30).

Ms. Luster's comment that photo #3 "looked the most like" Gordon Phillips illustrates

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[20] Wells, G.L. Steblay, N.K, Dysart, J.E.: A Test of the Simultaneous vs. Sequential Line up Methods, 2011. (Appendix, Item 9).

[21] Photo number 4 was of James Majors, the subject of Mr. Harrod's disallowed 3rd party defense. (R.T. 10-21-97, p. 65) (Inst. #135). His photo was included in the lineup because his former partner in crime, Guissepi (Joe) Calo had told the police Majors confessed having killed Ms. Tovrea to him.

precisely the most serious defect of simultaneous presentation of a photo lineup; that is, under this circumstance, witnesses tend to use "relative judgement."[22] A relative judgement is one in which witnesses compare lineup members to one another and try to decide which one looks most like their memory of the perpetrator.[23]

> The problem with relative judgment, according to the theory, is that someone will always look more like the perpetrator than the other members of the lineup, even when the lineup does not contain the perpetrator. *Id.*, at p. 2

Over Petitioner's objection, a live line-up was held on December 19, 1996 (R.T. 10-01-97, p. 75). The six men in the line-up varied in height (R.T. 10-03-97, pp. 33-34). They also varied in weight, hair color and age (R.T. 10-10-97, pp. 99-102). Except for Mr. Harrod, no picture of any other person in the line-up had been shown to Ms. Luster (R.T. 10-03-97, p. 22).

"Making a defendant the only common person in both a photo spread and a live lineup can be unduly suggestive. *State v. Via*, 146 Ariz. 108, 119, 704 P.2d 238, 249 (1985). Here, the witness saw a photo spread and did not identify anyone. She later saw a lineup and identified the defendant. Lehr was the only person common to both the photos and the lineup. This arrangement was arguably unduly suggestive." *State v. Lehr*, 201 Ariz. 509, 520-521, 38 P.3d 1172, 1183 (2002).

Two of the participants in the line-up were 19 and 16 years younger than Mr. Harrod (*Id.*, p. 37). This disparity in age has been held to be unnecessarily suggestive and reversible error. *State v. Henderson*, 116 Ariz. 310, 569 P.2d 252 (App. 1977). Ms. Luster asked that #2 and #5 (James Harrod) step forward for closer scrutiny. After 10 minutes and 20 seconds of viewing the line up she said "um, #5 there is just something familiar," prompting the following exchange:

> ER: And what does #5 look like to you?
> DL: Um, (inaudible)
> ER: #5, you said #5 looks.
> DL: He looks familiar to me or something when he came close to the glass. There was something familiar about his eyes or his um gesture or stance.

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[22]Wells G.L. The Psychology of Lineup Identifications. Journal of Applied Social Psychology 14, 89-103 (1984)

[23] Wells G.L., Steblay N.K. Dysart J.E.; a Test of the Simultaneous vs. Sequential lineup methods; An Initial Report of the AJS National Eyewitness Identification Field Studies (2011).

(Evidence #179; R.T. 10-27-97, p. 115)

That "something familiar" could well be her recollection of having seen his picture in the January 27, 1995 photo line-up. Mr. Harrod was the only man in the live line-up whose picture Ms. Luster had seen before. She did not say that she was certain #5 was Gordon Phillips (R.T. 10-03-97, p. 40).

Multiple identification procedures which involve more than one viewing of the same suspect can result in misidentification. When a witness initially views a photo lineup and makes no identification but then selects someone from a later presentation whose photo the witness had seen before is sometimes referred to as "mug shot exposure".[24] The Deffenbacher study showed that although 15% of witnesses mistakenly identified an innocent person viewed in a line up for the first time, that percentage increased to 37%, if the witness had seen the innocent person in a prior mug shot. Ms. Luster was more than twice as likely to misidentify Mr. Harrod by virtue of having seen his photo before the live lineup.

Later, Detective Reynolds asks her did she "recognize" any of them and she responds "and although it took a while, I very much felt that #5 resembled the man that I met that night in California." (Evidence #179, admitted 10/27/97). The statements made by Ms. Luster in the postscript are also not statements of identification.

The significance of Ms. Luster "eventually" pointing to photo #3 in the January 27, 1995 photo lineup is that studies have shown that there is a "time boundary" related to accurate versus inaccurate identifications.[25] In The Automaticity study the authors discovered that a time boundary of roughly 10 to 12 seconds best differentiated accurate from inaccurate positive identifications. Witnesses making their identifications faster than 10 to 12 seconds were nearly 90% accurate. Witnesses taking longer were roughly 50% accurate or, no greater than random chance. Det. Reynolds estimated that it "may have been several minutes" before she pointed to

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[24] Deffenbacher, K.A. *et. al.*; Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law Hum. Behav. 287 (2006).

[25] Dunning D. and Parretta S.; Automaticity and Eyewitness Accuracy: A 10 to 12 Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications. (Appendix, Item 10).

photo #3 and said that that person looked "the most like Gordon Phillips." (R.T. 10-03-97, p. 25). The import of this is twofold. First, it strongly suggests that Mr. Harrod bears little resemblance to Gordon Phillips; there was another person whose picture bore a greater resemblance to him. Second, at the live lineup it was 10 minutes and 24 seconds before Ms. Luster offered her tentative "just something familiar" comment. A delay of almost 10 and a half minutes suggests Ms. Luster was again just guessing and on this occasion, Mr. Harrod may have haplessly borne the greatest resemblance to Gordon Phillips, in the live lineup, in Ms. Luster's relative judgment.

Even the trial court was critical of the composition of the live line-up, saying "This wasn't the best line-up in the world" and opining that the detective could have done a "heck of a lot better job" in selecting the participants (R.T. 10-10-97, p. 111).

Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide. Eyewitnesses misidentified 76% of those persons later exonerated by DNA evidence. (B.L. Garret: Convicting the Innocent; Harvard University Press 2011).

"Long retention interval" is the technical term for the unremarkable common sense proposition that memories fade over time. (Loftus, E.F.; Eyewitness Testimony, 1996, p. 53). (Appendix, Item 11). Here, we are dealing with an unprecedentedly lengthy retention interval. From the July 12, 1987 meeting with Gordon Phillips to April 2, 1988 when Debra Luster first provided his description to police is just 10 days short of a full nine months. Only one study has ever attempted to test the effects on memory of such a lengthy retention interval, however the existence of a "forgetting curve" is well documented (Loftus E.F.: Eyewitness Identification, p. 53). The "forgetting curve" documents that people "forget very rapidly immediately after an event, but forgetting becomes more and more gradual as time passes." (*Id*). In the 1967 study, the decay of memory was measured over intervals of two hours, three days, one week and four months[26] (*Id*). That study demonstrated that retention dropped from 100% accuracy after a two hour interval to only 57% accuracy after four months (*Id*). Dr. Loftus points out that, "while 57% may seem high,

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[26] Shepard R.N. Recognition memory for words, sentences and pictures. Journal of Verbal learning and Verbal Behavior 6: 156-163 (1967).

it actually represents mere guessing." (*Id*).

The retention interval from the meeting in California to the production of the composite drawing in May, 1988 was 10 months. The retention interval for the time she was presented with the first photo lineup, May 21, 1991 is 46 months. The interval of the second photo lineup, January 27, 1995 is 96 months. The interval to the live line up on December 19, 1996 is 129 months. This is an astonishingly long period of time, complicated by Ms. Luster having seen Mr. Harrod's photo in the January, 1995 photo lineup some 22 months earlier. It was not until October 1, 1997 (an interval of 139 months) during a pretrial evidentiary hearing that Ms. Luster made an in-court identification of Mr. Harrod, now characterized by her as "certain" of her identification. (R.T. 10-01-97, p. 78) She repeated this claim of certainty at trial (R.T. 10-27-97, p. 63). This trajectory from "something familiar" to "certainty" is familiar to experts in the field of memory and identification. One cause of this is the introduction of post event information. (*Id.,* p. 54). The continued prosecution of Mr. Harrod could not help but bolster her sense of certainty that she had actually "identified" Mr. Harrod in the December, 1996 live line-up.

Cases involving contested eyewitness identifications must be resolved on a case by case basis. *Neil v. Biggers*, 409 U.S. 188, 196, 93 S.Ct. 375, 381 (1972), *quoting Simmons v. U.S.*, 390 U.S. 377, 384, 88 S.Ct. 967, 971 (1968). The question of whether an identification procedure was unduly suggestive requires the consideration of the totality of the circumstances. *Manson v. Brathwaite,* 432 U.S. 98, 104, 97 S.Ct. 2243, 2248 (1977), *quoting Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967). The trial court did consider the totality of the circumstances in making its ruling (R.T. 10-10-97, p. 111). The trial court found that the in-person lineup herein was not unduly suggestive but went on to address the *Neil v. Biggers* factors (R.T. 10-10-97, p. 112); acknowledging that the single most important factor in this case was one of the weakest factors: the enormous passage of time from the July, 1987 meeting with Gordon Phillips to the live lineup in December, 1996, some 129 months. (R.T. 10-10-97, p. 113) The *Neil v. Biggers* Opinion expressed its concern over the passage of seven months from the crime to the confrontation and observed that a lapse of this length "would be a seriously negative factor in most cases." *(Neil v. Biggers, supra* at 201, 93 S.Ct at 383). There simply has been no case with a retention interval

even remotely approaching this length and this, standing alone, should have been sufficient grounds to preclude both the out of court statements and the in-court "identification". The only study to report on such a lengthy retention interval is Eyewitness Memory for People and Events, Wells, G.L. and Loftus, E.F. 2012 (in press) which addresses the misidentification of Thomas Brewster. (Appendix, Item 12). On December 14, 1984 a man attacked two persons in a parked car. The man was killed and the woman sexually assaulted (*Id.*, p. 618). Four days after the crime the woman was shown a photo lineup with Brewster's photo in it. No identification was made. The next day a live lineup with Brewster in it yielded the same result. Four years later, another photo lineup with Brewster's photo had the same result. In 1995, 11 years after the murder, the woman was shown a series of photos by two new detectives and she identified Brewster. Six days later, she identified him from a live lineup. Trial commenced in 1997 (*Id.*, at p. 619). During trial, DNA testing was done on a semen stain on the woman's blouse which had been previously over looked. The DNA test exonerated Brewster as the woman's attacker and the case was dismissed. (*Id*).

The retention interval from Ms. Luster's meeting with Gordon Phillips on July 12, 1987 to her "certain" identification of Mr. Harrod on October 1, 1997 is 139 months, 11 years and 7 months later. That a similar interval in the Brewster case resulted in a misidentification bodes ill for Ms. Luster's "identification" herein. Factor in that Mr. Harrod was the only person whose picture Ms. Luster had seen prior to the live lineup and the case for preclusion seems inescapable. These circumstances are even more egregious than those of *Foster v. California, supra*, which was reversed for the due process violation created by the suggestive identification procedures used therein. The United States Supreme Court found that placing the suspect in a lineup with shorter men where no identification was made, then holding a one-on-one confrontation which only yielded a tentative identification, then having another lineup in which Foster was the only man who had been in the first lineup was so suggestive and conducive to irreparable mistaken identification as to be a denial of due process. *(Foster v. California, supra)*. That court found that "the suggestive elements in this identification made it *all but inevitable* that [the witness] would identify petitioner whether or not he was 'the man'." (Emphasis added). "In effect, the police

repeatedly said to the witness, 'this is the man'" (*supra* at 443, 1129). No less than that was done here. The *Foster* Court found that its facts "presents a compelling example of unfair lineup procedures." (*Id.*, at p. 442). The facts here are even more compelling. Ms. Luster's trajectory from "something familiar" to "resembled" to "certainty" reflects nothing less than the police saying in effect "this is the man" by the continued prosecution of Mr. Harrod.

Of the five *Biggers* factors listed in that case, certainty of identification is the only one to have been found to have almost no correlation to accuracy. Studies have shown that demonstrably false memories can still be recalled with a high degree of confidence in its accuracy. Loftus E.F; Our Changeable Memories: legal and practical implications. Nature Reviews Neuroscience V. 4 March 2003. (Appendix, Item 13).

The only claim of Ms. Luster's, as to her degree of fear or suspicion of this person which is susceptible to proof is her claim that Ms. Tovrea called the security guards after Mr. Phillips left and they responded by looking around the property (R.T. 10-01-97, p. 69). This assertion is contradicted by the only available proof. On 08-03-88 Detective Lott contacted the Manager of the Balboa Bay Club who checked their records, including those of the guard shack, and there was no record of Gordon Phillips having been on the property, though he did have a record of Ms. Tovrea having been on the property from July 4th though July 6, 1987[27] (Appendix, Item 14).

The identification procedures used in this case were unduly suggestive and both out-of-court and in-court "identifications" should have been precluded. The facts herein are more egregious than those of *Foster v. California* and it was a violation of due process of law under the 5th, 6th and 14th Amendments of the U.S. Constitution. Of the five *Neil v. Biggers* factors only the opportunity to view can be said to have any positive weight and even that factor is seriously undermined by the extremely long interval between the observation and subsequent provision of a description. It was reversible error and an abuse of discretion to admit the "identification". It was ineffective assistance of counsel to fail to brief this issue on direct appeal.

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[27] These dates are at variance with Ms. Luster's recollection of the meeting occurring on July 12, 1987.

CHANGE IN LAW ARGUMENT

There Has Been a Recent Significant Change in the Law with the January 1, 2012 Modification of Rule 702, Arizona Rules of Evidence by Adopting the Federal Rule of Evidence 702. This Change Replaces the *Frye* Standard with that of *Daubert*.

STANDARD OF PROOF:

The Interpretation and Application of a Statute is a Question of Law which the Court Reviews De Novo. *State v. Grell,* 212 Ariz. 516, 135 P.3d 696 (2006).

Prior to trial, Petitioner moved for the admission of his successful polygraph examination (Inst. #132). He had been examined by Dr. David Raskin, who concluded that Petitioner truthfully denied having any involvement in the murder of Jeanne Tovrea (Inst. #132, Exhibit A) *see also State v. Harrod*, 200 Ariz. 309, 324, 26 P.3d 492 (2001, Feldman J. concurring). The motion requested that the Court hold an evidentiary hearing (Inst. #132, p. 1). The court declined to hold an evidentiary hearing (R.T. 10-06-97, p. 13) and ultimately precluded the polygraph results from evidence. Following the return of the guilty verdicts the State took the initiative and moved to Preclude Admission of Polygraph Results and the Testimony of Dr. David Raskin in the penalty phase. (Inst. #239). No response appears in the file.

