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SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA Plaintiff, v. JAMES CORNELL HARROD, Defendant.	Arizona Supreme Court NO. CR-15-0045-PC Maricopa County Superior Court No. CR1995-009046 **Capital Case** **REPLY TO STATE'S RESPONSE TO PETITION FOR REVIEW**

The State sets out the issues presented for Review at page 1 of its Response adequately and will not be repeated here for reasons of economy.

The factual and procedural history section however contains numerous inaccuracies which have been adopted by the courts, despite being belied by the record. These are as follow:

1. "The trustees were permitted to invade the corpus of the trust during her [Jeanne Tovrea's] lifetime for her benefit .. ."

Response 2, citing Harrod III at ¶ 3.

This fiction was the lynchpin of the State's case: that Hap Tovrea was worried his stepmother Jeanne was squandering the trust so he desired that she be killed before she could deplete it entirely.

This claim is completely false and was promulgated by Petitioner's ex-wife, who could have no possible knowledge of it. (Petition 12-03-12, p. 38).

Based on anonymous tips (R.T. 11-05-97, p. 83) (the actual source of which was Anne Costello; Appendix Item 20, Supp. 71, p. 3) Detective Reynolds interviewed Glenn Kearney, the co-executor of the Will and Executor of the Trust (R.T. 10-23-97, p. 131) when asked if it had ever lost principle, he replied "not to my knowledge it didn't. . ." (R.T. 10-23-97, p. 131) (see also, Appendix Item 19, Supp. 67, p. 2). This was corroborated in 2005 by Kenneth Reeves, the lawyer who's firm drafted Ed Senior's Will (R.T. 10-27-97, p. 147). Mr. Reeves, when specially asked in 2005, answered ". . . the trust specifically provided that she couldn't invade the principle for her own benefit." (R.T. 9-20-05, p. 120). (All above quotes are found in the original Petition at pages 39-40).

2. The window above the kitchen sink was not connected to the [burglar] alarm (Harrod I ¶ 6). The police found that the window . . . had been removed and placed on a chair on the patio (Harrod III at ¶2; Harrod I at ¶ 5) (Response at page 2).

While the above are factually true statements, the only source that Petitioner knew the window was not connected to the alarm was, again, Anne Costello (R.T. 11-14-97, pp. 13, 18).

> The problem with this scenario is that, if the intruder *knew* the window was not on the alarm system, he scarcely would have bothered with the laborious process of removing the four pieces of weatherstripping and the window pane. This was a standard aluminum-framed sliding window. The latch can be released by sliding a credit card or a long thin metal shim in the gap between the overlapping window frames and simply sliding the window open. The fact that the intruder went to the trouble to remove the window pane is evidence that he did *not* know the window was not on the alarm system. Thus, yet another cornerstone of the State's theory is revealed to be based on a simple misunderstanding of the facts.
>
> Reply to Petition 5-10-13, p. 3

3. There were 1500 phone calls between Harrod and Hap in the months before the murder and 52 took place the day before the murder (Response, p. 4, fn 3, quoting Harrod I ¶ 10).

1 Petitioner had never discovered the source of this misinformation but it is
2 stunningly incorrect. Wayne Drew of the Rocky Mountain Information Network
3 (R.T. 11-06-97, p. 36) prepared several charts documenting the phone traffic
4 between the two men (*Id.*, p. 41, *et. seq.*). His testimony showed that on March 31,
5 1988 there were 9 calls, not 52, between them, 6 placed by Hap Tovrea (*Id.,* p. 50,
6 Exhibit 248, p. 54, Exhibit 251) and 3 placed by James Harrod (*Id.*, p. 49, Exhibit
7 247, p. 54). Conceivably, in that age before e-mail, most or all of them could have
8 been business faxes. Exhibits 243 and 244 show 271 calls from July 3, 1987 to
9 April 1988, a far cry from 1500, but not unusual for two men about to embark on
10 a business venture in China. These arguments are more fully set out in the original
11 Reply, 5-10-13, pp. 3, 4, and 29.
12 4. James and Anne suddenly had large unaccountable for sums of money.
13 Harrod III, ¶ 7, Response p. 5.
14 The sums of money were hardly unaccountable for. First the State had to
15 concede that no money passed from MECA to James Harrod until March of 1989
16 (R.T. 11-17-97 p. 30). Some 11 months after the murder of Jeanne Tovrea. MECA
17 was the mining company owned by Hap Tovrea. At trial, counsel presented the
18 testimony of another consultant, Jason Hu, to corroborate Harrod's testimony that
19 during 1988 and 1989 he and Hap Tovrea worked on developing sulfer mining
20 resources in China through MECA (R.T. 11-10-97 at 24-35, 40-54; R.T. 11-10-97
21 at 140-143, 146-154, 161-165). Counsel also produced corroborating documents
22 through Hu (*Id*).
23 5. At a live line-up, Debbie Luster positively identified Harrod as the man
24 posing as Gordon Phillips. (Response, p. 5 quoting Harrod I at ¶ 10).
25 There was no actual "identification". Except for Mr. Harrod, no picture of
26 any other person in the line up had ever been shown to Ms. Luster (R.T. 10-03-97,
27 p. 22). "Making the defendant the only common person in both a photo spread and
28 a live line up can be unduly suggestive." *State v. Via,* 146 Ariz. 108, 119, 704 P.2d

1 238, 249 (1985). What she actually said was "um, #5 [Harrod] there is just
2 something familiar." and "He looks familiar to me or something when he came close
3 to the glass. There was something familiar about his eyes or um, gesture or stance."
4 (R.T. 10-27-97, p. 115). This issue is set out more fully in the Petition at pp. 27-29
5 and in the Reply at pp. 10-12).

