No. 16A247

IN THE SUPREME COURT OF THE UNITED STATES

JAMES CORNELL HARROD,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court
(Capital Case)

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Disclosing to the Resentencing Jury that the Petitioner had previously been sentenced to death on this very case was fundamental, reversible error under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2623 (1985) and its progeny.

II. The Resentencing attorneys did no "thorough investigation" of this approach before presenting it to the jury and therefore cannot claim strategy under *Strickland v. Washington,* 466 U.S. 668, 690, 691, 104 S.Ct. 2052, 2066 (1984).

III. The Court below abdicated its role as a neutral arbiter, acted as an advocate and thereby exhibited judicial bias under *Hurles v. Ryan*, 706 F.3d 1021, 1028 (2013).

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STATUTES

OTHER

Petitioner, James Cornell Harrod respectfully petitions for a Writ of Certiorari to review the Judgment of the Arizona Supreme Court as follows:

OPINIONS BELOW

There were three reported opinions below, all published before this case was remanded for resentencing pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), none of which concerns the issue raised here and so will not be addressed here. A Minute Entry of 06-06-2013 at page 22, the Court grants an Evidentiary Hearing on the death row disclosure issues. The second Minute Entry, issued 04-24-2014 is the Court's actual ruling on the pleadings and hearing held below and may be considered the actual "Opinion Below". The Petition for Review was denied by the Arizona Supreme Court on June 14, 2016.

JURISDICTION

The Jurisdiction of this Court to review the judgement of the Arizona Supreme Court is invoked under 28 U.S.C. §1257(a), Petitioner having asserted below and asserts before this Court, the deprivation of rights secured by the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISIONS

The Constitution, Amendment VIII provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Constitution, Amendment VI provides in relevant part that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury.

STATEMENT OF THE CASE

The Capital case was reversed and remanded for resentencing following *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428 (2002), during the 2005 retrial of the penalty phase it was disclosed to the second jury that Petitioner had previously been sentenced to death in this very case. He was again sentenced to death by the second jury. Petitioner's Petition for Post Conviction Relief was denied in its entirety on June 6, 2013 but for Claim 12.B.6, which was whether disclosure to the second jury that he had been previously sentenced to death on this very case constituted ineffective assistance of counsel. An Evidentiary Hearing was held on that matter on March 28, 2014. Relief on this claim was denied on January 6, 2015. The Arizona Supreme Court denied Petitioner's Petition for Review on June 14, 2016.

REASONS FOR GRANTING THE WRIT

The Arizona Supreme Court's decision is inconsistent with the overwhelming, if not universal, majority of cases which hold that it is fundamental reversible error to disclose to a resentencing jury that a defendant has been previously sentenced on this very case. It was plain error for the Arizona Supreme Court to not reverse. It was also plain error to permit the court below to abandon its role as a neutral arbiter and act as an

advocate. This court should strongly discourage such practices and reverse and remand for resentencing.

I. The leading case in this area, when evidence is introduced which lessens a jury's sense of responsibility in rendering its verdict, is *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2623 (1985).

Cases in which it is disclosed to a second jury that the defendant had been previously sentenced to death, even on a different case, uniformly follow *Caldwell* because the prejudicial effect of this disclosure is so great as to be irreversible in relieving the jury's sense of ultimate responsibility in reaching its verdict. The sole exceptions to this uniformity are those instances where the disclosures were isolated, inadvertent, single instances not deliberately elicited by either party. *Caldwell* supports its holding with numerous reasons.

The sentencing retrial formally began on September 19, 2005. The State had previously proven the pecuniary gain aggravator, A.R.S. 13-751(F)(5) and trial proceeded to the penalty phase. One of the mitigators sought to be proven by the defense was good behavior while incarcerated. *See, Skipper v. Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986). As noted by the Court in its 06-06-13 Minute Entry, they succeeded in proving that his behavior was excellent (MEO 6-06-13, p. 19). The evidence of Petitioner's excellent behavior while incarcerated could have been elicited without any reference to "death row". While defense counsel may have had an inkling this area was highly problematic,

that she nonetheless proceeded strongly suggests she had no real appreciation for how devastating it actually was. No curative instruction to limit this damage was sought, again suggesting that trial counsel was virtually oblivious to how prejudicial this irrelevant and inflammatory information was.