State v. Zuck, 134 Ariz. 509, 658 P.3d 162 (1982) cited Rule 26.7(b), A.R.C.P., which provides that "any party may introduce any reliable, relevant evidence, including hearsay. . ." at the pre-sentencing hearing. By relying on a rule of criminal procedure, the court avoided direct reliance on the Rules of Evidence, which are inapplicable in the penalty phase. *See: State v. Hampton*, 213 Ariz. 167, 178, 140 P.3d 950 (2006). Nonetheless, with its addition of the requirement that the evidence be "reliable", Rule 26.7(b), imports an evidentiary requirement into the penalty proceeding. That evidentiary requirement of reliability is absent in §13-751(c), the statute which is applicable to **Capital** sentencings. This grafting-on of a reliability component deprives a defendant in a capital case of due process of law. This disparity was noted by Justice Feldman in *Harrod I* at p. 325.

> ¶ 89 We must first look at the provisions of our rules and statutes. Under A.R.S. § 13-703(C), a defendant may offer "[a]ny information relevant to any mitigating circumstances included in subsection G of this section," regardless of its admissibility at trial. Given that questions about the extent of a defendant's participation in the crime are certainly relevant as circumstances of the offense, and noting that the statute

> does not require reliability or compliance with the rules of evidence but permits the offer of "*any information*," it would seem that the question is solved by our statutes. But even if we were to read a reliability requirement into the offer of mitigating evidence, I conclude that the court should receive and consider such evidence when dealing with the literal decision of life or death.

The admission of evidence in a capital penalty phase hearing is ultimately constrained by the Due Process Clause of the Fourteenth Amendment. *See, Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597 (1991).

Even were it proper under the rules to exclude the polygraph results, evidentiary rulings which are valid under state law may still violate the constitution. *Bright v. Schmoda*, 819 F.2d 227, 229 (9th Cir. 1987). *See also, Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038 (1973).

The state filed a similar Motion to Preclude in the 2005 retrial (Inst. 311). Both these motions to preclude are subject to the same analysis as set forth in the balance of this section and the granting of them is subject to the same "substantial change in the law" analysis. The defense motion to reconsider the preclusion of the polygraph results was to no avail. (Inst. #409).

In litigating the admissibility of the polygraph examination, both parties relied on *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993) *cert. denied* 511 U.S. 1046 (1994). (Inst. #132, #140). Most central to this argument is the language in *Bible* by which the Arizona Supreme Court declined to abandon the *Frye* standard. ". . . this is not the case to determine whether Arizona should follow *Daubert*" (*Id.*, p. 580). Therefore, the court concluded: "[T]hus, for the present at least, we resolve this case without **significant change** in existing evidentiary law." (*Id.*, emphasis added). Thus, in the words of the Arizona Supreme Court itself, the replacement of *Frye* with *Daubert* on January 1, 2012, is a significant change in the law. The *Bible* court concluded "[w]e leave *Daubert* for another day." (*Id*). By modifying Rule 702, A.R.E. to employ the *Daubert* standard effective January 1, 2012, the Arizona Supreme Court is decreeing that that day has now come.

The battle in 1997 was whether *Frye* or *Daubert* should be applied with the State arguing that absent a stipulation, polygraph results were *per se* in-admissible. (R.T. 10-06-97, pp. 8, 9, 26). The defense argued that the *per se* rule violated the defendant's constitutional rights (Inst. #132, p. 1) and R.T. 10-06-97, pp. 5, 15-18, 25. As noted, the court declined to order an evidentiary hearing,

deeming it a "waste of this court's time" and there being no need to "reinvent the wheel" in light of extensive findings of fact by then-Superior Court Judge Susan Bolton. (R.T. 10-06-97, p. 13).[28] Both experts, Dr. Iacona for the State and Dr. Raskin for the defense, testified in that hearing (R.T. 10-06-97, p. 13), which was cited by the court in its denial of an evidentiary hearing in this case.

The failure to hold an evidentiary hearing, and the court relying on its understanding of a ruling by another judge precluding polygraph results in another case, effectively negates the court's ruling on this matter.

> We have repeatedly held that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, "the fact-finding process itself is deficient" and not entitled to deference. *Maddox*, 366 F.3d at 1001.
>
> *Hurles v. Ryan*, 650 F.3d 1301, 1312 (2001)

However, that was not the only contemporaneous case in Arizona addressing the admissibility of polygraph results. The Hon. Roger Strand had recently completed a similar hearing in Federal court under the *Daubert* standard, *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995). The trial court herein was aware of that case and ruling. (R.T. 10-06-97, p. 30). At that hearing both Dr. Iacona (R.T. 10-06-97, p. 4, 10, 12) and Dr. Raskin testified (R.T. 12-18-03, p.35). The *Crumby* case received extensive examination by Justice Feldman in *State v. Harrod*, 200 Ariz. 309, 507 et. seq. 26 P.3d 492 (Feldman J. concurring, 2001). Justice Feldman recommended the *Crumby* opinion as "well developed" and Judge Strand's "thorough and thoughtful *Daubert* analysis." (*Id.*, 508). Judge Strand, using a *Daubert* analysis with identical expert witnesses, and the identical issue; "a defendant seek[ing] to introduce such [polygraph] evidence for the limited purpose of bolstering his version of the events to prove innocence", found the polygraph evidence to be admissible (*Id.*, at pp. 508, 509).

The Arizona Supreme Court itself in *Bible* characterized the change from *Frye* to *Daubert* represented a "significant change" in the law. The January 1, 2012 change from *Frye* to *Daubert* in Rule 702, A.R.E. is, in the words of the Arizona Supreme Court, is just such a significant

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[28] Judge Bolton applied Frye and precluded the polygraph results.

change.

The successful passing of the polygraph examination was vital to Petitioner's claim of actual innocence.[29] It was also vital, together with the intertwined issue of residual doubt to any hope of receiving a sentence of less than death. Fatal to *Harrod I* is the majority's evasion of the polygraph issue with the *dicta* ". . . even had the polygraph results been admitted, they would not have altered the sentence imposed. The trial court made clear that 'the *court* does not have any lingering doubt as to the defendant's role or participation in the murder of Jeanne Tovrea'" (Special Verdict at 12) (emphasis in original) (*Harrod I*, p. 317). Justice Feldman's special concurrence far better stands the test of time. Citing to the ever growing proof of wrongful convictions documented by the Innocence Project, Justice Feldman makes a powerful, well documented case for recognizing residual doubt as a mitigator. (*Harrod, I,* pp. 322-324). Justice Feldman also makes a powerful case, based on Judge Strand's ruling in *United States v. Crumby*, for the interrelated issue of the admission of polygraph results *(Harrod I,* pp. 324-326).

Ring II, with its mandate of jury sentencing in Capital cases, rendered the *Harrod* majority's evasion of the polygraph issue a fatal flaw in its opinion. Thus, evading the polygraph issue because the trial judge had no lingering doubt as to Petitioner's guilt is no longer a viable resolution of the issue. This issue now has become, would a jury have any lingering doubt as to either guilt or the appropriate sentence? The substantial change in the law, made by switching Arizona to a *Daubert* state by the modification of Rule 702, A.R.E. renders the preclusion of the polygraph results an unsustainable error.

403 ARGUMENT

It was an Abuse of Discretion, a Violation of Due Process of Law and Reversible Error to Admit Gruesome and Inflammatory Post-Mortem Photographs of the Victim When the Method and Manner of Death Were Not At Issue.

Standard of Review: Rulings admitting or excluding evidence are reviewed for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990).

At the 1997 trial the State sought the admission of several post-mortem photographs of

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[29] Unlike Ms. Luster, who failed a polygraph on 9-29-89 when asked if she was involved in her mother's murder (Appendix Item 15).

Jeanne Tovrea, from both the scene and the autopsy. (R.T. 10-21-97, p. 3). A timely objection, on the grounds of Rule of Evidence 403 was made (R.T. 10-20-97, p. 109). The admissibility of the balance of the photos, outside the presence of the jury (*Id*) was addressed the following day (R.T. 10-21-97, p. 3). (Appendix Item 17) The defense made the same objection, noting that none of the photos shed any light on whether Mr. Harrod was the assailant (*Id.*, p. 8).

The State's assertion that the photos were relevant because of the burden on the State to prove premeditation (R.T. 10-21-97, p. 7) is a preposterous nonsequitor. Due to the minimal, if not non-existent relevance, the danger of unfair prejudice, by definition, substantially outweighed their relevance under Rule 403.

In a case directly on point, the Arizona Supreme Court reversed the three murder convictions and related felonies in *State v. Chapple*, 135 Ariz. 28, 660 P.2d 1208 (1983). That opinion revisited the "often quoted" case, *State v. Mohr*, 106 Ariz. 402, 476 P.2d 857 (1970). (*Id.*, p. 288, 1215). The court stated:

> "Relevancy is thus not the sole test of the admissibility of evidence; admissibility depends, rather, on a balancing of the various effects of the admission of such evidence, considered in the light of recognized rules of law governing the administration of criminal justice."
>
> *State v. Chapple, supra* at p. 228, 1215.

In *Chapple,* as in Harrod, the only issue was the identity of Ms. Tovrea's assailant. It was reversible error to admit the photographs.

The error was even more stark in the 2005 retrial of the aggravation and penalty phases. Prior to the commencement of the retrial, Petitioner moved to Preclude Evidence of Guilt During the Sentencing Proceeding (Instruments #381). This Motion and the Reply (Inst. #406) emphasized that the manner and circumstances of Ms. Tovrea's death were irrelevant. This Motion was denied by Minute Entry Order on 10-01-04. (Inst. 425) (R.T. 10-01-94, p. 26, *et. seq.*).

The State had sought, *inter alia*, in the 1997 trial to prove the aggravating circumstances of §13-703(F)(6), committed the offense in an especially heinous, cruel or depraved manner. (Inst. 258, Special Verdict). Of these, the State succeeded only in proving the (F)(5) factor *(Id)*. With the elimination of the (F)(6) aggravator, the post-mortem photos of Ms. Tovrea had absolutely no relevance and were more inflammatory than in the 1997 trial. If the jury was not retrying the issue

of guilt, the photos become completely irrelevant and should have been excluded under Rule 401, as argued by the defense in its Motion to Preclude Evidence of Guilt. (Inst. 381, p. 3).

Under Arizona's statutory scheme, the aggravation and penalty phases of capital cases are permitted to be retried by a second jury with a directed verdict of guilt. Surely, the admission of these inflammatory photographs under such Kafkaesque circumstances was error.

Some, but not all, of the inflammatory photos were admitted in the 2005 trial. (Clerk's Exhibit Worksheet 9-14-05, Appendix, Item 18). Defense objected (R.T. 10-01-04, p. 26, *et. seq.*).

While the burden on the defense is only to show that there is a **danger** that this evidence is unfairly prejudicial, may confuse the issues or mislead the jury, these photos most certainly did confuse the issues and mislead the jury. The introduction of these photos on 9-19-05 and 9-20-05 precipitated a flurry of juror questions, almost all of them directed at issues which underpinned the issue of guilt. (Insts. #535-548, 553-560, 564-570). The court itself expressed frustration that the jury continued to be preoccupied with the issue of guilt, despite having been "instructed that the defendant has been found guilty" (R.T. 9-26-05, p. 55).

Small wonder that the jury was confused and misled when the state was permitted to introduce post-mortem photos, fingerprint evidence (R.T. 9-20-05, p. 55, *et. seq.*), crime scene reconstruction testimony (R.T. 9-20-05, p. 76, *et. seq.*), all of which go solely to the issue of guilt. The court abused its discretion in both the 1997 and 2005 trials and committed reversible error in admitting inflammatory and unfairly prejudicial evidence which ought have been excluded. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the 14th Amendment provides a mechanism for relief." *See Darden v. Wainwright*, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 2470-2472 (1986).

MISCONDUCT ARGUMENT

The State Committed Misconduct in the 1997 trial by:

1. **Presenting Fingerprint Identification Testimony and Arguing That Such Identifications Are Made With 100% Scientific Certainty.**
2. **Arguing its Core Theory that the Motive for the Murder was so that Ms. Tovrea's Step-Children Could Gain Access to the Family Trust Before it was Depleted when that was Unsupported by the Evidence of its Own Witnesses.**

The State Committed Misconduct in the 2005 Trial by:

1. **Refusing to Extend Immunity to Ed Tovrea, Jr., when it had Previously Granted Immunity to Two Other Witnesses.**
2. **Violated the Double Jeopardy Clause and the Law of the Case When it Presented Evidence and Argument that the Murder was Committed in an Especially Heinous, Cruel or Depraved Manner. (13-703(F)(6)).**
3. **Changed Their Theory of the Case to Support their Impermissible (F)(6) Argument by Unilaterally Revisiting the Issue of Guilt in Violation of Court Order and Statute and Judicial Estoppel which Precluded the Petitioner from Presenting a Full Defense in Violation of Due Process of Law.**
4. **Misrepresented the Circumstances of the Offense as an Aggravating Circumstance in Violation of A.R.S. §13-751(G).**

STANDARD OF REVIEW

The Court reviews claims of prosecutorial misconduct with a view to determining whether they affected the proceedings in such a way as to deny the defendant a fair trial. *State v. Hughes*, 193 Ariz. 72, 80, 969 P.2d 1184, 1192 (1998). If no objection was made in the trial court, then the review is one for fundamental error. (*Id*).

1. The Fingerprint Testimony in 1997.

The misrepresentation of the fingerprint testimony in the 1997 trial as a absolute 100% scientific certainty is set out fully in the Fingerprint Argument set forth above and, is incorporated fully herein.

2. The State's Core Theory Regarding Motive in 1997.

As of the time of his death in 1983, Ed Tovrea's estate was worth approximately 6 million dollars (R.T. 10-23-97, p. 124). Based on anonymous tips (R.T. 11-05-97, p. 83), Detective Reynolds again interviewed Mr. Kearney on 11-14-94. (Appendix, Item 19). Detective Reynolds advised Mr. Kearney that "stories had been circulated that Jeanne had been living beyond her means, and that she was spending on the principle of her estate." (Appendix Item 19, Supp. 67, p. 2). Mr. Kearney advised him that "Jeanne had a good income from the interest on the Trust Account," essentially disputing the rumors. (*Id.*) Anne Costello was the source of the stories. (Appendix, Item 20, Supp. 71, p. 3). This is the sole reference in the departmental reports to Ms. Tovrea possibly invading the principle.