6 The procedural background and standard of review set forth by the State in
7 its Response at pages 5 through 9 is accurate but Petitioner does contest the
8 assertion at page 10 that the conviction and sentence was not obtained in disregard
9 of fundamental fairness and that he has not made such a showing. He also disagrees
10 that the Petition for Post Conviction Relief Court did not abuse its discretion.

11 **FINGERPRINT ARGUMENT**

12 1.a. In order to dispose of Petitioner's 1.a. Argument that the certainty of
13 fingerprint identification were untrue and scientifically unsustainable (Response,
14 p. 10), the Court employs three interrelated fictions.

15 (1) That Petitioner did not specifically denominate which exception upon
16 which he relied in making this claim. (06-06-13 MEO, p. 4).

17 This requirement is imposed only upon untimely successive Petitions
18 by Rule 32.2(b). This is a Petition brought under Rule 32.2.(A) which
19 contains no such requirement. (Motion for Reconsideration, p. 1;
20 Petition for Review, p. 3) (Response, p. 10).

21 This error by PCR Court is so fundamental it is still expressed in its
22 original latin: "*inclusio unius est exclusio alterius*" (*Maryland v. King*,
23 569 U.S. __ 2013 (Scalia *dissenting*) (Motion for Reconsideration, p.
24 2; Petition for Review, p. 3).

25 (2) The Court then conjures the legal fiction that, by specifying that the
26 1.a. Argument relies on "newly discovered evidence" in his Reply in reaction to
27 arguments raised in the Response he is "reframing" his arguments in an attempt to
28 avoid preclusion.(06-06-13 MEO, p. 4) (Response, p. 10). The concept of

"reframing" exists no where in Arizona case law or statute. It is solely the invention of PCR Court and, as such, is an abuse of discretion and clear error (Petition for Review, p. 4).

(3) The Court then engages in its most astonishing leap of illogic, that the specious "reframing" claim leads to the conclusion that argument was not raised in the Petition **at all.** (06-06-13 MEO, p. 4). (Motion for Reconsideration, p. 3; Petition for Review, p. 4, 5). The Court does so in an unsuccessful attempt to come within the ambit of *State v. Lopez,* 223 Ariz. 238, 240, 221 P.3d 1052, 1054 (App. 2009).

In *Lopez,* his claims of IAC of trial and appellate counsel were **literally absent** in his Petition, challenging only the order of paying $400.00 fees. This is clearly not the case here. The court first imposes a condition unrequired by the Rules, then transforms this specious "requirement" into the self-invented concept of "reframing" and then, citing no authority other than the clearly inapplicable *Lopez* case, does nothing short of waving a magic wand to claim this (and other) issues do not even exist.

Indeed, *Lopez* itself acknowledges that a court is free to exercise its discretion to consider a claim raised as late as a supplemental reply, citing *State v. Bishop,* 144 Ariz. 521, 698 P.2d 1240 (1985) (*Id.,* at 239, 240, 1053, 1054).

The PCR Court also finds this issue precluded because it was not raised, or could have been raised on direct appeal. (06-06-13 MEO, p. 3) (Response, p. 10).

The simple fact is that issue of the certainty of fingerprint identification were untrue and scientifically unsustainable could not have been raised on direct appeal because the basis and foundation therefore were not yet known. (Petition for Post Conviction Relief, p. 2, *et. seq*; Motion for Reconsideration, p. 2; Petition for Review, p. 6). This issue could not have been raised in the direct appeal because the basis was unknown at the time and therefore this "failure" cannot serve as a basis for preclusion.

1 **1.b. Pat Wertheim Perjury**

2 The State's Response, but for one self-serving quote by the PCR Court
3 (Response, p. 16) (Exhibit F, p. 16-17), completely ignores the fact that the PCR
4 Court initially ignored the claim of perjury in its entirety, instead mischaracterizing
5 it out of thin air that it was a claim that his testimony was "beyond his expertise"
6 (06-06-13 MEO, p. 15; Comprehensive Ruling, 01-06-15, p. 16) (Claim raised in
7 Petition for Post Conviction Relief, p. 2; 16-24; Motion for Reconsideration p. 2-3;
8 Petition for Review, p. 7-9). The PCR Court does finally acknowledge Petitioner's
9 claim of perjury but minimizes its earlier omission by utilizing the false conjunction
10 "also" as though Petitioner had, in fact, made the "beyond his expertise" claim.
11 (Comprehensive Ruling, 01-06-15, p. 14).

12 Petitioner invites this Court to review the original Petition for Post
13 Conviction Relief to see if it can find the words "beyond his expertise" anywhere
14 therein. They appear nowhere and this is an utterly fictitious argument conjured by
15 the PCR Court out of thin air. The court quotes the actual perjury

16 Q. You compared the latent prints you had before you with the
17 known inked prints of the defendant James Cornell Harrod?
18 A. Yes sir, I did.
19 Q. And you did so as part of your work in this case?
20 A. Yes sir.
21 Q. What is your conclusion regarding all 18 of those lift prints?
22 A. Each of those 18 prints was made by Mr. Harrod.