Any factor which lessens the jury's sense of responsibility in making the "ultimate determination of death . . . presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985), at 333.

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

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

Later, the Court held:

> On reaching the merits, we conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining

the appropriateness of the defendant's death rests elsewhere.

Id. at 328-329.

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

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

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

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

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

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

> FN4, *See, e.g., Hawes v. State*, 240 Ga. 327, 333, 240 S.E.2d 833, 839 (1977) (setting aside death sentence in spite of counsel's failure to object to prosecutor's argument); *Fleming v. State,* 240 Ga. 142, 146, 240 (S.E.2d 37, 40 (1977) (setting aside death sentence in spite of curative instruction); *State v. Willie*, 410 So.2d 1019, 1034-1035 (La. 1982) (use of this argument by prosecutor calls for setting aside death sentence even in the absence of other improprieties); *State v. Jones,* 296 N.C. 495, 498-499, 251 S.E.2d 425, 427 (1979) (ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though there was no contemporaneous objection); *State v. White,* 286 N.C. 395, 404-405, 211 S.E.2d 445, 450 (1975) (ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though trial judge gave

curative instruction); *State v. Gilbert,* 273 S.C. 690, 696-698, 258 S.E.2d 890, 894 (1979) (setting aside death sentence in spite of defendant's failure to raise issue on appeal).

FN5. *See, e.g., People v. Morse*, 60 Cal.2d 631, 649-653, 36 Cal.Rptr. 201, 212-215, 388 P.3d 33, 44-47 (1964); *Pait v. State*, 112 So.2d 380, 383-384 (Fla. 1959); *Blackwell v. State,* 76 Fla. 124, 79 So. 731, 735-736 (1918); *People v. Johnson,* 284 N.Y. 182, 30 N.E.2d 465 (1940); *Beard v. State,* 19 Ala.App. 102, 95 So. 333 (1923). See generally Annot., *Prejudicial Effect of Statement of Prosecutor that if Jury Makes Mistake in Convicting It Can Be Corrected by Other Authorities* , 3 A.L.R.3d 1448 (1965); Annot., Prejudicial Effect of Statement of Court that if Jury Makes Mistake in Convicting It Can Be Corrected by Other Authorities, 5 A.L.R.3d 974 (1966).

Id., at 334.

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

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

In *State v. Britt,* 288 N.C. 699, 220 S.E.2d 283 (1975), the Supreme Court of North Carolina found that such a development was "incurably prejudicial." (*Id.*, at 713, 292). There, the prosecutor elicited that information while cross examining the defendant

during retrial (*Id.*, at 707, 289). Here the information was elicited by defense counsel but was no less incurably prejudicial. In *Britt* both the conviction and death sentence had been reversed so the retrial was "entirely new." (*Id.*, at 708, 289). Here, the error was even more clearly prejudicial because only the sentencing phase was being retried and the jury was operating under a directed verdict of guilt. It is inestimable how greatly this directed verdict of guilt diminished the jury's sense of responsibility in reaching its verdict. Here, the jury was not deciding the single most important issue in a criminal trial; guilt or innocense. Forced to accept Petitioner's guilt by directed verdict as the correct verdict, it is hard to imagine that they would not also accept the sentence of death as correct once they learned that it had been previously imposed. As stated by the Court in *Britt:*

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

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

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

People v. Davis, 97 Ill. 2d 1, 452 N.E.2d 525 (1983) found that the prejudice was so great, when the jury was advised of a previous death sentence *in another case*, as to require the death sentence be vacated and remanded. The court noted that, in order to prove the statutory aggravator of the defendant having been convicted of two or more murders, the State needed to prove a conviction for a prior murder (*Id.*, at 24, 536). The State did so by introducing a certified copy of Davis' conviction for murdering one Charles Biebel (*Id.*, at 25, 536). This document, as did clerks minute docket, also stated that he had been sentenced to death for the offense *(Id.*, at 25, 536-537). The court noted the fact "that the defendant received the death sentence for a prior murder has absolutely

no relevance to the issue of whether he is eligible to receive that penalty for the instant offense." (*Id.*, at 26, 537, emphasis added). The court went on to say:

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

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

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

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

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

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

The only cases which hold that it was not fundamental error to mention that the defendant was on death row previously involve having been so sentenced on another case and usually involved a single inadvertent reference to it. The oldest, *Romano v. Oklahoma,* 512 U.S. 1, 114 S.Ct. 2004 (1994) involved the disclosure that the defendant had been sentenced to death on a different case. There, Romano was tried in series for two different, unrelated murders (*Id.*, 3, 2007). The State was required to prove two aggravating circumstances, one of which was that Romano had previously been convicted of a violent felony. (*Id.*, 4, 2007) Various evidence was introduced to prove this element, including a copy of the previous judgment and sentence, which stated he had been sentenced to death on the prior case.

The *Romano* Opinion neither overruled nor retreated from *Caldwell*, it simply answered a narrower question, by finding that Justice O'Connor "supplied the fifth vote

in *Caldwell* and concurred on grounds narrower than those put forth by the plurality, her position is controlling (citations omitted)". *Romano, Id.*, at 8, 2010 (1994). The *Romano* court itself expressly acknowledged that it had narrowed the question answered by *Caldwell* to a different issue by stating:

> Petitioner argues that *Caldwell* controls this case. He contends that the evidence of his prior death sentence impermissibly undermined the sentencing jury's sense of responsibility, in violation of the principle established in *Caldwell.* We disagree. The infirmity identified in *Caldwell* is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process.
>
> *Romano, Id.*, at p. 9, 2010 (1994)

That narrower question presented by *Romano* is not before this court on this case. First, *Romano* involved the disclosure of a death sentence having been previously imposed in a different case, not in the same case as is at issue here. Second, the disclosure was made by the prosecutor in the course of having to prove statutory aggravators, prior conviction of a violent felony and presenting a continuing threat to society (*Id.*, at 4, 2007). Neither factor in the latter distinguishing factor is present here. Petitioner had not been previously convicted of a violent felony and "continuing threat to society", sometimes called "future dangerousness" is not an aggravating factor statutorily recognized in Arizona. Thus, the very rationale for introducing these records in *Romano* is absent here. The prejudicial impact of disclosing that the defendant had been previously sentenced to death in this case can scarcely be exaggerated. The resentencing jury, already told that a previous jury had "gotten it right" by virtue of the directed verdict

of guilt, would be strongly biased to also accept that the death sentence had also been "gotten right" by (what they assumed to be) a previous jury which had heard all the facts.

The *Romano* case has limited applicability to the issues presented here because it presented a single mention of having been sentenced to death *on a different case*. While the Court granted certiorari on an issue facially similar to that presented in *Caldwell*, it disposed of it on far narrower grounds of whether the prosecutor's remarks were accurate.

> Petitioner sought our review, and we granted certiorari, limited to the following question: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?" 510 U.S. 943, 114 S.Ct. 380, 126 L.Ed.2d 330 (1993). We now affirm.
>
> *Romano, Id.*, at 6, 2008, 2009.
> (The citation is from *Resha v. Tucker*)

The *Romano* court thusly explicated the holding in *Caldwell*.

> We have also held, in *Caldwell v. Mississippi,* that the jury must not be misled regarding the role it plays in the sentencing decision. See 472 U.S. at 336, 105 S.Ct., at 2643 (plurality opinion); *Id.*, at 341-342, 105 S.Ct. at 2646 (O'CONNOR, J., concurring in part and concurring in judgment). The prosecutor in *Caldwell,* in remarks which "were quite focused, unambiguous, and strong," misled the jury to believe that the responsibility for sentencing the defendant lay elsewhere. *Id.,* at 340, 105 S.Ct. at 2645. The trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them." Id., at 339, 105 S.Ct., at 2645.
>
> *Romano, Id.*, at 8, 2010 (1994)

The *Romano* court then goes on to give a narrow reading of *Caldwell*, based on Justice O'Connor's concurrence.