The "stories" however were completely false. In the 1997 trial Mr. Kearney, co-executor of Ed Senior's Will, which administered the Trust (R.T. 10-23-97, p. 129), when asked if the Trust had ever lost principle replied "not to my knowledge it didn't. . ." (R.T. 10-23-97, p. 131). (See also, Appendix Item 19, Supp. 67, p. 2) Most conclusive on this issue however is the testimony

of Kenneth Reeves, the lawyer whose firm drew up Ed Senior's Will (R.T. 10-27-97, p. 147). In the 2005 trial, he was specifically asked and answered ". . . the trust specifically provided that she couldn't invade the principle for her own benefit." (R.T. 9-20-05, p. 120).

Even the Arizona Supreme Court was duped by this misrepresentation. They recited in *Harrod I* that "Hap" Tovrea had hired Petitioner for "$100,000 to murder Jeanne so that Hap and his siblings could take under the trust" because she "was depleting the remaining assets with her new boyfriend." *State v. Harrod*, 200 Ariz. 309, 312 ¶ 11 and FN1, 26 P.3d 492 (2001). The source of this spurious story was Anne Costello, Petitioner's ex-wife (R.T. 11-14-97, p. 15).

Nonetheless the State was undeterred. Throughout its opening and closing, the State showcased its discredited theory. (R.T. 10-20-97, p. 47), (R.T. 11-17-97, p. 29), (R.T. 11-17-97, p. 21), (R.T. 11-17-97, p. 30).

The State itself conceded that no money passed from MECA to James Harrod until March 1989 (R.T. 11-17-97, p. 42). Ms. Tovrea's dissipation of the family trust, never happened according to the State's own two witnesses, Glenn Kearney and Kenneth Reeves. It was misconduct to argue to the contrary.

The State Committed Misconduct in the 2005 Trial by:

1. Refusing to Extend Immunity to Edward Tovrea, Jr., When it had Previously Granted Immunity to Two Other Witnesses.

This argument is set forth in the "selective immunity" argument made below and which, by this reference, is incorporated herein in full.

2. Violated the Double Jeopardy Clause and the Law of the Case when it Presented Evidence and Argument that the Murder was Committed in an Especially Heinous Cruel or Depraved Manner (§ 13-703(F)(6).

Following Petitioner's conviction in 1997 the State filed its Sentencing Memorandum (Inst. 242). In it the State listed three aggravating factors; §13-703(F)(5), §13-703(F)(4), §13-703(F)(6). In its Special Verdict (Inst. #258) the court found the evidence in support of (F)(4) was "insufficient to establish beyond a reasonable doubt". The court also found, regarding (F)(6). "The State has failed to prove beyond a reasonable doubt that the murder was committed in an especially heinous, cruel or depraved manner." (*Id.*, p. 8). The Court upheld the (F)(5) pecuniary gain factor and sentenced Petitioner to death (*Id.*, p. 18).

Upon remand, the State filed its Amended Notice of Aggravating Factors, alleging the sole aggravating factor of §13-703(F)(5) (Inst. 299). Petitioner was sentenced again to death.

A defendant is entitled to require that the Government prove he is guilty of every element of the crime with which he is charged. *United States v. Gaudin*, 515 U.S.506, 510, 115 S.Ct. 2310 (1995). "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970).

Apprendi ultimately resulted in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2484 (2002), which struck down Arizona's capital sentencing scheme. The following term, Justice Scalia enlarged upon these two cases and the changes they wrought.

> Just last Term we recognized the import of *Apprendi* in the context of capital-sentencing proceedings. In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 l.Ed.2d 556 (2002), we held that aggravating circumstances that make a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a *greater offense.*'" *Id.*, at 609, 122 S.Ct. 2428 (emphasis added).
>
> *Sattizahn v. Pennsylvania,* 537 U.S. 101, 111, 123 S.Ct. 732, 739 (2003)

Justice Scalia makes clear that an aggravating factor is an element of the greater crime of capital murder.

The Double Jeopardy Clause of the 5th Amendment directs that "no person shall be subject for the same offense to be put twice in jeopardy of life or limb." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072 (1969). The Double Jeopardy Clause [applies] to capital-sentencing proceedings where such proceedings "have the hallmarks of the trial on guilt or innocence." *Sattizahn v. Pennsylvania , supra* at 106, 737, quoting *Bullington v. Missouri*, 451 U.S. 430 at 439, 101 S.Ct. 1852 (1981). Here, the 1998 sentencing hearing had all the hallmarks of a trial on guilt or innocence. The hearing was held over two days (R.T. 4-6-98, 5-06-98), witnesses were called (*Id.*), arguments were made (*Id.*), memoranda were filed (Inst. #242, #252) and the court made detailed findings of fact in its Special Verdict (Inst. #258).

In *State v. Rumsey*, 136 Ariz. 166, 665 P.2d 48 (1983) the Arizona Supreme Court held that imposition of a life sentence acquitted the defendant of whatever was required for the imposition of the death penalty. Upon resentencing, the Court sentenced Rumsey to death, relying on the

(F)(5) factor. The Arizona Supreme Court reduced the sentence to life imprisonment finding, as in the *Bullington* case, Arizona's capital sentencing procedure resembled a trial on guilt or innocence and therefore jeopardy had attached when Rumsey was sentenced to life.

As Justice Scalia said in *Sattizahn*:

> We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an "offense" for purposes of the Fifth Amendment's Double Jeopardy Clause.
>
> * * *
>
> In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)."
>
> *Sattizahn, supra* at 111, 112, 739-740.

Here the Petitioner was acquitted of having committed the murder in an especially heinous, cruel or depraved manner (F)(6) by the court's May 27, 1998 Special Verdict (Inst. 258). The State violated the double jeopardy clause when it introduced in the 2005 trial, evidence literally identical to that by which it had sought to prove the (F)(6) aggravator in the 1997 trial. It is Petitioner's position that the defense Motion to Preclude Evidence of Guilt During the Sentencing Proceeding (Inst. #381) was sufficient to preserve this issue and avoid a fundamental error analysis.

The state even upped the ante when it changed theories in the 2005 trial, now arguing Petitioner was in fact the actual shooter, and argued that "the state does not have to prove *this man* pulled the trigger." (R.T. 11-17-97, p. 19, emphasis added). In 2005, the state opened with "*this man* brutally murdered her while she slept in her bed" (R.T. 9-19-05, p. 31, emphasis added) and ". . . *this man* brutally murdered Jeanne Tovrea for money . . ." (*Id.*, p. 51, emphasis added).

The sole issue was pecuniary gain. The comments about the brutality of the murder were, by definition, unfairly prejudicial because they went to an issue which was irrelevant, not to mention barred by the double jeopardy clause, and the law of the case.

The testimony of the crime scene reconstructionist should have been barred in its entirety, as it shed no light on pecuniary gain, rather, it was in support of (F)(6). In 2005 Mr. Haag, the reconstructionist, testified as to Ms. Tovrea's head being at a different angle for one of the shots (R.T. 9-20-05, p. 87) and was asked if her hands were in a "defensive posture" (*Id.*, p. 94) which

would indicate consciousness at the time of the shooting. Dr. Phillip Keen testified at the first trial that there were no defensive wounds (R.T. 10-22-97, p. 163) and her hands were in a fairly normal sleeping position (*Id.*, p. 168). He was not invited back in 2005.

The position of the hands and the bullet trajectories go to F6 factors. It could only have inflamed the jury, was unfairly prejudicial, irrelevant and violative of double jeopardy. The context of the remarks and the totality of the circumstances, that of a double jeopardy barred issue in a second trial undertaken with a directed verdict of guilt mandates that this was misconduct and reversible error.

3. Changed Their Theory of the Case to Support their Impermissible (F)(6) Argument by Unilaterally Revisiting the Issue of Guilt in Violation of Court Order and Statute and Judicial Estoppel which Precluded the Petitioner from Presenting a Full Defense in Violation of Due Process of Law.

The change in theory in which the State switched from conceding that it could not prove Petitioner was the actual shooter in the 1997 trial, (R.T. 11-17-97, p. 25) to claiming this very thing in the 2005 trial (R.T. 10-05-05, p. 26), violated double jeopardy, and the law of the case. The change in theory was raised in the Petitioner's direct appeal (Appendix Item 21) but not in the context of double jeopardy, or violation of the law of the case. To the extent that argument did not urge this context on direct appeal, Petitioner received ineffective assistance of counsel. This ineffective assistance is underscored by appellate counsel's mistaken concession that Petitioner had not objected to this change in theory below (Appendix Item 21, p. 42). This is incorrect, Petitioner did file a written objection to the introduction of any guilt-phase evidence at the 2005 retrial (Instruments #381). Likewise, appellate counsel failed to note in his brief that in the Special Verdict following the 1997 trial, the court stated "Although the State did not prove beyond a reasonable doubt that the defendant fired the shots that actually killed Jeanne Tovrea . . ." (Instruments #258, p. 15). This operates in the same fashion here as it did in the argument immediately above in the discussion of the *Sattizahn* and *Bullington* cases. The Special Verdict operates as an acquittal of the Petitioner having been the actual shooter. It was a due process violation as the Special Verdict foreclosed this argument.

A prosecutor engages in misconduct by changing the theory of the case or taking inconsistent

positions as to the role in the crime. It is a due process violation for the prosecutor to take inconsistent positions on the defendant's role as the killer. *See, Jacobs v. Scott*, 513 U.S. 1067, 115 S.Ct. 711 (1995) (Stevens J. dissenting from the denial of certiorari).

The presentation of this new theory also violated the law of the case. In a detailed Minute Entry Order on 10-01-04 the Court repeatedly ordered that "the jury will not retry the issue of Defendant's guilt." (Instruments #425, p. 4). The only issue in the 2005 trial was pecuniary gain. The method or manner of Ms. Tovrea's murder was completely irrelevant, notwithstanding the court's concern that the case not be retried "in a vacuum." (*Id.*, p. 4). Despite the court's order, the state unilaterally retried the issue of guilt, and did so with a completely new theory which it had not disclosed to the court or the defense. This was misconduct.[30]

> For example, the prosecutor may not obtain a conviction through the use of false evidence. *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 341-42, 79 L.Ed. 791 (1935); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). From these principles emerges the requirement that the prosecutor not pursue wholly inconsistent theories of a case at separate trials.
>
> *Thompson v. Calderon*, 109 F.3d 1358, 1371 (1997).

Here the issue is not just the use of "false" evidence, it is the use of evidence and argument regarding acts for which the Petitioner had been acquitted both globally (the (F)(6) aggravator; Instruments #258, p. 7) and specifically ("the State did not prove beyond a reasonable doubt that the defendant fired the shots that actually killed Jeanne Tovrea.") (*Id.*, p. 15).

Nor did the state stop there. Despite the fact that in 2005 the case was being retried with a directed verdict of guilt, the state forced Petitioner to deny, on the witness stand, that he was Gordon Phillips, thereby squarely putting the issue of guilt before the second jury (R.T. 9-29-05, p. 129). This was a direct violation of the court's order that the issue of guilt not be revisited (Inst. #425, p. 4). At a minimum, the jury should have received a residual doubt instruction as a response to this deliberate provocation by the state. Petitioner so moved, in writing (Inst. #613). That motion was denied (Inst. #627). This was an abuse of discretion and a violation of the 5th,

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[30] *State v. Towery*, 186 Ariz. 168, 920 (1996) ". . . we believe it improper for the State to fail to first notify defense counsel and the court of its intent to use the evidence in this manner. . . . his failure to give notice in either case constitutes misconduct." (At 184, 306).

8th and 14th Amendment's right to due process and to be free of cruel and unusual punishment, and Arizona's constitutional protections under Art. 2 §4 and §15. *See, Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (Capital defendant denied right of rebuttal), *Skipper v. South Carolina*, 476 U.S. 1, 5 n1 (1986) (ditto).

The jury could not possibly have properly assessed Petitioner's moral culpability without a residual doubt instruction to counter the State's misconduct. *See, Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Porter v. McCollum*, 130 S.Ct. 447, 454 (2009).

4. Misrepresented the Circumstances of the Offense as an Aggravating Circumstance in Violation of A.R.S. §13-703(G).

Standard of Review

The interpretation of a statute is reviewed *de novo Zamora v. Reinstein*, 185 Ariz. 272, 275; 915 P.2d 1227, 1230 (1996).

A.R.S. §13-751(G) provides, in pertinent part:

> **G.** The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

This is the sole reference to "the circumstances of the offense" in the entirety of Arizona's statutory capital sentencing scheme. This subsection solely addresses mitigation. Its text is clear

> In interpreting statutes, we begin with the text of the statute. *Mejak v. Granville*, 212 Aiz. 555, 557, ¶ 8, 136 P.3d 874, 876 (2006). If the language is clear and unambiguous, we need look no further. *Id.*
> *State v. Harrod, (Harrod III)*, 218 Ariz. 268, 277, 183 P.3d 519, 528 (2008).

Arizona law provides that only those aggravating circumstances enumerated in A.R.S. §13-751(F) are admissible in order to qualify a defendant for the death penalty. The "circumstances of the offense" is not so enumerated. Subsection (G) requires no interpretation, its language is clear and unambiguous. The circumstances of the offense are admissible only as mitigation. It was fundamental, structural error and a violation of the 8th Amendment to permit the State to present a mitigating circumstance as aggravation. Petitioner hereby incorporates in full the law and arguments presented above in Subsections 2 and 3. It is axiomatic that it is error and improper to

offer evidence designated as mitigation as an aggravating circumstance. This principle is firmly embedded in Capital litigation.

> Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant. *cf Herndon v. Lowery*, 301 U.S. 242, 57 S.Ct. 732 81 L.Ed. 1066 (1937), or to *conduct that should actually militate in favor of a lesser penalty*, such as perhaps the Defendant's mental illness. *Cf Miller v. Florida*, 373 So.2d 882, 885-886 (Fla. 1979).
> *Zant v. Stephens*, 462 U.S. 862, 886, 103 S.Ct. 2733, 2748 (1983) (Emphasis added)

The presentation of the circumstances of the shooting of Ms. Tovrea is just such an instance. Permitting this testimony did not just defeat the "narrowing function" mandated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct 2726 (1972), it reversed that function, widening, rather than narrowing Petitioner's eligibility for the death penalty with evidence that was barred by the Double Jeopardy Clause, and Law of the Case.

The proposition that the "circumstances of the offense" is admissible only as mitigation is firmly embedded in the Supreme Court's 8th Amendment jurisprudence.

> ". . . we conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor any aspect of a defendant's character, or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
> *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978)
> (emphasis in the original, footnote omitted).

This comports with a long line of Eighth Amendment jurisprudence from the U.S. Supreme Court cases.

> It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "(f)or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51, 55, 58 S.Ct. 59, 61, (1937). Otherwise, "the system cannot function in a consistent and a rational manner." American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures s 4.1(a), Commentary, p. 201 (App. Draft 1968).
> *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932-3 (footnotes omitted) (1976).