23 Resentencing (sic) Transcript (RT) November 5, 1997 at 150-52
24 (Comprehensive Ruling 01-06-15, p. 15).

25 The Court then ignores the fact that the statements were perjurious and comes
26 up with an "alternate reading" of the testimony – that Wertheim was merely
27 distinguishing them from forged prints - as though that forgave Wertheim's
28 perjurious claims of having examined Mr. Harrod's inked prints and compared them

1 to the latent impressions found at the scene and made identifications. (*Id.*)

2 Pat Wertheim never looked at the inked exemplar of Mr. Harrod's prints and
3 never compared the inked exemplar prints to the latents recovered from the scene.
4 (PCR p. 2; 16-24; Motion for Reconsideration p. 2-3; Petition for Review p. 7-9).
5 It was Pat Wertheim himself who admitted, in a pretrial interview, that he never
6 even looked at the inked exemplar.

7 Q. Did you compare them [latents] to the inked prints of James Harrod?
8 A. No.
9 Q. Ok. So you're not at this point, in any event, prepared to testify as to
10 whose prints those are?
11 A. That's correct. I was not asked to
12 • • •
13 A. Yeah, sure. No, I did not do any comparisons
14 (Appendix Item 3, Defense Interview 04-24-97, p. 11)

15 He later added:

16 A. No No No. Did not do any comparisons to the ink. Frankly, never
17 looked at them. That wasn't part of the request.
18 (*Id.*, p. 28) (Petition for Review p. 17)

19 No disclosure was received prior to trial that his position had changed so it
20 hardly matters and is immaterial that the interview was conducted "months before
21 his testimony" (Response p. 17). Both the Court and the State conclude there is "no
22 indication the expert [Wertheim] committed perjury (Exhibit "F", Comprehensive
23 Ruling 01-06-15, p. 13-16; Response p. 16). This is because they both look only to
24 the evidence of the perjury, the perjury itself, rather than the **proof** of the perjury,
25 Pat Wertheim's own words during the 04-24-97 defense interview.

26 Equally damning to the Court and State's assertion that "there is no indication
27 the expert committed perjury" as are the words out of his own mouth, are his bench
28 notes written in his own hand. In Mr. Harrod's 1997 trial, his "bench notes"

consisted of a scant quarter page of a crude drawing of a pair of hands. (Petition for Review, p. 8) (Petition, p. 17). By contrast, when he testified in the Shirley McKie case that she had been misidentified as having deposited a latent impression of her left thumb, which she denied having done, he generated one set of 11 pages documenting his step-by-step methodology and another set of 18 pages of densely detailed notes and drawings documenting his work in support of his conclusion of exclusion. (PFR p. 8 fn 4, 5, 6; Petition pp. 17-19). Pat Wertheim offers more proof, by his own hand, that he committed perjury.[1]

Additionally, and quite telling the PCR Court does not mention the Department of Justice's investigation of the FBI's handling of the Brandon Mayfield investigation (Exhibit F, Comprehensive Rule, p 12) and the State mentions it only in passing in an abbreviated title with no later argument (Response, fn 10, p. 13). This argument is set forth in the original Petition at pp. 2-6 and a lesser extent at pp. 7-9. The reason for this omission by the PCR Court is not surprising, in that it is a real-life example of the NAS conclusion that the core claims of fingerprint analysis of 100% accuracy and an error rate of zero were unsustainable and have never been proven empirically (Petition pp. 2-10); (PFR, pp. 9-10).

2A-2B: SUGGESTIVE IDENTIFICATION PROCEDURES

This argument is broken out into two independent grounds (PCR p. 24; PFR pp. 10-12; Response to PFR pp. 17-22). One was a straightforward attack on the suggestiveness of the identification methods used by the Phoenix Police

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[1]The Response's claim, raised for the first time in its Response to the Petition for Review is not exactly a model of timeliness and irrelevant for two reasons; first, Petitioner need not prove motive (it is actually grandiosity if that matters) and second, the fact that two other witnesses identified the 18 latent prints are subject to there own methodology errors, as set forth at pages 2 through 16 of the Petition and does not forgive the perjury of the third. *Kyles v. Whitley*, 514 U.S. 410 at 433 FN 7, 115 S.Ct. 155 at 1565 (1995).

Department, the other was the use of the testimony of a witness who had been previously hypnotized: both issues were raised by timely filed Motions on September 17, 1997 (PCR, p. 22; Inst. #134, #135). Appellate counsel raised the hypnosis issue but not the suggestiveness issue, which was raised as IAC in the PCR (Petition, pp. 24-32; PFR, p. 10). The State's claim, that because the suggestiveness issue was not raised on direct appeal, it is waived is incorrect (Response, p. 18). It was raised as IAC to not do so and therefore not waived.

The State's dismissal of this error as "meritless" (Response, pp. 19-20) and "harmless" (*Id.*, p. 21), is scarcely consistent and congruent with Justice Feldman's observation in concurrence in the first Harrod opinion that "the single largest factor in wrongful convictions in Capital cases is mistaken identification (84%)". *State v. Harrod I, 200* Ariz. 309, 322-323 (FN1), 505-506). There was ample knowledge in the legal community at the time of the first appeal that suggestive identification procedures was a very viable claim.

Then, in the absence of any evidence that appellate counsel did so, the State relies on the PCR court's invocation of the concept of "winnowing" to forgive appellate counsel's failure to include the suggestive identification procedures in the direct appeal. First, it is utter speculation that the absence of this issue resulted from "winnowing" and not just utter incompetence. Second, if it was "winnowing" the appellate lawyer threw out the wheat and kept the chaff. As stated above, there was ample knowledge extant at the time of the first direct appeal to support a suggestive identification claim. The post-hypnosis claim however, was so suffused with subjectivity at every level, including the trial court's conclusion that Ms. Luster had not been hypnotized, that no appellate court could ever second-guess the trial court and overrule it. (Exhibit F, Comprehensive Ruling, p. 16). The PCR court speculates that the suggestive identification procedures argument would have met the same fate, but this is mere speculation. Nonetheless, the PCR court uses this speculation to find the claim meritless (*Id*). This is mere bootstrapping.

The State also claims the evidence against Petitioner was overwhelming (Response, pp. 22-23). There follows a laundry list of Anne Costello's uncorroborated and contradictory statements and utter myths which have some way made their way into the record, which Petitioner debunks in the first section of this reply under the "numerous inaccuracies" list. See also, the Actual Innocence claim in the PCR Reply pp. 28-30. When taken as a whole, the issues raised in the Petition for Post Conviction Relief and its progeny demonstrate that the evidence against Petitioner is hardly overwhelming.

CLAIMS 3.A, 3.B and 3.C: (*DAUGHBERT* STANDARD)

This argument consists largely of the Petitioner and the State talking past each other on the issue of the admissibility of polygraph results. The discussion is couched in terms of whether *Daughbert* constitutes a significant change in the law but ultimately comes down to whether Rule 26.7(b), A.R.C.P., which requires evidence presented at a sentencing hearing be reliable and relevant (Response PFR, p. 27) [the State fails to note this is a Capital sentencing); or whether ARS 13-703(c),[2] which expressly applies to **Capital** sentencing does. (PFR, p. 11; PCR pp. 33-36). The State cites *State v. Zuck*, 134 Ariz. 509, 514 658 P.2d 162, 167 (1982) which relies on *State v. Valdez* and *Frye* (Response, p. 27). *Zuck* also relies on Rule 26.7(b), A.R.C.P., with its requirement of reliability and relevance. This imports into a Capital Sentencing proceeding a requirement of "reliability", which is absent in 13-751(c), which allows the introduction of "any information". (PFR p. 11; PCR p. 33). The State is simply relying on the wrong body of law.

CLAIM 4: GRUESOME PHOTOGRAPHS (DUE PROCESS OF LAW VIOLATION, DOUBLE JEOPARDY, REVERSIBLE ERROR)

The misuse of the gruesome photographs is not only set out in this section but also expressly set out in the Misconduct Argument (2) and (3) in the Petition for

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[2] Now renumbered 13-751(c), *State v. Harrod,* 200 Ariz. 309, 500 P.3d 492 (2001).

Post Conviction Relief (p. 39, *et. seq.*), as expressly recognized and acknowledged by the PCR court in its Comprehensive Ruling (Exhibit F, p. 18). Despite Petitioner having raised the Appellate attorneys failure to raise the use of the gruesome photographs as Double Jeopardy and therefore IAC in the PCR (See, p. 43) (Exhibit F, p. 18), the State persists in claiming the IAC issue was not raised until the Reply (Response to PFR, p. 28). Indeed, as early as the Motion for Reconsideration, filed August 9, 2013, Petitioner has been protesting that these issues were raised in the Original Petition in black and white and not "reframed" in anyway (Motion for Reconsideration, p. 8), again on direct appeal, the issue was originally presented as "a false claim" but not "double jeopardy", hence the IAC claim in this PCR. (*Id.*)

The Double Jeopardy argument is set out more fully in the Petition for Review at pp. 12-13. The balance of the State's argument, set forth at pages 28-30 of its Response simply avoids this issue and argues various evidentiary rationales for the admission of the photos while ignoring the constitutional issue. The Response also ignores the 13-751(G) argument at page 14 of the Petition for Review, which is the misuse of a mitigating circumstance as an aggravator, and that the photos had absolutely no probative value as to pecuniary gain, the only issue in the 2005 trial, and therefore excludable under 403. Additionally, the "not sanitize the State's case" argument at page 29 of the Response is made only in passing and it is fundamentally at odds with the "not retry the issue of guilt" statutory prohibition found in §13-752(J). This issue is set out more fully at pages 17-18 of the Petition for Review. There is simply no statutory support of this judicially crafted language and it violates due process of law for Court's to rely on it. Again, the State offers no argument in support of this issue and moves directly on to the prosecutorial misconduct argument.

CLAIM 5: PROSECUTORIAL MISCONDUCT

The presentation by the State that fingerprint evidence was 100% scientific fact could not have been raised in the 1997 direct appeal because the foundation for

such an argument did not yet exist. Nonetheless, the State never gave the jury the slightest hint that the identifications were, ultimately, opinion testimony. (PFR, p. 15-16) Therefore it cannot be subject to preclusion for not having been raised

5.A.2 Depletion of the Trust. This is a false claim promulgated solely by Petitioner's ex-wife, Anne Costello, who could have had no way of knowing as much (R.T. 11-14-97, p. 15; PCR p. 40; PFR, p. 16). The PCR Court and the State both advance the entirely speculative theory that it was the "what the actors believed" and "the effect of the belief that the trust was being depleted on the actors that was relevant . . ." (Exhibit F, Comprehensive Ruling, p. 23; Response, p. 32 respectively). There was no evidence introduced at either trial that any "actor" believed any such thing and it was misconduct to argue the trust was being depleted when the evidence was to the contrary.