As a general proposition, there may be occasions when the circumstances of the offense may be admissible when they are not mitigating, as when they are in support of an enumerated aggravator, such as (F)(6). Such a rationale was absent in the 2005 trial by virtue of Petitioner having been acquitted of that aggravator by the court's previous Special Verdict (Inst. #258).

There was simply no predicate upon which to introduce the circumstances of the offense in 2005.

SELECTIVE IMMUNITY ARGUMENT

Petitioner was denied due process and equal protection of the law when the prosecutor refused to grant use immunity to a crucial defense witness after it had granted transactional immunity to a State's witness and use immunity to a second witness regarding a collateral matter. It was an abuse of discretion for the trial court not to intervene when the state refused to grant immunity to the defense witness after granting it to two other witnesses. It was ineffective assistance of counsel for trial counsel to not request that the defense witness be granted immunity. The foregoing deprived Petitioner of due process of law, compulsory process, and the right to present a defense, in violation of the 5th, 6th and 14th Amendments to the U.S. Constitution and Article 2 §§ 4 and 24 of the Arizona Constitution.

STANDARD OF REVIEW

The standard of review for this issue "is a mixed question of law and fact that we review *de novo*, (*United States v. Straub*., 538 F.3d 1147, 1156 (9th Cir. 2008) citing *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004).

Prior to consenting to a police interview, Petitioner's ex-wife, Anne Costello was given transactional immunity for the Jeanne Tovrea homicide. Detective Reynolds promised her she "would not be held liable for any part of being involved in this case" She agreed that "the only reason [she] made a statement" to the police was that she had been assured she would not be prosecuted (R.T. 10-29-95, p. 65). The State itself, in its 1997 opening statement confirmed that she was given immunity when it stated: "Anne Costello will testify in this case. She will be testifying under a grant of immunity, given to her by the State" (R.T. 10-20-97, p. 51). In any event, the Arizona Supreme Court has ruled that she was granted immunity (*State v. Harrod,* 200 Ariz. 309, 312, 26 P.3d 492, 495 (2001).

Prior to the 1997 trial, on April 21, 1997 a hearing was held on the State's Motion for Sanctions for the unauthorized disclosure of the police reports. At that hearing, Ms. Barney was called as a witness and she invoked her 5th Amendment privilege (R.T. 4-21-97, p. 43). The State then petitioned the court to grant her use immunity (Inst. 116). The Petition was granted in open court (R.T. 4-23-97, p. 5).

Trial commenced in October, 1997. It was Petitioner's position at trial that his business relationship with Ed Tovrea, Jr. was legitimate (R.T. 10-20-97, p. 84). Ed Tovrea, Jr. was the President of MECA, Mineral Exploration Company of America. MECA operated a sulfur mine

in Chile (RT 11-10-97, p. 141). MECA was interested in exploring the possibility of setting up such an operation in China (R.T. 11-10-97, p. 143). To this end, Petitioner, Ed Tovrea, Jr. and a third party, Ji Shen (Jason) Hu traveled to China in 1989 (R.T. 11-9-97, p. 28). Mr. Hu testified at trial that he believed this to be a legitimate business trip for a legitimate venture (R.T. *Id.* p. 53). Any payments received by Petitioner from MECA were pursuant to this legitimate business venture (R.T. 10-20-97, p. 64).

In the 1997 trial, there was no attempt made by the defense to subpoena Ed Tovrea, Jr. to testify at trial. For the 2005 trial, the defense did subpoena Ed Tovrea, Jr., as the aggravation phase would address the (F)(5) factor, pecuniary gain. Mr. Tovrea sought to have the subpoena quashed, citing his 5th Amendment privilege against self incrimination (Inst. 468). The defense prepared a detailed offer of proof containing a list of questions for Mr. Tovrea which would not implicate the 5th Amendment (Inst. 464). On 3-22-05 a hearing was held on the motion to quash. At that hearing Mr. Henze, Mr. Tovrea's lawyer stated to the court: "I am assuming that Mr. Ahler doesn't intend, on behalf of the sovereign, to apply for use immunity for Mr. Tovrea, so you couldn't immunize him in compelling him to answer." (R.T. 3-22-05, p. 24). Mr. Ahler responded: "Let me also say, that the State has no intention of offering immunity to Edward Tovrea." *(Id.)*. (See also, Inst. 469, p. 4) Unlike the federal system, Arizona has no formal mechanism for requesting immunity for a defense witness. Federally, a written request for immunity can be made under 18 U.S.C. 6001 but even this requirement is not strictly enforced. See, *United States v. Straub*, 538 F.3d 1147, 1150 (9th Cir. 2008).

Thus, the issue of granting immunity to Ed Tovrea, Jr. was squarely before the court.

The notion that a litigant or a witness for the defense can be immunized at their own request is not new to Arizona. *Smith v. Arizona*, 17 Ariz. App. 79, 495 P.2d 519 (1972) found that a litigant in a civil proceeding (securities fraud) was entitled to assert a claim of immunity when forced by the court to respond to various discovery requests, thereby incriminating himself. In *U.S. v. Morrison*, 535 F.2d 223 (3rd Cir. 1976), the Court found that due process may require defense witness immunization if the Government, through prosecutorial misconduct, induced the witness to withhold testimony from fear of self incrimination. The second case, *Government of the Virgin*

Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980) stated another circumstance justifying defense witness immunity.

> "(W)hen it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity, the court should grant judicial immunity to the witness in order to vindicate the defendant's constitutional right to a fair trial."
> *State v. Axely*, at p. 388; 273, *quoting The Government of the Virgin Islands v. Smith.*

The 9th Circuit has adopted the 3rd Circuit's reasoning in this area, so 3rd Circuit cases have a direct bearing on Arizona.

> In *Lord*, our earliest case to develop a test for compelled use immunity, we adopted the Third Circuit's rule that "'[t]he defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact-finding process.'" 711 F.2d at 890 (quoting *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978)). *Lord* also adopted the Third Circuit's subsequent developments of this rule, in *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980).
> *U.S. v. Straub, supra* at p. 1158.

The *Virgin Islands* case has unquestionable application to this case. It is beyond argument that Mr. Tovrea's testimony would have been offered for its clearly exculpatory nature and that Mr. Tovrea was essential to Petitioner's defense. Nor can it be said that the government had a strong interest in withholding immunity from Mr. Tovrea. It was noted in oral argument in the March 22, 2005 hearing on Mr. Tovrea's motion to quash his subpoena, that the records of MECA corporation of which Mr. Tovrea was President were "a central part of the record of Mr. Harrod's trial . . ." (R.T. 3-22-05, p. 16).

Mr. Harrod's attorney noted that "The police have hours and hours of tapes of a conversation he (sic) had with Mr. Tovrea about the deals with MECCA (sic) . . . They have all kinds of stuff." (R.T. 3-22-05, p. 23). This material was obtained through the execution of search warrants on Mr. Tovrea's business office and his home in 1988. The government had no interest in withholding use immunity from Mr. Tovrea because it already possessed everything it needed to take him to trial. The police had been investigating him for 17 years at that point! Granting Mr. Tovrea use immunity would not have imperilled anything learned by the police in those seventeen years of investigation. Use immunity would not have insulated him from prosecution. Conversely, Mr.

Tovrea was the single most essential witness to Mr. Harrod's defense.

Petitioner's rights of due process and equal protection of the law mandated that Mr. Tovrea should have been granted use immunity, thereby compelling his testimony as an enforcement of Petitioner's bedrock constitutional right of compulsory process. The court retains a duty to protect the public interest in fair trials and the Petitioner's constitutional rights. By the court's failing to exercise its inherent power to either grant Mr. Tovrea use immunity or curtail the State's cross-examination of him, it allowed the State to distort the fact finding process, depriving Petitioner of a fair trial. The court retains the inherent power to limit cross-examination. "The scope of cross examination is committed to the sound discretion of the trial court." *State v. Robinson*, 165 Ariz. 51, 58 976 P.2d 853, 860 (1990). *See also State v. Smith*, 138 Ariz. 79, 81, 673 P.2d 17, 19 (1983).

Government of the Virgin Islands v. Smith (supra) recognizes the court's inherent authority to grant use immunity to a witness when justice requires: that case began its Opinion by stating:

> In *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978) *cert. denied* 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1979), this court explored the circumstances in which a defendant may claim that immunity must be provided to defense witnesses. Although the *Herman* court rejected the claim for immunity in the case before it, it recognized two possible situations in which the due process clause might compel the granting of immunity to defense witnesses. First, it noted that in cases where government actions denying use immunity to defense witnesses were undertaken with the "deliberate intention of distorting the judicial fact finding process," the court has the remedial power to order acquittal unless on retrial the government grants statutory immunity. (589 F.2d at 1204). Secondly, it noted that in certain cases a court may have "inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense." *Id.* (Emphasis added).
>
> *Government of the Virgin Islands, supra* at p. 964.

There is no question that the fact finding process was distorted in the 2005 retrial by the State's refusal to grant Mr. Tovrea use immunity. The only actual issue was whether the murder was committed for the expectation of pecuniary gain.[31] The State deprived Petitioner of his most powerful witness on this, the sole, issue. Likewise, the Court failed to exercise its inherent

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[31] The issue has to be couched this way because the conviction was not overturned. The Petitioner maintains his innocense.

authority to effectuate Petitioner's compulsory process right by granting judicial use immunity to Mr. Tovrea. Nor did the court force the State to justify its refusal to request immunity. Without such a justification, it has to be presumed that the refusal was solely to distort the fact finding process.

The *Virgin Island's* court found its position supported by *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973). The *Virgin Island's* court also found its position grounded in *Brady v. Maryland*, 373 U.S. 83, S.Ct. 1194 (1963), in that the suppression of exculpatory evidence by the Government "was found to trench upon the same due process right to present an effective defense as is implicated here." (*Supra* at p. 971). That court went on to say:

> *Chambers*, *Roviaro* and *Brady*, like *Gideon v. Wainwright*, recognize that the essential task of a criminal trial is to search for truth, and that this search is not furthered by rules which turn the trial into a mere "poker game" to be won by the most skilled tactician. *See Williams v. Florida*, 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970). Thus, these cases resulted in new trials, thereby vindicating the defendant's right to present an effective defense. We are therefore not concerned with a new or unique constitutional right, but rather with the prescription of a new remedy to protect an established right.
>
> * * *
>
> Although we have characterized the immunity remedy as "new," it is new only in the sense of its application to this type of case. Both the Supreme Court and this court have previously found an inherent judicial power to grant witness immunity in order to vindicate constitutional rights. *See Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968) (testimony at 4th Amendment suppression hearing). Moreover, as the *Herman* court indicated when referring to *Simmons*, the Supreme Court case which pioneered the concept of judicial immunity:
>
> > It would seem that a case in which clearly exculpatory testimony would be excluded because of a witness's assertion of the Fifth Amendment privilege would present an even more compelling justification for such a grant (of judicial immunity) than that accepted in *Simmons* itself.
> >
> > *Virgin Islands, supra* at p. 971

This case presents just such a compelling justification for immunity. As stated by the *Virgin Island's* court, this is not a new right, but rather, one deeply entrenched in the due process right to a fair trial. The *Virgin Island's* court also found that the remedy, should the government refuse to extend use immunity in an appropriate circumstance, is dismissal of the charge. Here, it would be dismissal of the (F)(5) aggravator.

The case which squarely addresses the issue herein is *United States v. Straub,* 538 F.3d 1147

(9th Cir. 2008). That case contains a useful overview of the development of what it terms the "selective denial of immunity" doctrine (*Id.*, at p. 1158). In setting out the development of this issue, the 9th Circuit employed what it deemed the "*Williams*" Test[32] (*Id.* at p. 1157). The Test was:

> The prosecution's refusal to grant use immunity to a defense denies the defendant a fair trial only when
> (1) The witnesses testimony would have to be relevant, and
> (2) The prosecution refused to grant the witness immunity with the *deliberate intention* of distorting the fact finding process. . . .
> (*Id.*, at p. 1156) (emphasis added)

The second prong can be satisfied in either of two ways.

> (1) By a showing "that the prosecution intentionally caused a defense witness to invoke the 5th Amendment . . . or,
> (2) The prosecution granted immunity to a government witness. . . but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness.
> *(Id.)* (Emphasis in original).

The first issue was whether the defendant had to prove the prosecution acted with the *purpose* of distorting the fact finding process, or "merely that the prosecution's conduct had the *effect* of distorting the fact finding process." (*Id.*) (Emphasis in original). To answer this question, the *Straub* court backed up and addressed the first prong, "relevance", finding that the defendant need only show minimal relevance, and "need not show that the testimony sought was either clearly exculpatory or essential to the defense." (*Id.*, at p. 1157), citing Westerdahl, 945 F.2d at 1086 (*Id.*). Here, even though not required, Petitioner can show both that Edward Tovrea's testimony was clearly exculpatory in that it directly contradicted his ex-wife Anne Costello, (who testified under a grant of immunity) and was essential to his defense of the pecuniary gain aggravator.

Anne Costello testified at both the 1997 and 2005 trials. (See, R.T. 10-29-97, p. 26-28). She testified substantially identically in the 2005 trial.

The state cross-examined Petitioner, which was interspersed with questions regarding conversations he had had with Anne Costello about killing Jeanne Tovrea. He denied all such

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[32] *Williams v. Woodford*, 384 F.3d 567 C.A. 9 (Cal) (2004).

conversations. (R.T. 11-13-97, p. 22, *et. seq.*).

The State then called Anne Costello in rebuttal. (R.T. 11-14-97, p. 9, *et. seq.*) She testified in great detail to numerous statements she claimed he had made in the course of planning to kill Jeanne Tovrea as a "favor" to Ed Tovrea, Jr. (R.T. 11-14-97, p. 9, et. seq.) Ed Tovrea was the sole witness who could directly contradict Anne Costello as to his conversations with James. His testimony would have been clearly exculpatory and was essential to the defense. The preclusion of his testimony by the State refusing to offer him use immunity, or the court to grant him judicial immunity distorted the fact finding process. Returning to the *Straub* case, it is clear that Petitioner qualifies for relief under the standards therein. Proceeding with its analysis of the second prong of the *Williams* test, that court noted that earlier cases held that something akin to prosecutorial misconduct was required to find that the prosecutor forced a witness to invoke the 5th Amendment (*supra* at p. 1157). That court found that to prevail on this theory, a defendant must show that the prosecution unduly interfered with the witness with conduct that constituted harassment or intimidation (*supra* at p. 1158). There is no question that Mr. Tovrea was both intimidated and harassed. Pursuing a suspect for 17 long years without making an arrest is a textbook definition of harassment and could be nothing other than intimidating.