Holbrook v. Flynn, 475 U.S. 560, 567 (1986) "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial" *quoting Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("the right to a fair trial is a fundamental liberty secured by the 14th Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice") (citation omitted); see also, *United States v. Moore*, 572 F.3d 334, 341 (7th Cir. 2009) ("Guilt beyond a reasonable doubt cannot be premised on pure conjecture"); *United States v. Garcia*, 439 F.3d 363, 366-68 (7th Cir. 2006) ("The presumption [of innocence] is violated . . . when the jury is encouraged (or allowed to consider facts which have not been received in evidence") *Owens v. Duncan*, __ U.S. __, __ S.Ct. ____ (March 23, 2015). This issue was first raised in the Petition for Post Conviction Relief at page 40; renewed in the Petition for Review at pp. 16-18 and introjected into this litigation by PCR Courts Cummulative Ruling at page 27 when it interjected the speculative claim that "The issue was not necessarily what the terms of the trust were, but what the actors believed, albeit

erroneously: that the trust was being depleted". Because it was the PCR Court which itself couched the issue in this speculative fashion for the first time in its Cumulative Ruling, it cannot be precluded for being addressed on these terms here.

5.B.1: Immunity

As stated at pages 18 and 19 of the Petition for Review, granting Hap Tovrea immunity in the 2005 trial would not have imperilled the State's case in any fashion after 17 years of investigation of him. The prosecution does not enjoy unlimited discretion in offering immunity and it was misconduct to not offer it to Hap Tovrea to rebut Anne Costello's testimony when she was testifying under a grant of immunity.

5.B.2: Change in the Theory/Double Jeopardy

As noted in the Petition for Review at page 19, the PCR Court imports into this argument the IAC claim which is actually made in the following section, 5.b.3, and consists of little more than strings of quotes of previous Harrod opinions, including their factual inaccuracies included in the outset of this Reply. The PCR Court spends not a word on the issue of permitting into evidence in the 2005 trial, conduct of which Petitioner had already been acquitted. Also, the PCR Court's "slate wiped clean" argument at page 27 is hardly persuasive. The slate was most certainly not "wiped clean". The 2005 trial went forward with a directed verdict of guilt, cherry-picked facts by the State so that the case "was not tried in a vacuum" which the Petitioner could not contest because this jury "was to not retry the issue of guilt." Scarcely a "clean slate". The balance of the State's argument at page 36 of its Response consists of broad, contextless quotes about the purpose of sentencing, ignoring the fact that the 2005 jury's job was very narrow: to decide if the murder had been committed for pecuniary gain.

5.B.3: Change in Theory

That Petitioner had previously been acquitted of the conduct represented by this change in theory has already been thoroughly documented at pages 19 through

24 of the Petition for Review and will not be further amplified here. The PCR Court even takes note of the Special Verdict acquitting him of this conduct at page 27 of its Comprehensive Ruling (Exhibit F).

5.B.4 Misrepresentation of the Circumstances of the Offense as an Aggravating Circumstance in Violation of A.R.S. §13-752(G)(*sic*)

The Court abandoned its duty as an impartial tribunal and acted as an advocate when it advanced the theory of substituting "the circumstances surrounding the event", an argument not offered by the State.

Petitioner regrets the typographical error of listing 13-752(G) for 13-751(G) in the above heading. There is also a clerical error at page 25, line 7 where the phrase "The Court advocated" its duty rather than "abdicated" its duty.

The State completely fails to address the Court's having acted as an advocate issue, and therefore concedes it. The "circumstances surrounding the event" is inapt and indefensible, as argued at page 24 of the Petition for Review. Further, it is an argument never proffered by the State, therefore the Judge is acting as an advocate, calling into question his impartiality in every other holding in every other issue raised in the original Petition for Post Conviction Relief and this Petition for Review.

CLAIM 6: SELECTIVE IMMUNITY

This claim was addressed as 5.B.1 above for the sake of continuity with the Comprehensive Ruling. It appears in the PCR pp. 47-54. It was precluded in the 06-06-13 MEO (Exhibit A) and briefly addressed at page 24 of the Comprehensive Ruling. (Exhibit F) It is not separately addressed by the State under this heading and will not be further discussed here.

CLAIM 7: JUDICIAL BIAS

This issue has an exceptionally convoluted procedural history due to a change in the law in *Hurles v. Ryan,* 650 F.3d 1301 (2011). This history is set out in the Petition for Review at pages 26 and 27. This claim of Judicial Bias is originally set

out in full at pages 54 to 63 in the Petition for Post Conviction Relief. This argument was predicated on *Hurles v. Ryan, (Id),* which was later depublished. See PFR pp. 26-27. The State's Response argued preclusion in a single paragraph at page 37, arguing the issue had not been raised on direct appeal at the time of the Direct Appeal, *Hurles v. Ryan* had not yet been handed down (nor, obviously depublished and republished). The issue was raised again in the Reply in the PCR at page 18. The PCR Court addressed the Judicial Bias claims in its 06-06-13 MEO at pp. 11-13 (Exhibit A). There is an argument headed "Judicial Bias" in the Motion for Reconsideration but is more properly considered as a claim for IAC. Trying to further untangle the procedural history of this case at this point would be futile.

CLAIM 8: BURDEN SHIFTING

This issue is raised in the PCR at pages 63-65. The State claims in its PCR Response at page 38 that the claim is waived because it was not raised on direct appeal. It also claims any error was cured because the Court properly instructed the jury that "neither side has the burden of proving that the evidence is or is not sufficiently substantial to call for leniency", citing the PCR at 65 *(Id)*. The PCR Reply points out at page 18 that the claim is not waived because it is raised in the context of IAC. The PCR Court summarily dismissed this claim as precluded in its 06-06-13 MEO at page 4 (Exhibit A).

The claim is raised again as structural error at page 29 in this Petition for Review. The State again, raises preclusion at page 39 of its Response.

The fact that the Court properly instructed the jury (see PCR p. 65) does not cure the structural error of the burden shifting, but rather demonstrates that throughout the trial the parties were aware this issue was on the brink of resolution yet recklessly disregarded this resolution throughout the jury selection process. Despite *Baldwin* not yet formally handed down, the community was already aware of its gist and a proper instruction could not undo the harm already done in *voir*

dire, which affected the manner in which they understood the evidence as they received it during the retrial.