The second alternative way of satisfying the second prong of the *Williams* test, selective immunity, is an even stronger argument for relief. The *Straub* court, in the detailed review of cases mentioned above, concluded that a defendant need not prove that the Government "deliberately intended" to distort the fact finding process, but rather, need only show that selective immunity had the *effect* of so doing *(supra* at p. 1158) (emphasis added). It noted that the *Williams* test had been expanded in *Westerdahl*[33] *(supra* at 1159) and noted that "the due process clause addresses the defendant's right to a fair trial, not just whether the Government intended to deny the defendant his rights. (*Id.*, at 1160). It reasoned that "even where the Government has not denied a defense witness immunity for the very purpose of distorting the fact finding process, the Government may have stacked the deck against the defendant in a way that has severely distorted the fact finding

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[33] *U.S. v. Westerdahl*, 945 F.2d 1083 C.A. 9 (Or) (1991).

process at trial" (*Id.*, at 1160) and again cited *Westerdahl*. The court noted, as it had in *Westerdahl*, that "where two eye-witnesses tell conflicting stories and only the witness testifying for the Government is granted immunity, **the defendant would be denied any semblance of a fair trial"** *(Id.* at 1159) (emphasis added). Petitioner was denied any semblance of a fair trial and the deck was stacked against him, starting with the 1997 trial.

The trial court took no steps to limit cross-examination of Mr. Tovrea as an alternative to granting immunity. Instead, it was the Court itself which asked the defense why would the State be limited (R.T. 3-22-97, p. 22). It is well settled that the Court can impose reasonable limits on cross-examination of witnesses. *See, Delaware v. VanArsdall*, 475 U.S. 673, 106 S.Ct. 1431 (1959).

There is no question that refusing to grant Ed Tovrea immunity had the effect of so distorting the fact finding process that the trial bore no semblance of fairness. There is no question that the court has inherent authority to immunize a witness when the public interest in fair trials requires it.

To the extent that the 2005 trial counsel failed to raise the foregoing issues, he was ineffective.

JUDICIAL BIAS ARGUMENT

The trial court permitted itself to be exposed to adverse pretrial ex-parte communications by both police and prosecutors, creating an unconstitutionally high risk of the potential for bias.

STANDARD OF REVIEW

The issue of judicial bias is subject to fundamental error analysis and is not subject to harmless error analysis. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967)

A claimant need not prove actual bias to make out a due process violation. *Johnson v. Mississippi*, 403 U.S. 212, 215, 91 S.Ct. 1778 (1971); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S.Ct. 1580 (1986). "Indeed, the Supreme Court has pointed out that it would be nearly impossible for a litigant to prove actual bias on the part of a judge." *Hurles v. Ryan*, 650 F.3d 1301 (2011) *citing Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 858, 129 S.Ct. 2252 at 2262-3 (2009).

> "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchinson*, 349 U.S. 133, 136, 75 S.Ct. 623 (1955). It is the court's duty, not the defendant's to protect the integrity of the court. The burden is on the judge to disqualify herself, even if a party never seeks recusal. See 17A Ariz.Rev.Stat. Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Rule 2.11(A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.") *Hurles v. Ryan*, 650 F.3d 1301, 1315 (2011)

> [The] legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship.
> *Mistretta v. United States*, 488 U.S. 361, 407, 109 S.Ct. 647 (1989)

"The court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Caperton v. A.T. Massey, supra* at 2262.

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.
> *Tumey v. Ohio*, 273 U.S. 510, 532 47 S.Ct. 437 (1927).

The procedures which offered the temptation here were when the same judge who presided over trial also had reviewed and issued the search warrant and took the return of the Indictment. The search warrant affidavit is five and a half single spaced pages which details from start to finish the then-eight year long investigation and brims with facts adverse to Petitioner. This same judge soon thereafter also took the return of the Grand Jury Indictment and learned additional adverse facts, primarily the fingerprint evidence. That the judge was vested with legal authority to take these actions does nothing to lessen the risk that he would be tainted by and biased against Petitioner by so doing. A court's actions, which are "valid under state law may still violate the constitution". *Bright v. Shimoda*, 819 F.2d 227, 229 (9th Cir. 1987). The judges in the *Murchinson, Tumey, Caperton* and *Johnson* cases were all discharging their offices lawfully and yet by their actions violated the due process rights of the respective defendants. There is a positive obligation on the part of a judge not only to be impartial, but to be seen as impartial. *Matter of Haddad*, 128 Ariz. 490, 498, 627 P.2d 221 (1981).

Petitioner is mindful that the judge in question ". . . is one of our most experienced and, deservedly, most respected [on the bench]." *State v. Harrod*, 200 Ariz. 309, 326 (Feldman J. specially concurring, 2001). That being said, the judge could easily avoided any question of

impropriety by utilizing the then-standard practice of having a commissioner rule upon the issue of probable case for the search warrant. *See generally, State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655 (1996). "Even where there is no actual bias, justice must appear fair." *State v. Salazar*, 182, Ariz. 604, 608, 898 P.2d 982 (App. 1995), *quoting McElhanon v. Hing*, 151 Ariz. 403, 411, 728 P.2d 273 (1986).

As is often noted, capital cases mandate an even "greater degree of reliability" than do other cases. *Murray v. Giarratano,* 492 U.S. 1, 9 109 S.Ct. 2765 (1989); *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978 (1976).

In this case, the trial court ruled against the Petitioner on every significant evidentiary matter. This includes, perhaps most importantly, the preclusion of the third party defense, which was not made until the defense case was well under way (R.T. 11-07-97, p. 129). Trial had begun on October 20th. The State had filed a Motion to Preclude the third party defense, which would have named James Majors as the actual killer (Inst. #158). Guisseppi (Joe) Calo had, as part of a deal to avoid the death penalty for seven murders, debriefed to the state. He told police that Majors had confessed the murder to him (*Id.*). The defense filed a response, detailing the many facts which corroborated Calo's claim (Inst. 180). Additionally, Debra Luster, when shown a six person photo line-up on May 21, 1991 picked Majors' photo as looking the "most like" Gordon Phillips (Instruments #135, p. 3; 180 Exhibit A; R.T. 10-01-97, p. 102; 10-21-97, p. 61) (R.T. 10-27-97, p. 87). Extensive argument was had that any inaccuracy goes to the weight, not the admissibility (R.T. 11-07-97, pp. 130-134). Nonetheless, the court precluded the defense (*Id.*, p. 134).

Of equal importance was the preclusion of the results of Petitioner's successful polygraph and preclusion of a residual doubt instruction. This issue is set forth fully in the "change in the law" argument made above and is incorporated herein. It is however worth noting that of all the adverse evidentiary rulings by the court, this ruling alone was supported by the applicable case law. Every other ruling was solely an exercise in discretion and was exercised to the detriment of Petitioner.

Petitioner moved to preclude the identification testimony of Debra Luster as a post-hypnotic statement (Inst. #137) following days of testimony in a pretrial hearing, the court ruled against

Petitioner (R.T. 10-10-97, p. 132) saying "that if the burden of proof was clear and convincing evidence, I would not find clear and convincing evidence." (*Id.*, p. 130).

Prior to trial, the State moved in Limine to Admit the Marital Communications of Petitioner and his ex-wife, Anne Costello (Inst. 129). Initially, the court denied the State's Motion but invited further briefing on the issue of whether Petitioner merely taking the witness stand would waive the privilege (R.T. 10-09-97, p. 66), following further briefing, and after Ms. Costello had testified without being asked any questions involving marital communications, the issue was taken up following the day's testimony on 11-07-97. After observing that, had marital communications "come out in the State's case in chief, it would have been a dead cinch reversal" (R.T. 11-07-97, p. 123), the court went on to Rule that by merely testifying, Petitioner would waive the privilege (*Id.*, p. 124). A request for a stay so that a special action could be filed was denied (*Id.*, p. 128). Nonetheless, a Special Action was taken on November 10, 1997, in mid-trial (Appendix Item 22). The Court of Appeals ruled "the court rules that defendant would not waive the marital privilege merely by taking the stand and testifying." (Appendix Item 23).

This set the stage for Petitioner to testify, which he began doing on 11-12-97, without incident. However, the following day gave rise to possibly the single clearest example of judicial partiality. Petitioner was asked a series of questions whether he had discussed with Hap Tovrea the killing of his stepmother. On the third question, the following occurred:

> Q. Did you ever talk to Mr. Tovrea during any of the time periods exhibited by these charts about killing his stepmother?
> A. I have never had a conversation with anyone regarding killing Mrs. Tovrea.
> Q. My question to you was, did you talk to Mr. Tovrea about killing Ms. Tovrea?
> A. No.
> MR. BERNAYS: And Your Honor. I move to strike his earlier answer as nonresponsive.
> MR. CULBERTSON: No. We object strenuously to that, Judge.
> MR. BERNAYS: That is my objection, Your Honor, not the State's.
> R.T. 11-12-97, p. 60

The following day the issue was taken up with the court observing: "I don't know how much time Mr. Harrod has been on the stand on direct but I would guess at least, what, four hours or so. And probably for three hours and fifty two minutes of that time, there was nothing that would have constituted a waiver of the marital privilege." (R.T. 11-13-97, p. 9). After a lengthy offer of proof

by the state, the court ruled that there had been a waiver and the state could both cross examine Petitioner on statements purportedly made by him to his wife and recall Anne Costello for rebuttal. This has to be seen not just in the larger context of the court ruling against the Petitioner on every substantive evidentiary issue (except when the court knew it would be a "dead cinch reversal") but also in the more specific context that when the state objected to the unresponsive answers by this very witness, the objection was sustained and the motion to strike granted. *See* R.T. 11-12-97, p. 8 and 11-13-97, p. 121. The court's estimate that the privilege had not been implicated in three hours and fifty two minutes is an under estimation. The unresponsiveness was limited to exactly one word; "anyone". Had Petitioner said "him" rather than "anyone" there would not have been an issue. This is a split second lapse. A split second of which the jury would have had no idea of its significance and would have quickly forgotten. Instead additional hours, if not days of adverse testimony was admitted against Petitioner.[34]

The trial court also exhibited partiality when it denied the defense Motion to Preclude Identification testimony, based on the suggestive identification procedures employed by the State (Inst. #134). Petitioner was the only person in the live line-up whose picture Ms. Nolan had previously seen (R.T. 10-10-97, p. 102). The Identification Argument is incorporated fully herein.

The trial court's permitting the fingerprint experts to testify, and the state to argue, that fingerprint identification is made with 100% scientific certainty displayed the court's partiality because the court appears to have been aware that fingerprint identification is a matter of opinion. During a bench conference, the court asked the State "Are you trying to establish that it is, **in his opinion**, it's not a fabricated print?" (R.T. 11-06-97, p. 125, emphasis added). The trial court appears to have been well aware that fingerprint identification was opinion evidence, yet did nothing to force any expert to testify to that effect.

The preclusion of voice spectrograph analysis of the answering machine tape with "Gordon Phillips" voice on it also demonstrates the court's partiality.

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[34] That the jury discounted Anne Costello's testimony does not undo the harm. (Inst. #252, p. 16). Rather, it underscores the "stop at nothing" atmosphere of the trial.

There appears to have been substantial discussion, off the record, of this issue because on 10-30-97 at page 11, Mr. Ahler is arguing against the admission of "voice spectrograph" testimony based on *Frye* and refers to some case law. This appears to have been precipitated by the cross-examination of Curt Costello on 10-28-97, in which he has asked if he had sent out his copy of "Unsolved Mysteries" for "testing" or "analysis" (R.T. 10-28-97, p. 115).

The court mischaracterized the voice analysis as "voice stress analysis," finding that it did not meet the *Frye* standard (R.T. 11-14-97, p. 6). Defense counsel corrected the court, pointing out that voice "stress" analysis was a type of ersatz lie detector test, whereas spectrograph analysis deals with identification issues (*Id*). Nonetheless, the court ruled, just before closing arguments, that the voice comparison testimony was stricken (R.T. 11-17-97, p. 6). This ruling has to be seen in the context of the court having permitted Petitioner's ex-wife and in-laws and a third party to testify that the voice of "Gordon Phillips" on the answering machine tape was that of James Harrod. See, R.T. 10-28-97, p. 110 (Curt Costello), 10-28-97, p. 167 (Elizabeth Costello) 10-28-97, p. 188 (Mark Costello), 10-29-97, p. 61 (Anne Costello) and 11-05-97, p. 37 (Jeff Fauver). Striking the questions and answers of the Costello family members that they had not sent the tape for "voice analysis" had the effect of bolstering their identification of the voice as that of James Harrod, as it eliminated an important impeachment of that testimony.

The court also precluded any argument based on residual or lingering doubt, to Petitioner's obvious detriment. This subject received extensive discussion in *Harrod I.* Needless to say, adding a few more words here will not resolve the issue. Petitioner recommends however Justice Feldman's concurrence, in which he maintains that 13-703(G) is already broad enough to accommodate residual doubt as a mitigator *(Harrod I,* p. 324) and that both Spears and Atwood "intimate if not hold that residual doubt is a mitigating circumstance." (*Id.*, p. 323). *See also, Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978).

What is instructive however, is how the fingerprint evidence was found to be overwhelming

and dispositive.[35] The court notes in its Special Verdict that the court itself did not "have any lingering doubt as to the defendant's role or participation in the murder. . ." (Inst. #258, p. 12). Because lingering doubt and the polygraph results are intertwined, the court went on to state: "As to the polygraph evidence, while this court has previously ruled it inadmissible, both at trial and in these proceedings, it is well aware of the results. However, the court notes that this case and its facts are a *classic example of why polygraph evidence is unreliable, when one considers the 18 fingerprints* defendant left at the scene in various locations. . ." (*Id*) (emphasis added). In other words, the fingerprints were dispositive, no other issue mattered. The over-statement of the significance and reliability of fingerprint evidence is set forth more fully above and is hereby incorporated in this argument as well.

Following the *Ring* remand this same judge presided over virtually all pretrial rulings. These motions included the State's Motion to Preclude Polygraph Evidence (Inst. #311) and its Motion to Preclude Evidence, Argument and Instructions Regarding Residual or Lingering Doubt (Inst. #313). Both motions were granted (Inst. #352). While the instant situation was the same judge presiding over the same defendant on the same charge, the Arizona Supreme Court has spoken disapprovingly of the same Judge presiding over a second charge of the same nature.

> ". . . we believe that there is an appearance of impropriety when a judge who has sentenced the defendant to death in a prior case, also tries the same defendant for another potential death penalty offense. The judge should have recused himself from trying this defendant for the second murder.
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> *State v. Vickers*, 138 Ariz. 450, 452, 675 P.2d 710 (1984).

The potential for bias by this judge did not go unnoticed. On 8-26-03 Petitioner himself filed a Rule 10.1 Motion for Change of Judge for Cause (Inst. #310). This motion was summarily denied by the same judge as was the subject of the motion as not being entitled to hybrid representation (Inst. #318). Subsequently, on 3-31-04, defense counsel filed a similar motion, alleging that the trial judge had pre-existing opinions and was prejudiced against him (Inst. #357). The State responded that the Motion was untimely (Inst. #360). This motion was denied as

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[35] The court notes as it did in the Special Verdict . . . that the evidence against Defendant was overwhelming (Inst. #499 MEO).

untimely, (Inst. #367). It was ineffective assistance of counsel to not have been alerted to the issue by the 8-26-03 *pro per* motion and taken appropriate steps to preserve the issue.

As in 1997, the trial court decided every significant evidentiary issue to Petitioner's detriment with one additional major factor; the Court's refusal to order the State to extend immunity to Hap Tovrea or to limit the State's cross-examination of him. (R.T. 3-22-05). This argument is set forth fully in the "selective immunity" argument above but is fully incorporated herein as another example of partiality by the court against Petitioner.

The issue of judicial bias is not merely academic. The 9th Circuit Court of Appeals found the probability of actual bias in a Maricopa County case litigated around the same time as Petitioner's arrest, *Hurles v. Ryan*, 650 F.3d 1301 (2011). The court succinctly summed up the case in the second paragraph of its opinion:

> For the reasons set forth below, we reverse the district court's denial of Hurles's judicial bias claim. The highly unusual facts of this case–in which the trial judge became involved as a party in an interlocutory appeal, was denied standing to appear as an adversary, and then proceeded to preside over a murder trial and single-handedly determine Hurles's death sentence–compel us to conclude that Hurles was denied his right to due process. These exceptional facts raise the probability of actual bias to an unconstitutional level.
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> *Id.* at 1304.

The court went on to describe the conduct using the language of Arizona Court of Appeals

> The Arizona Court of Appeals published a decision denying Judge Hilliard standing to appear in the special action and ruling it improper for judges to file pleadings in special actions solely to defend the correctness of their decisions. *Hurles v. Superior Court*, 174 Ariz. 331, 849 P.2d 1 (App. 1993). Addressing Judge Hilliard's participation specifically, the court held that it was "of the inappropriate 'I-ruled-correctly' sort," which violated the "essential [principle] to impartial adjudication" that judges must have "no personal stake – and surely no *justiciable* stake – in whether they are ultimately affirmed or reversed." *Id.* at 4 (emphasis in original). The court then declined jurisdiction over the petition. *Id.*
>
> *Id.* at 1306.

Two things about this are of particular interest. Once, the judge herein was himself the subject of just such an interlocutory appeal when he ruled that Petitioner would waive the marital privilege simply by taking the witness stand at his trial (see: this argument above). He received an adverse ruling on this special action from the Court of Appeals. Second, the judge herein, following the published opinion of *Hurles v. Superior Court* (*supra*) did himself, in his capacity as Presiding Criminal Judge, take a special action to the Arizona Supreme Court, urging that the

Arizona Court of Appeals had "wrongly decided the case" (Appendix, Item 24). It is of particular importance to note that, by taking the Special Action to the Arizona Supreme Court, the Presiding Criminal Judge stepped into the shoes of Judge Hilliard because: "Respondents determination that Petitioner has no standing to appear in the *Hurles* special action prohibited Petitioner from petitioning for review of that ruling." (Appendix, Item 24, p. 2). In other words, the Presiding Criminal Judge, the very judge in this case, saw nothing wrong with the position taken by Judge Hilliard and saw nothing wrong with the court involving itself in conduct which had just been deemed improper.

This issue is not just the idle musing of Petitioner. The 9th Circuit itself made this very point.

> The presiding criminal judge of the Maricopa County Superior Court, Ronald S. Reinstein, petitioned for a special action to the Arizona Supreme Court following the Court of Appeals's ruling in *Hurles v. Superior Court* in order to defend a judge's ability to appear in such proceedings. *See* Pet. For Special Action, CV-93-0135-SA (Apr. 20, 1993). In that petition, Judge Reinstein referred to the pleadings in the Hurles special action as "Judge Hilliard's response," *Id.*, at 6, and highlighted the direct participation of judges in defending their rulings or policies in special action proceedings. Judge Reinstein also argues that if judges are not able to appear in special actions like Hurles's – actions in which the state has no standing to appear – the proceeding would "completely lose[ ] its adversarial quality." *Id.*, at 4. The Superior Court's presiding criminal judge thus assumed judges in this type of posture are indeed adversaries of the party bringing the appeal.
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> *Hurles v. Ryan, supra* at 1317-18.

The *Hurles* case was working its way through the Arizona Courts at the same time as was Petitioner's case. *See State v. Hurles,* 914 P.2d 1291 (1996). *Hurles* is a time capsule revealing the judicial culture in Maricopa County in the 1990's. That culture is reflected in the 9th Circuit's summation of the foundation of which it found Judge Hilliard's apparent bias

> In her responsive pleading, Judge Hilliard commented on the overwhelming evidence of guilt the state had assembled against Hurles, evidence which rendered the case "very simple and straightforward." These comments took place months before any evidence had been presented in the case.
>
> *Hurles v. Ryan, supra* at 1306

The 9th Circuit then drolly concluded: "According to Judge Hilliard, the case was simple because he was obviously guilty." (*Id.,* at p. 1318).

This observation bears an uncanny parallel to the great weight given to the fingerprint evidence in this case; they were treated as overwhelming, dispositive evidence of guilt. The trial court, in its special verdict noted that it did not "have any lingering doubt" as to Petitioner's guilt

and the fingerprints proved the unreliability of the polygraph results. (Inst. #258, p. 12).

Petitioner has already noted the high regard and esteem this judge enjoyed from members of the bench and bar, but no one is infallible nor immune from presenting the wrong impression. When the record is examined as a whole, it presents an unconstitutionally high risk of potential bias.

BURDEN SHIFTING

Both the State and Defense Conflated the Mitigation Burdens of Proof and Persuasion, Unconstitutionally Shifting the Burden of Persuasion to the Defendant. This error was Compounded by the Misdescription of the Sentencing Decision as Fact-Based and Involved "Weighing".

STANDARD OF REVIEW

Structural error. Errors that create "defects . . . in the trial mechanism" itself affect the "entire conduct of the trial from beginning to end" damage "the framework within which the trial proceeds" and are therefore not subject to harmless error analysis. *Arizona v. Fulmanante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 1265 (1991); *State v. Anderson*, 197 Ariz. 314, 323 4 P.3d 369, 379 (2000).

Burden shifting is fundamental error requiring reversal. *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984); *State v. Johnson*, 173 Ariz. 274, 842 P.2d 1287 (1992).

That there is not a burden on the defendant to prove that the mitigating circumstances are sufficiently substantial to call for leniency is perfectly clear.

> ". . . the statutory scheme does not place any burden of proof on the defendant in connection with establishing that the mitigation evidence is sufficiently substantial to call for leniency.
> *State ex rel Thomas v. Granville, Baldwin RPI,* 211 Ariz. 468, 472, 123 P.3d 666 (2005)

Of the sixteen jurors seated for trial fully ten of them were told during voir dire by either or both the state and defense that the defendant bore the burden of proving that the mitigating circumstances were sufficiently substantial to call for leniency. This is burden shifting and is reversible error. *See: State v. Johnson,* 173 Ariz. 274, 842 P.2d 1287 (1992); *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984).

Somewhat clumsily the State told #29 ". . . the defense then has the opportunity to present mitigating evidence to try to demonstrate to you leniency, and if they haven't been able to prove that to your satisfaction. . ." (R.T. 9-14-05, p. 38). #34 was told ". . . the defense has an

opportunity to present mitigating circumstances to find out why the defendant should not receive the death penalty, why if there is sufficient mitigation that's presented and its substantial enough to demonstrate to you that he should be spared." (R.T. 9-15-05, p. 175).

The defense explained the process to #60 ". . . [we] would put forth mitigating evidence which we would argue would be sufficiently substantial to call for a life sentence." (R.T. 9-14-05, p. 125). The state explained to #83 that the defense would "argue for leniency, and the standard they have to meet is that this mitigation is sufficiently substantial to call for leniency" (R.T. 9-14-05, p. 209). In the single clearest instance of burden shifting the state told #87 "and if they are able to present sufficient mitigation, sufficiently substantial to call for leniency, then the jury is to vote for life." Adding in the next exchange ". . . and the defense has not met their burden of proof of sufficient mitigation, sufficiently substantial to call for leniency, [could you vote for death]?" (R.T. 9-15-05, p. 20). There were two instances with #88 in which the state shifted the burden: "But that's their burden. They have to demonstrate that to you. And the mitigation has to be sufficiently substantial to call for leniency." (R.T. 9-15-05, p. 26). And ". . . if the defense has demonstrated mitigation sufficiently substantial to call for leniency, would you be willing to say 'Yeah, it's a life sentence'?" (*Id.*, p. 27). The state told #91 ". . . it then shifts to the defense to prove – it's their burden to prove any mitigation, and the standard in this state is that the mitigation has to be sufficiently substantial to call for leniency." (R.T. 9-15-05, p. 42). The state told #93 "The burden then shifts to the other side, the defense, to prove to you that there is mitigation sufficiently substantial, that's the standard, to call for leniency." R.T. 9-15-05, p. 55). The state told #96 "If they demonstrate that to you, that there is mitigation and that mitigation is sufficiently substantial to call for leniency, then the sentence would be life." (R.T. 9-15-05, p. 78). And finally, the state told #98 ". . . they have the burden of persuading you that mitigation exists . . . and that that mitigation is sufficiently substantial to call for leniency." (R.T. 9-15-05, p. 98).

That the state maintained the burdens were conflated is not surprising, in that they filed a motion advocating this position on May 28, 2004 (Inst. #369) and argued this position while jury instructions were being settled (R.T. 10-20-05, p. 73). They did so at their own peril, as the parties and the court were aware that this very issue had been the subject of oral argument a few days

earlier before the Arizona Supreme Court in *Baldwin*. (R.T. 10-20-05, p. 78). What is unclear is how the correct statement of the law was presented in the final instructions: "Neither the state nor the defendant has the burden of proving the weight of the mitigation is or is not sufficiently substantial to call for leniency." (Inst. #633, p. 5). Presumably, it was one of a number of jury instructions prepared by the court in the wake of the *Ring* opinion (R.T. 10-20-05, p. 72).

The improper burden shifting created defects in the trial mechanism fatal to the proceeding.

751(E) ARGUMENT

Instructing the Jury that they "Must" Impose the Death Penalty if they Unanimously Find that the Mitigation Was Not Sufficiently Substantial to Call for Leniency Violated Petitioner's Right to Due Process of Law Under the 5th and 6th Amendments by Invading the Province of the Jury.

Standards of Review

Courts review de novo whether jury instructions adequately state the law. *State v. Gallardo*, 225 U.S. 560, 567, 242 P.3d 159, 166 (2010).

The interpretation and application of a statute is a question of law which the court reviews de novo. State v. Grell, 212 Ariz. 516, 135 P.3d 696 (2006).

The final jury instructions in this matter said, *inter alia*: "If you unanimously find the mitigation is not sufficiently substantial to call for leniency, you **must** impose the death penalty." (Inst. #633, p. 5, emphasis added). This language is drawn from A.R.S. §13-751(E)[36] which uses "shall" rather than "must". Developments in 6th Amendment jurisprudence starting with *Jones v. U.S.*, 526 U.S. 227, 119 S.Ct. 1215, (1999)[37] mandate that the sentence in this matter be vacated for invading the province of the jury.

The opening brief on direct appeal in this matter took note of *Jones* and argued that "the aggravating factors that a judge finds under Arizona law are really elements of the offense which must be found by a jury." *State v. Harrod*, 200 Ariz. 309, 318, 26 P.3d 492 501 (2001) (Harrod I). That opinion noted that after the briefs were filed in that appeal the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), which, like *Jones*, distinguished

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[36] Renumbered from §13-703(E).

[37] *Jones* was a non-capital case.

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990). *Harrod I* at 501. Citing the Supremacy clause, *Harrod I* declined to address the issue saying "We are thus bound to follow *Walton* unless the Supreme Court overrules it." (*Id*).

Arizona did not have to wait long for *Walton* to be overruled, as the Supreme Court decided *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428 in 2002. Justice Ginsberg, writing for the majority abandoned any distinction between capital and non-capital defendants holding:

> "*Apprendi's* reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, *supra* at 589.

Prior to the 2005 retrial, the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) in which it reiterated the long provenance of 6th Amendment rights and consolidated its jurisprudence following *Jones*. (*Id.*, at 302). The *Blakely* opinion made express the far reaching and fundamental distribution of power in the courtroom between the citizenry and the government. As Justice Scalia, writing for the majority expressed it:

> Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent but a **fundamental reservation of power** in our constitutional structure. **Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.**
> *Blakely, supra* at 306-7 (citations omitted, emphasis added)

Stated simply, the government may no more tell a citizen at the ballot box that he "must" vote for candidate "A" than it can tell the citizen in the jury box that he "must" vote for death. The jury instruction given herein invaded the province of the jury and is fundamentally at odds with Arizona's claim that its capital sentencing scheme does not create a presumption of death.

> ¶12 The State concedes that A.R.S. §13-703(E) has been interpreted as not creating a "presumption of death" and acknowledges that a jury may return a verdict of life in prison even if the defendant decides to present no mitigation evidence at all. *See, e.g. Glassel*, 211 Ariz. at 52, ¶72, 116 P.3d at 1212 (rejecting presumption of death argument); *State v. Van Adams*, 194 Ariz. 408, 422, ¶ 55, 984 P.2d 16, 30 (1999) (to same effect).
> *Baldwin, supra* at 471, 665

If a jury may return a verdict of life in prison even if the defendant presents no mitigation whatsoever, the jury should be told so, rather than being told they "must" impose death. The issue

is that the statute and the jury instruction invades the province of the jury when it tells them they "shall" or "must" impose a sentence of death under a specific set of circumstances. The question of what is the appropriate sentence is not a fact question to which a mechanical equation can be applied, it is rather a juror's individual "sentencing decision" (*Baldwin,* at 473 ¶21). A citizen, sitting as a capital juror is not, and cannot, be required to surrender his own reasoned, moral judgment as to the appropriate penalty and substitute that of the government.