CLAIM 9: §13-751(e) ARGUMENT (MUST IMPOSE DEATH)

The procedural history and argument is set out at pages 30-31 in the Petition for Review and originally in the PCR at pages 65-68. As stated in the Petition for Review at page 30, the argument is not that the instruction creates a "presumption of death" as urged by the PCR Court at page 30 of its Comprehensive Ruling, Petitioner's argument is that it invades the province of the jury, thereby violating due process of law.

10/11: *WITHERSPOON/BLAKELY* ERROR
(*Voir Dire* "Follow the Law" Questions)

The procedural history is set out in the Petition for Review at page 32. As in the foregoing section the PCR Court never directly addresses the improper *voir dire* issue but relies on jury instructions to "cure" it. A proper jury instruction given at the end of a trial cannot cure jurors who were seated through an improper *voir dire* process and received evidence throughout the trial under the influence of this improper process.

CLAIM 12: INEFFECTIVE ASSISTANCE OF COUNSEL

12.A.1: (1997 Mitigation)

The PCR Court concluded this issue was moot because the death sentence was vacated post-*Ring* (Exhibit A, p. 14). The State agrees (Response, p. 43). Petitioner maintains that he may not have been sentenced to death at all, had effective mitigation been presented at the 1997 trial (PFR, p. 33).

12.A.2: Cross Examination of Mr. Wertheim in 1997.

The State claims, at page 44 of its Response, that the 1997 trial counsel made a "reasonable strategic choice" to argue the fingerprints were forged, rather than pursue a misidentification theory. The scientific foundation to pursue a misidentification theory did not exist in 1997 so trial counsel could not have made

a "strategic decision" to not pursue it. Again, the State claims there is "no evidence" to show Wertheim committed perjury in the 1997 trial because it refuses to look in the right place, his interview by defense counsel in which he adamantly insists he never even looked at the inked exemplars, let alone made any comparisons to the latent prints. See, PFR pages 7 - 9.

12.A.3: Failure to Call Various Witnesses in 1997

In its Response at page 45, the State dismisses Petitioner's claim that members of the MECA Board of Directors should have been called in the guilt phase as "not colorable" without further elaboration. The testimony of a member of the board of directors of MECA would not have been cumulative to that of Jason Hu but would have added another, credible dimension to Petitioner's testimony. A business man with a fiscal duty of MECA would have been a very credible source to maintain any payments received by Petitioner were part of a legitimate business transaction.

12.A.4: Failure to Offer Rebuttal Testimony

The Response claims, at page 46 that Petitioner's assertion that an "August 3, 1988 police report . . . shows 'no record of . . . security guards having been called by Ms. Tovrea'" is incorrect. The proof of Petitioner being incorrect appears to be "The police report makes no mention, one way or another, of whether there was a record of security being called". Well, tacking on the words "one way or the other" does not change the fact that it contains "no mention" also known as "no record" of . . . security guards being called by Ms. Tovrea.

12.B.1: 2005 Failure to Secure Immunity for Hap Tovrea

In its Response, the State cites the PCR Court's 06-06-13 Ruling denying relief on this claim at page 17 (Response, p. 47). While the 06-06-13 MEO uses "2005" in the heading, it uses "1997" in the body and makes reference to the granting of immunity to Petitioner's sister, June Barney, and his ex-wife, Anne Costello, both of whom testified in 1997, June Barney did not testify in 2005,

though Anne Costello did. (Exhibit A, pp. 16-17). Upon information and belief, there was no attempt to secure Hap Tovrea's testimony in 1997. It is unclear then whether the PCR Court actually ruled on this issue.

The failure to secure immunity for Hap Tovrea in 2005 to rebut Anne Costello's testimony certainly rendered the fact finding process unfair but we cannot tell if the PCR Court addressed this issue.

12.B.2: Improper "fairness/follow the law" Voir dire Questions in 2005

12.B.3: Burden of Proof and Persuasion were Conflated in the 2005 Voir Dire

12.B.4: Failure to Rehabilitate Venire Persons in 2005

12.B.5: Inadequate Voir Dire Regarding Predisposition to Impose Death

12.B.2: Improper "Fairness/Follow the Law" Questions.

Contrary to the State's Assertion at page 48 of its Response, Petitioner does cite authority for this Proposition in its *Witherspoon/Blakely* Argument at pages 32 and 33 of his Petition for Review. The Court claims this error was somehow harmless because counsel conceded these jurors could be seated and thus acted appropriately (Exhibit A, 06-06-13 MEO, p. 18). This is simply circular logic.

12.B.3: Burden of Proof and Persuasion were Conflated in the 2005 Voir Dire

The State addresses this claim, out of order at pages 50 and 51 of its Response. Neither the Court's 06-06-13 MEO (p. 18) and the State's Response, which claims that *Baldwin* had not yet been decided (p. 51) can explain how it is then that a *Baldwin*-compliant instruction was given in this case. Nor can either explain how a jury instruction, given after the close of evidence, can cure the misunderstanding under which the jurors *received* the evidence during the course of trial.

12.B.4: Failure to Rehabilitate Anti-Death Penalty Venire Persons

This issue involves arcane issues of Capital Jury selection.

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 is the single area in which a capable trial lawyer can utilize "follow the law" questions to rehabilitate a juror who might otherwise be stricken for cause.

It fell below currently prevailing professional standards to not attempt to rehabilitate these jurors.