This unconstitutional interpretation of §13-751(E) can be resolved by finding that the word "shall" is permissive rather than mandatory.

> The word "shall" normally indicates a mandatory provision while "may" generally indicates a permissive one. *Walter v. Wilkinson*, 198 Ariz. 431, 432, 10 P.3d 1218, 1219 (App. 2000). *State v. Seyrafi*, 201 Ariz. 147, 151, 32 P.3d 430, 434 (App. 2001).

However, under certain circumstances, Arizona Courts have interpreted the word "shall" in statutes to indicate a permissive, rather than mandatory action. In one such instance, directly on point, this court addressed the jury's discretion in finding the adequate measure of redress for a death in a civil case. This is exactly the task of a capital jury in the penalty phase of trial. That case was interpreting A.R.S. §12-613.

> "'In an action for wrongful death, the jury shall give such damages as it deems fair and just . .. [h]aving regard to the mitigating and aggravating circumstances . . . [.]'. The fact that the statute uses the term "shall" does not render it mandatory for such a term may be defined as "must" or "may"depending on the context of the provision and the intent of the drafters. (Citations omitted) We believe that the use of the word "shall" in our wrongful death statute is not mandatory but permissive." *State v. Sanchez*, 119 Ariz. 64, 68, 579 P.2d 568, 572 (1978).

Here, the very same issue is addressed, the jury's measure of the adequacy of redress for a death, but in a criminal context. That both statutes speak of the role of "aggravating and mitigating circumstances" in assessing the proper measure of redress for a death is strong evidence that the word "shall" in §13-751(E) should likewise be construed as permissive, rather than mandatory. Finding that the word "shall" is permissive in this context finds support in the Supreme Court's 6th Amendment jurisprudence

> While we think the fairest reading of § 2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view. Any doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule, repeatedly affirmed, that "where a

> statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson, Co.*, 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909); *see also United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916).
>
> *Jones v. United States, supra* at 239.

At most, the jury instruction herein should have said that the jury "may" impose death. Doing so would have been entirely consistent with the findings of *Glassel* and *Baldwin* stating that jurys are free to return a verdict of a life sentence even if the defense offers no mitigation at all. A capital juror's moral sense of when a death sentence is justified is potentially a disagreement that citizen has with the government over a matter of public policy. The government, as is made clear in *Witherspoon,* cannot disenfranchise a citizen, either by striking them from the jury panel or telling them they "must" vote for death, when he merely disagrees with the government over a matter of public policy. If a juror feels that a particular instance of first degree murder does not warrant death, even with the finding of an aggravating circumstance, the government cannot tell him he "must" find otherwise. This is, in essence, the juror finding the circumstances of the offense to operate as a mitigating circumstance, which the law, in §13-751(G) allows him to do.

The law has long since held that the invasion of the province of the jury requires reversal. A "judge is without power to direct a verdict of guilty, although no fact is in dispute." *United States v. Taylor (C.C.)*, 11 Fed. 470 [3 McCrary 500 (1882)]; *Horning v. District of Columbia*, 254 U.S. 135, 139, 41 S.Ct. 53 (1920) (Justice Brandeis, dissenting).

The *Horning* decision ultimately repudiated

> *Horning's* holding that it was harmless error, if error at all, for a trial judge effectively to order the jury to convict, *see* 254 U.S., at 138, 41 S.Ct. at 54, has been proved an unfortunate anomaly in light of subsequent cases.
>
> *U.S. v. Gaudin*, 515 U.S. 506, 520, 115 S.Ct. 2310, 2318 (1995).

The jury instruction herein, with its "must impose the death penalty" language directed a verdict of death, invading the province of the jury in violation of the 5th, 6th and 14th Amendments.

WITHERSPOON/BLAKELY ERROR

THE VOIR DIRE EXAMINATION INVADED THE PROVENCE OF THE JURY WITH IMPROPER "FOLLOW THE LAW" QUESTIONS.

STANDARD OF REVIEW

Absent an objection at trial, only claims of fundamental error can be raised for the first time on appeal. *State v. Holder*, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987).

There were six veniremen, three of whom were seated as jurors, who were not opposed to the death penalty with whom the state nonetheless used "follow the law" questions to coerce them into surrendering their own moral sense of when the death penalty was appropriate and instead, accept that of the state's.

In 1968 the Supreme Court limited the State's ability to remove for cause jurors who hold strong conscientious or religious objections to the death penalty in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968). The court held ". . . that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can be put to death at the hands of a tribunal so selected." (*Id.* at 521, 522, 88 S.Ct. at 1776-77). The *Witherspoon* court noted that it was foreseeable that even persons who opposed the death penalty could still be fairly seated as jurors.

> FN7. It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State. *See Commonwealth v. Webster,* 59 Mass. 295, 298. *See also Atkins v. State*, 16 Ark. 568, 580; *Williams v. State*, 32 Miss. 389, 395–396; Rhea v. State, 63 Neb. 461, 472–473, 88 N.W. 789, 792.
>
> *Witherspoon, supra*, FN7 at 515.

This standard was refined by *Wainwright v. Witt,* 469 U.S. 412, 1055 S.Ct. 844 (1985). In *Wainwright* the court held that a person's opposition to the death penalty need not be proven with "unmistakable clarity" but a venireman may be stricken for cause if his views "would prevent or substantially impair the performance of his duties as a juror. . ." *Id.*, at 412, *quoting Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2528 (1985).

Gray v. Mississippi, 481 U.S. 648, 658, 107 S.Ct. 2045, 2052 (1987) emphasized: "The State's power to exclude for cause jurors from a capital case *does not extend beyond* its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths'. *Wainwright v. Witt*, 469

U.S. at 423, 105 S.Ct. at 851." *Gray v. Mississippi, supra* at 658 (emphasis added).

All of the above were capital cases. They authorize questioning potential jurors whether they can set aside their beliefs and "follow the law" only when their opposition to the death penalty might disqualify them for service.

In the instant case the state went far beyond any legitimate interest, hectoring jurors who were not even opposed to the death penalty to "follow the law" and defer their own autonomous sense of moral certitude of when the death penalty was appropriate to that of the state's. There is simply no support whatsoever in case law to justify these questions. The jurors who were subjected to improper "follow the law" conditioning were: #34 (death penalty only if "particularly heinous circumstances involved", R.T. 9-15-05, p. 174), #87 (death penalty only if a violent crime with little motive, R.T. 9-15-05, p. 18) and #93 (death penalty only when the crime is so heinous there is no alternative, R.T. 9-15-05, p. 52). There was simply no legal or factual predicate for the state to tell these jurors that they were required to set aside their own moral convictions and substitute that of the state's. Capital jurors are the "conscience of the community." *Witherspoon, supra* at 519, 88 S.Ct. at 1775. These jurors were not opposed to the death penalty and frustrated no legitimate interest of the state. This misstatement of the law transformed these jurors into mere conduits for the state's opinion in violation of the 5h Amendment to the United States Constitution and Article 2 § 24 of the Arizona Constitution. If there was any doubt that this was an unconstitutional infringement on the right to a trial by jury, Justice Scalia resoundingly dispelled it in *Blakely*:

> Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the peoples ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.
>
> *Blakely v. Washington*, 542 U.S. 296, 306-7 (2004) (emphasis added)

These jurors were absolutely entitled to use their own moral calculation in assessing the strength of any aggravation and mitigation in deciding what punishment, to them, was appropriate. A citizen's reluctance to impose death except under those circumstances they feel warrant it is exactly what they are expected to do as the conscience of the community. The state thwarted their role by bullying them into accepting the state's "moral calculation" instead of their own, thereby

depriving petitioner of a fair trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner Received Ineffective Assistance of Counsel in Both the 1997 Trial and the 2005 Retrial.

STANDARD OF REVIEW: Claims of Ineffective Assistance of Counsel are Mixed Questions of Law and Fact and are Reviewed *De Novo*. *Allen v. Woodford*, 366 F.3d 823, 836 (19th Cir. 2004).

> To prove ineffective assistance of trial counsel, a petitioner must show both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 1984); Ketchum, 191 Ariz. at 416, 956 .2d at 1238. *State v. Donald*, 198 Ariz. 406, 413, 10 P.3d 1193 (Div. 1, 2001)

To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness". *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003) *quoting Strickland v. Washington*, 466 U.S. 668, at 688, 104 S.Ct. 2052 (1984). This performance is measured by simple reasonableness under prevailing professional norms (*Id*).

The 1997 Trial

Performance of trial counsel in a capital case was subject to the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter: Guidelines). These guidelines recognized that "a capital trial is, in substance, two separate trials – the guilt/not guilty trial and the penalty trial." (Commentary to Guideline 1.1). This commentary states that, for many cases for which there is no credible argument for innocence, "the life or death issue of punishment is the real focus of the entire case." (*Id*). That Mr. Harrod's case was arguably within the category of cases was reasonably foreseeable, given the understanding of forensics at the time. The commentary emphasizes the need for adequate preparation of mitigating evidence and it is in this regard that counsel's performance was deficient. Trial counsel spoke with his successor counsel. He admitted to them that this case was one of the first capital cases of his career, and his first [as lead counsel], that he "came late" into the case and was "overwhelmed" with the volume of documents related to the guilt/innocence phase and did little to prepare mitigation. Further, he admitted to having "no idea" of how to investigate or proceed with mitigation (Inst. #422, p. 2).

The voir dire and cross examination of Pat Wertheim was inept and fell below prevailing professional standards. This issue is developed above in the fingerprint argument (Pat Wertheim's Methodology) which is hereby incorporated herein. It was prejudicial because it permitted Mr. Wertheim to testify falsely that he had identified Petitioner from his fingerprints.

A presentence report was privately prepared (Inst. #264). The report contains an extremely superficial social history. Attached to the report is the report of Polygrapher Dr. David Raskin, who is of the professional opinion the Petitioner was truthful in denying any involvement in the murder. No mitigation specialist was retained. The defense prepared a sentencing memorandum (Inst. #252). A mitigation hearing was commenced on April 6, 1998. An attempt to offer the polygraph results as mitigation was denied (R.T. 4-6-98, p. 6). Two Detention Officers testified on Petitioner's behalf (*Id.*, p. 15, *et. seq.*, p. 29, *et. seq*). The hearing was reconvened the following month on May 6, 1998. The Petitioner addressed the court denying his guilt and criticizing the evidence (5-06-98, p. 43-53). This minimal preparation and presentation of mitigation was deficient and fell below prevailing professional standards.

The defense did not subpoena anyone from the MECA Board of Directors, nor Ed Tovrea, Jr. As pecuniary gain had been a major component of the state's case, failure to call any of these persons fell below prevailing professional standards. Also of critical importance was Ms. Luster's identification of Petitioner as Gordon Phillips, (R.T. 10-27-97, pp. 24-45). Mr. Phillips' behavior was such that, at her daughter's prompting, Ms. Tovrea called the compound's security guards, who patrolled the perimeter in response (*Id.*, p. 45). The defense did not call witnesses who could have contradicted Debra Luster's claim of having called security following his visit. Defense had in their possession a departmental report in which the manager of the resort property advised the Phoenix Police Department that there was no record of a "Gordon Phillips" having been on the property, nor of security guards having been called by Ms. Tovrea (Appendix, Item 14). The defense called no expert witness on memory or eyewitness testimony to counter the identification of Petitioner by Debra Luster. The harm presented by this lack of rebuttal, and resultant prejudice, is set forth above in the Identification Argument and hereby incorporated herein.

The 2005 Trial

The juror voir dire and jury selection in the 2005 retrial fell below prevailing professional standards by (1) failing to move for immunity for Hap Tovrea, (2) the use of improper general fairness and "follow the law" questions, (3) conflating the burdens of proof and persuasion for mitigation, (4) making no attempt to rehabilitate veniremen inclined against the death penalty and (5) inadequately voir diring veniremen who were predisposed to inflict death, and failing to move to strike these veniremen for cause, all to the prejudice of Petitioner. The failure to move for immunity for Hap Tovrea is set out in the Selective Immunity argument above and is incorporated herein.

Both parties, as well as the court asked general fairness and "follow the law" questions. Literally every venireman with any type of issue was asked by the State if they would "follow the law" or some variant thereon. These types of questions are insufficient to detect those jurors who would invariably impose death. *Morgan v. Illinois*, 504 U.S. 719, 734, 112 S.Ct. 2222, 2232 (1992). In fact, these questions actually camouflage such jurors, permitting them to evade a Motion to Strike for Cause and such questions should have been objected to each and every time. To the contrary, both the court (R.T. 9-13-05, pp. 110-111) and defense counsel asked "follow the law" questions (*Id.*, pp. 124-125) and received answers which, in one particular instance, was so clearly disingenuous that a strike for cause was granted (*Id.*, p 128, 129).

The improper "follow the law" *voir dire* for veniremen 34, 87 and 93 is set out above in the *Witherspoon/Blakely* error argument and is hereby incorporated herein. Failing to object to this *voir dire* as invading the province of the jurors fell below prevailing professional standards.

The second IAC argument of error, conflating the mitigation burdens of proof and persuasion is set out above in the Burden Shifting argument which is hereby incorporated herein. Failing to object to this burden shifting by the state, indeed, its commission by the defense, fell below prevailing professional standards.

The third IAC assignment of error, failing to attempt to rehabilitate anti-death penalty veniremen occurred in 7 out of 8 occasions. These occasions consisted of either the feeblest attempts at rehabilitation or actually counter-productively reinforcing the rigidity of their position,

and each time having no objection to the state's motion to strike for cause. On 9-13-05 this occurred with #4 (R.T. 9-13-05, pp. 72-75). On 9-14-05 it occurred with #48 (R.T. 9-14-05, pp. 81-86); #58 (pp. 114-116); #59 (pp. 116-120); #62 (p. 127-130); #75 (pp. 194-198) and on 9-15-05 with #92 (R.T. 9-15-05, pp. 48-51). The sole exception was on 9-13-05 when the defense successfully opposed the state's strike for cause of #37 (R.T. 9-13-05, pp. 179-188). Unfortunately, this victory was short lived. #37 expressed his frustration with the process and he was recalled and stricken for cause (R.T. 9-15-05, pp. 3-4).

There were 7 veniremen, 4 of which were seated on the jury who were excludable for cause under *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (1992), had a motion to strike been made.

> *Witt* held that "The proper standard for determining when a prospective juror may be excluded for cause because his or her views on capital punishment . . . is whether the jurors views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"
>
> *Morgan, Id.*, at 728

#16 would impose death if the murder was premeditated but not if it were "spur of the moment" (R.T. 9-13-05, p. 140). Rather than moving to strike for cause, the defense rehabilitated him (*Id.*). He was seated on the jury. #31 also would impose death for premeditated murder (R.T. 9-13-05, p. 172). The defense likewise rehabilitated him with a "follow the instruction of the court" question (*Id*). A peremptory strike was used to keep him off the jury when he could have been stricken for cause.