12.B.5: Inadequate Voir Dire Regarding Predisposition to Impose Death.

The State responded to this issue at pages 49 and 50. The State lists six veniremen by number (p. 49). The original PCR lists six at p. 74 and goes on to note that the defense had to waste three preemptory strikes to remove them from the jury. These three jurors were *Morgan* excludable and the death sentence cannot stand (PCR, p. 75; PFR, p. 38). The State responds to this issue at page 49.

12.B.6: Was granted Supplemental Briefing and an Evidentiary Hearing was held thereon. It was addressed last in the 06-06-13 MEO (Exhibit A) and therefore for the sake of consistency it will be also addressed last herein.

This was misstated in the Petition for Review as having been stated last in the Comprehensive Ruling (Exhibit F). Petitioner regrets the error. It is addressed at pages 51 through 57 in the State's Response.

Claim 13: *PORTILLO* INSTRUCTION

The State's Response addresses the issue at pages 57 and 58. The Court's claim that this issue was only raised in the Petitioner's Reply (Exhibit A, p. 31) and th State's adoption of this claim (Response, p. 57) are both incorrect. It was raised in the original PCR at pages 75 through 77. 1997 Trial counsel timely objected to the instruction (PCR, p. 76; R.T., 11-14-97, p. 88). It was raised as fundamental and structural error in the original Petition (*Id.*, pp. 76-77). Both the Court and State are correct however that it was not raised as IAC until page 24 of Petitioner's Reply. As stated in the Petition for Review at pages 38 and 39, the issue is raised for the same reason attorneys argued for 20 years that *Walton* was wrongly decided.

Claim 14: MITIGATION EVIDENCE WAS RESTRICTED IN SCOPE

The Court's Comprehensive Ruling contains an argument enumerated "14" but it is actually the "follow the law" argument, as noted in the PFR at p. 39. The Court actually summarily precluded it (Exhibit A, 06-06-13, MEO, p. 4). The 2005 jury, although instructed broadly, it is still restricted "an aspect of defendant's background, character, propensities, record or circumstances of the offense." (Exhibit F, p. 32). This jury did not have the advantage of Justice Feldman's more expansive reading of "mitigation" to include "residual doubt" (PCR, p. 78) and suffered from the State's misuse of the "circumstances of the offense" (see, PCR 403 Argument, p. 36; PFR, pp. 24-26).

Claim 15: ACTUAL INNOCENCE.

In his original Petition, Petitioner was page restricted to one page, 79, for this argument, noting that the entire Petition supported it as an accurate assertion. It is set out at greater length in his Reply at pages 28 through 30 to demonstrate this. The PCR Court's citation to the *Harrod III* Court's finding of "overwhelming

evidence [of pecuniary gain]" has refuted by subsequent developments and its repeated misreading of the record as set forth at the outset of this Reply (as has that of guilt, for that matter). The Petition for Review demonstrates this regarding guilt at pages 39 through 43.

12.B.6: Death Row Disclosure in 2005.

The procedural history of this claim is accurately set out at page 4 of the Petition for Review at page 43, but for its failure to mention the PCR Court's lengthy 04-24-14 MEO denying the "Death Row Disclosure" Claim (Exhibit D).

The PCR Court correctly notes in its 06-06-13 MEO at page 21, the issue is, in attempting to present mitigation evidence of Petitioner's good behavior while incarcerated did the 2005 trial attorneys fail to consider that this would also result in the admission of evidence that he had previously been condemned to death on this very case. (Exhibit A, p. 21). The State in its Simultaneous Briefing, claimed this was justifiable as an example of "Death Row Redemption" (Simultaneous Briefing re: PCR Claim, pages 4-12). This claim was rejected by Petitioner (Response to Simultaneous Briefing, *passim*); as it was also expressly rejected by the PCR Court (04-24-14 MEO page 15; Exhibit D).

Specifically, the Court states "To be clear, the Court does not adopt the State's contention that resentencing counsel directed mitigation efforts toward Defendant having "redeemed himself since the murder." (04-24-14 MEO, Exhibit D, p. 15). However, the PCR Court then goes on to fashion its own argument to defeat any claim of error, thereby abandoning its role as an impartial tribunal. Once the Court rejects the State's "death row redemption" argument, it can only be acting as an advocate, advancing a completely new argument. It is one which claims to find its roots in the death row redemption theory, but contains arguments which were never made by the State. *Notice of Errata: At page 25 of the Petition for Review at line 27 it states "the Court advocated its duty"; it should read "the Court **abdicated** its duty to act as an impartial arbiter".*

The Court's 04-24-14 MEO is nothing other than post-hoc reasoning in an attempt to justify a blunder as strategic decisions. The record does not show "resentencing counsel was engaged fully in defendant's defense. . ." as claimed at page 34 of Exhibit F, but rather, trial counsel simply stumbled into the death row disclosure (PFR, pp. 44-46). They had done no research on the critical issue of the effects of disclosing to the jury that Petitioner had previously been sentenced to death on this very case (*Id*). This is not the "strategic choices made after thorough investigation of law and facts relevant to plausible options" required by *Strickland* in order to justifiably claim strategic decisions. See, Petition for Review, p. 47. Nor can trial counsel's blundering into this fatal area be blamed on Petitioner's alleged non-cooperation with the general mitigation investigation, as urged by PCR Court at page 34 of its 01-06-15 Comprehensive Ruling (Exhibit F; and also urged by the State in its Simultaneous Briefing re: PCR Claim at page 9). The ABA Guidelines 11.4.1(c) require "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." *Harrington v. Richter*, 131 S.Ct. 770 (2011) expressly rejects such an approach "Court's may not indulge 'post hoc rationalzations' for counsel's decision making that contradicts the available evidence of counsel's actions. *Wiggins v. Smith*, 539 US at 526-527, 123 S.Ct. 2527." (See, Response to State's Simultaneous Briefing, p. 5). The evidence shows counsel's blundering, not strategic decision making.

The defense team did not even do any research on the advisability of disclosing to the jury that the Petitioner had previously been sentenced to death on this very case (Petition for Review, p. 44). They did not even begin to do any research until it had been mentioned twice (Petition for Review, p. 45)

. . .

. . .

. . .

1 **CONCLUSION**

2 The most serious errors committed by the PCR Court are:

3 1. Imposing a condition not required by statute in its **06-06-13 MEO**
4 **(Exhibit A)** to preclude multiple issues (06-06-13 MEO, pp. 3-5; Exhibit A). It also
5 styled this preclusion as "reframing".

6 2. **01-06-15 MEO, Exhibit F, pp. 13-15:** Fabricating Petitioners "Pat
7 Wertheim committed perjury in the 1997 trial" argument as that of he testified
8 "beyond his area of expertise."

9 3. The PCR Court's rejection of the State's 12.B.6. "Death Row
10 Redemption" argument and then fashioning its own remedy in its place, thereby
11 abandoning its role as an independent arbiter and acting as an advocate. (06-06-13
12 MEO pp. 18-21, Exhibit A) (04-24-14 MEO, Exhibit D) (01-06-15 MEO, p. 34
13 Exhibit F) (Reply, pp. 20-21)

14 4. The PCR Court's finding that the 2005 "Death Row Disclosure" was
15 strategic when it was not the result of a complete investigation of the facts and the
16 law as required by *Strickland.*

17 5. **5.B.4 The State Misrepresented the Circumstances of the Offense**
18 **as an Aggravating Circumstance in Violation of A.R.S. §13-751(G).**

19 **The Court abandoned its duty as an impartial tribunal and acted as an**
20 **advocate when it advanced the theory of substituting "the circumstances**
21 **surrounding the event" an argument not offered by the State.**

22 *Notice of Errata: the Petition for Review erroneously lists the statute as §13-*
23 *752(G) rather than §13-751(G).*

24 *Notice of Errata: At page 25 of the Petition for Review at line 27 it states*
25 *"the Court advocated its duty"; it should read "the Court* ***abdicated*** *its duty to act*
26 *as an impartial arbiter".*

27 §13-751(G) which sets forth mitigating circumstances contains the only
28 mention of the circumstances of the offense. It was misconduct to present it as an

1 aggravator.

2 When the Court abandons its role as an impartial tribunal and acts as an
3 advocate, it calls into question the entirety of its rulings on every issue and raises
4 legitimate questions as to its bias (Petition for Review, pp. 24-25).

5 The previous holdings of *Harrod I, II* and *III* contain factual inaccuracies as
6 set forth at pages 1 through 4 of this Reply. Without these inaccuracies the case
7 against Petitioner loses much of its vitality and becomes hardly "overwhelming".

8 Pat Wertheim committed perjury in the 1997 trial and the conviction must be
9 reversed (see, 1.B. Argument). With the advances in the understanding of the
10 limitations of latent fingerprint identification. Petitioner's conviction upon retrial
11 is hardly a foregone conclusion.

12 The PCR Court's numerous errors, the worst of which are detailed above, call
13 into question its impartiality for each and every ruling on each and every issue. Its
14 imposition upon Petitioner conditions contrary to statute, its fabricated distortions
15 of Petitioner's claims and its abandonment of its role of an impartial tribunal for that
16 of an advocate undermine the entirety of its rulings and calls into question the
17 reliability of its findings.

18 James Harrod did not get a fair hearing on his Petition for Post Conviction
19 Relief and his conviction and sentence must be overturned.

20 RESPECTFULLY SUBMITTED this 2nd day of December, 2015

21

22 /s/ *Richard D. Gierloff*
Richard D. Gierloff
23 Attorney for Petitioner

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CASE NAME: STATE OF ARIZONA v JAMES CORNELL HARROD	CASE NUMBER: CR-15-0045
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SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, v. JAMES CORNELL HARROD, Defendant,	Arizona Supreme Court No. CR-15-0045-PC Maricopa County Superior Court No. CR1995-009046-001 (Capital Case) **CERTIFICATE OF COMPLIANCE**

Petitioner's Reply to State's Response to Petition for Review is double-spaced, uses 14-point Times New Roman proportionately-spaced typeface, and contains 7816 words, 447 sentences, 669 lines, 156 paragraphs on 24 pages according to the processing system used to prepare this Reply.

RESPECTFULLY SUBMITTED this 2nd day of December, 2015.

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

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STATE OF ARIZONA

STATE OF ARIZONA Plaintiff, v. JAMES CORNELL HARROD, Defendant.	Arizona Supreme Court NO. CR-15-0045-PC Maricopa County Superior Court No. CR1995-009046 **CERTIFICATE OF SERVICE**

Petitioner's Reply to State's Response to Petition for Review and Certificate of Compliance was electronically filed and notification sent electronically this 2nd day of December, 2015, to:

Ginger Jarvis
Capital Litigation Section
Office of the Attorney General

The Honorable David Gass
Maricopa County Superior Court

A copy deposited for mailing this date to:

James Cornell Harrod, #136270
ASPC - Eyman Complex - Browning Unit
P.O. Box 3400
Florence, Arizona 85132

Respectfully submitted this 2nd day of December, 2015

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

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