#43 was a *Morgan*-excludable automatic death penalty imposer "I believe every person is, or should be sentenced to death" (R.T. 9-14-05, p. 73). Rather than strike for cause, the defense rehabilitated him (*Id.*, p. 74). He was seated on the jury (R.T. 9-15-05, p. 105).

#46 believed in "an eye for an eye" the classic death penalty rationale (R.T. 9-14-05, pp 76, 79-80). Again, rather than a strike for cause, the defense rehabilitated (*Id.*, p. 80). A peremptory strike had to be used on him. #53 was a *Morgan*-excludable death sentencer. Defense counsel summed up her questionnaire answers as ". . . because somebody commits murder, they should receive the death penalty. Am I reading that wrong?" (R.T. 9-14-05, p. 102). #53 did not disagree *(Id)*. Again, rather than strike for cause, the defense rehabilitated her with a "follow the judges instruction" question (*Id.*, p. 103) and a peremptory strike was required to not empanel her.

#60 was mitigation impaired and unable to think of any mitigation which would persuade him to grant a life sentence (R.T. 9-14-05, p. 125). He also was rehabilitated by the defense *(Id)* and was seated on the jury.

Had a motion for a strike for cause been made on each of these persons and denied by the court, the seating of them on the jury (three were) would have been constitutional error. As stated in *Morgan* ". . . because the constitution guarantees a defendant on trial for his life to have an impartial jury, the trial courts failure to remove the juror for cause was constitutional error under the standard enunciated in *Witt.*" And "if even one such juror is empaneled and the death sentence imposed, the State is disentitled to execute the sentence." *Morgan v. Illinois, supra* at 728, 729. The failure to make a motion to strike for cause for each of these persons fell below prevailing professional standards.

The fourth IAC assignment of error occurred during the direct examination in the penalty phase of Steven Fulton, an employee of the Arizona Department of Corrections (R.T. 10-19-05, p. 4). He knew Petitioner from his work as a classification officer at SMU-2 (*Id.*, p. 6). During his testimony he disclosed that SMU-2 was death row (*Id.*, p. 11).

Q. And at SMU-2, I'm assuming all the inmates were a level 5?
A. Death row inmates are P-5.

(*Id.*, p. 12)

The defense attorney seemed oblivious to the damage resulting from disclosing to the jury that Petitioner had previously been sentenced to death. This jury had been given a directed verdict of guilt and not heard all the evidence. They would reasonably conclude that if Petitioner had been once sentenced to death by the body which had heard all of the evidence, it must be the correct sentence, drastically reducing their sense of responsibility to reach their own, independent decision.

PORTILLO ARGUMENT

The *Portillo* Instruction Given in the 1997 Trial Lowered the Burden of Proof on the State and Shifted the Burden of Proof to the Defendant.

STANDARD OF REVIEW

Courts Review *De Novo* Whether Jury Instructions Adequately State the Law. *State v. Gallardo,* 225 Ariz. 560, 567, 242 P.3d 159, 166 (2010).

At trial, the court gave a variation of the mandatory *Portillo* instruction (Inst. #228, p. 5) *see*

State v. Portillo, 182 Ariz. 582, 596, 818 P.2d 920, 924 (1995). Petitioner timely objected that the instruction both lowered the burden of proof on the state and shifted the burden to prove lack of guilt to the defendant. (R.T. 11-14-97, p. 88). Specifically, he argued the instruction lowered the burden of proof by its use of the phrase "firmly convinced". This phrase is problematic for two reasons: (1) it is virtually identical to the intermediate burden of proof "clear and convincing" and (2) it utterly dispenses with the critical consideration that the burden on the state is proof *beyond* a reasonable doubt. Neither lesser burden of proof, whether "preponderance" or "clear and convincing" has any language analogous to this critical concept. It is this concept of proof *beyond* a certain standard which gives the criminal burden its vitality and best conveys what distinguishes it from lesser burdens of proof. Without question "reasonable doubt" is a higher standard and meant to convey that a greater degree of certainty is required, in and of itself. But it is the concept of the proof having to be *beyond* even this higher standard which sets the criminal burden apart and distinct from any other burden of proof. "Firmly convinced" conveys none of this. "Firmly convinced" is just another bland increment on the continuum of persuasion, and one which is virtually indistinguishable from the intermediate burden of "clear and convincing" evidence.

"Firmly convinced" deflates and drains the vitality from proof beyond a reasonable doubt. It is a lesser burden. While deferential to State's definitions of reasonable doubt the Supreme Court it will find error "if there is a reasonable likelihood that the jury in fact understood the instructions to permit conviction based on proof below the reasonable doubt standard." *Portillo, supra* at 594, *citing Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239 (1994). The *Portillo* court goes on to say "If an instruction improperly reduces the State's standard of proof, such error is structural and cannot be harmless. *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 2082-83 (1993)" (*Id*).

The other objection to the *Portillo* instruction was that it shifted the burden to show lack of guilt to the defendant (R.T. 11-14-97, p. 88). The language in question is: "If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the defendant the benefit of the doubt and find the defendant not guilty." (Inst. #228, p. 5). A defendant is entitled to require that the Government prove he is guilty of every element of the crime with which he is

charged. *United States v. Gaudin,* 515 U.S. 506, 510, 115 S.Ct. 2310 (1995). "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). The language from the *Portillo* instruction cannot be reconciled with these cases. A juror may be "firmly convinced" of a defendant's guilt while being quite well aware that the State has not proven an element of the offense beyond a reasonable doubt. And that juror may *not* think "there is a real possibility that the defendant is not guilty" and be completely unaware of his duty to acquit under these circumstances as a result of this instruction. The instruction places the burden on the defendant to prove the "real possibility" he is not guilty and that "real possibility" will always be something more than the lack of proof beyond a reasonable doubt as to an element of the offense. The instruction entirely obviates the requirement that the state prove its case, and every element of the offense, beyond a reasonable doubt.

It is fundamental error to give jury instructions which improperly shift the burden of proof to the defense. *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984); *State v. Mincey*, 130 Ariz. 389, 398, 636 P.2d 637, 646 (1981) *cert. denied* 455 U.S. 1003, 1205 S.Ct. 1638 (1982).

RESTRICTIVE MITIGATION ARGUMENT

The permitted mitigation evidence was restricted in scope violating the Due Process Clause to the prejudice of Petitioner.

STANDARD OF REVIEW

Courts review de novo whether jury instructions adequately state the law. *State v. Gallardo*, 225 U.S. 560, 567, 242 P.3d 159, 166 (2010)

Rulings admitting or excluding evidence are reviewed for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 756 P.2d 853, 858 (1990).

The 2005 jury was instructed, in pertinent part:

> You are not limited to these mitigating circumstances, or any other suggested by the parties. You may also consider any other information admitted as evidence during the aggravation phase or the penalty phase that is relevant in determining whether to impose a sentence less than death **so long as it relates to** an aspect of the defendant's background, character, propensities, record, or circumstances of the offense. As a juror and a sentencer in a death penalty case, you must give consideration to all relevant mitigating evidence presented.
>
> Inst. #633, p. 4 (emphasis added)

This was an impermissible restriction on the scope of what qualifies as mitigation in violation

of the 5th, 6th, 8th and 14th Amendments to the U.S. Constitution. Simply stated, mitigation is anything a juror believes it to be. This is not a mere academic complaint. There were several jurors whose independent moral judgment was compromised during voir dire with improper "follow the law" questions and this jury instruction further invaded the provenance of the jury. The *Witherspoon/Blakely* error argument details this issue more fully above and it is incorporated herein.

Nor was this the first time in this case that the proper scope of mitigation was an issue. A great deal of effort was expended in the original Appellate opinion addressing the role of residual doubt. Both concurring opinions, by Justices Jones and Feldman found that residual doubt was a valid mitigating circumstance in the appropriate case. Justice Jones' concurrence however posits that mitigation must relate to the "defendant's character, propensities, record and any of the circumstances of the offense." (*Harrod* I, p. 504). Justice Feldman, on the other hand, found the language of §13-703(G) to be broad enough to accommodate residual doubt as a mitigating circumstance, correctly noting that the statue is stated in the conjunctive and provides that *any* factor can be mitigating, *including* any of the factors listed by Justice Jones (*Id.*, p. 324).

The jury instruction herein initially correctly states the broad scope of mitigation but then restricts it to "the defendant's background, character, propensities, record or circumstances of the offense." (Inst. #633, p. 4). This misstatement of the law compounded the earlier error during voir dire as set out in the *Witherspoon/Blakely* error argument. The restriction on mitigation evidence is especially troublesome when one takes into account that the 2005 trial was limited to only the aggravation and penalty phases. Despite this, the state essentially retried the entire case and did so with the luxury of a directed verdict of guilt. This left the jury understandably confused as to its role, so much so that thirteen days into the trial, jurors were still submitting questions which went to the issue of guilt. The judge observed:

> THE COURT: If you'll recall, one of the questions the jury asked this morning was how Mr. Fauver could be so sure it was the defendant's voice on the tape. So even though the jury has been instructed the defendant has been found guilty, at least that question in my mind goes to the issue of guilt, and at least one juror is still thinking about that, despite the court's instruction.
>
> So, you have asked them to do a lot. We've asked them to take the guilty verdict

of the defendant, not on faith, but by instruction, and I think this 20 minutes or 15 minutes is not overly burdensome or prejudicial to the defendant and I do think it's relevant on the issue of pecuniary gain. R.T. 9-26-05, p. 55

Petitioner hereby incorporates in full the 403 Argument and the 2005 Prosecutorial Misconduct Argument in full. Petitioner was subjected to a unilateral barrage of guilt phase evidence and prohibited from responding to it. Any restriction on mitigation was especially prejudicial under these circumstances.

ACTUAL INNOCENCE RULE 32.1(h)

The entirety of this Petition is in support of Petitioner's claim of actual innocence.

CONSTITUTIONAL CHALLENGES TO THE DEATH SENTENCE RAISED AND PRESERVED AND NOT WAIVED FOR FUTURE FEDERAL REVIEW.

Mr. Harrod preserves and does not waive the following constitutional challenges to his death sentences. This Court has rejected such challenges in the past, but the law is a fluid and living thing. Mr. Harrod is confident that this Court will determine the error of having rejected these claims. When that day comes, Mr. Harrod will have raised and preserved them for review in the Federal Courts. Mr. Harrod raises and "fairly presents" these claims to this Court in the first instance and invites this Court again and affords this Court the opportunity to correct its earlier jurisprudence. Conscious of the constraints imposed on lengths of briefs (*State v. Atwood*, 171 Ariz. 576, 658, 832 P.2d 593 (1992) and *State v. Cruz*, 175 Ariz. 395, 401, *et seq.*, 857 P.2d 1249 (1993)), Mr. Harrod presents these claims in an itemized way, not in derogation of their importance, but in deference to economy and efficiency.

1. The death penalty is *per se* cruel and unusual punishment. This claim has been rejected by *Gregg v. Georgia*, 428 U.S. 153, 186-87, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992); and *State v. Gillies*, 135 Ariz. 500. 507, 662 P.2d 1007, 1014 (1983).

2. Execution by lethal injection is cruel and unusual punishment. This claim has been rejected in *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995).

3. The death statute is unconstitutional because it fails to guide the sentencing jury. This claim has been rejected by *State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991).

4. The death statute unconstitutionally fails to require either cumulative consideration of multiple mitigating factors or that the jury make specific findings as to each mitigating factor. This claim has been rejected in *State v. Gulbrandson*, 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995); *State v. Ramirez*, 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994); and *State v. Fierro*, 166 Ariz. 539, 551, 804 P.2d 72, 84 (1990).

5. Arizona's statutory scheme for considering mitigating evidence is unconstitutional because it limits full consideration of that evidence. This claim has been rejected by *State v. Mata*, 125 Ariz. 233, 242, 609 P.2d 48, 57 (1980).

6. Arizona's death statute insufficiently channels the sentencer's discretion in imposing the death sentence. This claim has been rejected in *State v. West*, 176 Ariz. 432, 454, 862 P.2d 192, 214 (1993), *overruled on other grounds, State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998); and *Greenway,* 170 Ariz. at 164, 823 P.2d at 33.

7. Arizona's death statute is unconstitutionally defective because it fails to require the State to prove that death is appropriate. This claim has been rejected in *Gulbrandson*, 184 Ariz. at 72, 906 P.2d at 605.

8. The prosecutor's discretion to seek the death penalty unconstitutionally lacks standards. This claim has been rejected in *Salazar,* 173 Ariz. at 411, 844 P.2d at 578.

9. The Constitution requires a proportionality review of a defendant's death sentence. This claim has been rejected in *Salazar*, 173 Ariz. at 416, 844 P.2d at 583; and *State v. Serna*, 163 Ariz. 260, 269-70, 787 P.2d 1056, 1065-66 (1990).

10. There is no meaningful distinction between capital and non-capital cases. This claim has been rejected in *Salazar,* 173 Ariz. at 411, 844 P.2d at 578.

11. Applying a death statute enacted after the Supreme Court's decision in *Ring II* violates the Ex Post Facto Clauses of the Federal and Arizona Constitutions and A.R.S. § 1-244. This claim has been rejected in *Ring III*, 204 Ariz. at 545-47, ¶¶ 15-24, 65 P.3d at 926-28.

12. The death penalty is cruel and unusual because it is irrationally and arbitrarily imposed and serves no purpose that is not adequately addressed by life in prison. This claim has been rejected in *State v. Paneli*, 200 Ariz. 365, 382, ¶ 88, 26 P.3d 1136, 1153 (2001), *vacated on other grounds, Ring II*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; and *State v. Beaty*, 158 Ariz. 232, 247, 762 P.2d 519, 534 (1988).

13. Arizona's death penalty statute is unconstitutional because it requires imposition of the death penalty whenever at least one aggravating circumstance and no mitigating circumstances exist. This claim has been rejected in *Walton v. Arizona*, 497 U.S. 639, 651-52, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled on other grounds, Ring II*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; *State v. Miles*, 186 Ariz. 10, 19, 918 P.2d 1028, 1037 (1996); and *State v. Bolton*, 182 Ariz. 290, 310, 896 P.2d 830, 850 (1995).

RESPECTFULLY SUBMITTED this 3rd day of December, 2012

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Original filed with the Clerk of the Court,
Maricopa County Superior Court
this 3rd day of December, 2012

Copy of the foregoing mailed this
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