> As Justice O'CONNOR supplied the fifth vote in *Caldwell,* and concurred on grounds narrower than those put forth by the plurality, her position is controlling. See, *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993-994, 51 L.Ed.2d 260 (1977); *Gregg, supra*, at 169 n. 15, 96 S.Ct., 2923, n. 15. Accordingly, we have since read *Caldwell* as "relevant only to certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright,* 477 U.S. 168, 184, n. 15, 106 S.Ct. 2464, 2473, n. 15, 91 L.Ed.2d 144 (1986).
>
> *Romano, Id.,* at 9, 2011 (1994)

That court held that since there had been no misrepresentation to the jury this did not violate the Eighth Amendment and affirmed the death sentence (*Id*).

The Petitioner's presence was living, breathing proof that death sentences are not necessarily final and, the inept questioning of mitigation witnesses by trial counsel, and subsequent cross-examination drove the point home.

Even the *Romano* court had to acknowledge that, even when a jury is not misled as to its responsibility, a reversal of a death sentence is required where a prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a violation of due process" (*Romano, Id.,* at 12, 2012, (1994)), quoting *Donnally v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1971).

Jones v. South Carolina, 332 S.C. 329, 504 S.E.2d 822 91998), cited *Romano* and found a single, passing reference to Petitioner having been on death row was not prejudicial because the jury may well have believed it was for a different crime (*Id.,* 324, 828). *State v. Adams,* 347 N.C. 48, 490 S.E.2nd 220 (1997), is very similar to *Jones.* The court held that a single, unresponsive comment by a witness about seeing the defendant

on death row was made "in a fairly off handed way without the intent to emphasize it to the jury." (*Id.*, 64, 228). The court found that this single, inadvertent reference did not warrant a sentencing retrial.

Here, the situation is far worse, with both parties, the defense and the prosecution, repeatedly eliciting the fact that Petitioner had previously been sentenced to death on this very case. As noted by the trial court, what occurred here was far more extensive than a mere off-handed remark (MEO 6-06-13, p. 19). The court found that the references "death row" and "condemned row" were "pervasive and occurr[ed] throughout the course of the course of the penalty phase." (MEO 4-24-14, p. 10).

Despite the overwhelming body of law to the contrary, much of it holding that this sort of error is "incurably prejudicial" and an "intolerable danger" for lessening a jury's sense or responsibility in reaching its verdict, the Court below ignores this vast body of case law and instead relies exclusively upon the easily distinguishable *Romano* case to find no error.

There was not a single reference, either by the parties or the court, to this fact being completely irrelevant to the instant jury's decision. There was no objection and no curative instruction requested or given. Nothing was done to convey to the jurors that this fact was irrelevant and not to be considered by them in their deliberations. *See, People v. Davis,* 97 Ill. 2nd 1 @ 26, 452 N.E.2d 525, 537 (1983).

II. The Court below claims that retrial counsel's actions constituted "trial tactics, not sheer neglect" (MEO 4-24-14, p. 8) and that "*Strickland* and *Harrington* . . . direct this court to presume that the disclosure that Defendant had been a death row inmate constituted resentencing counsel's strategy." (MEO 4-24-14, p. 9).

The Court below then goes onto cite a series of extremely ambiguous exchanges between predecessor courts and retrial counsel, presenting them as evidence of "strategy". It cites retrial counsel's statement on May 27, 2005 hearing that the defense was "considering" presenting such evidence (MEO 4-24-14, p. 9). Also at that same hearing "We haven't made that decision yet judge . . ." (*Id.*).

The Court below also noted that retrial counsel made the conscious decision to keep the word "resentencing" out of the jury questionnaire (*Id.*, Evidentiary Hearing Transcript 3-28-14, p. 88-90); evidence that retrial counsel had clear knowledge of how damaging this evidence would be.

Retrial counsel was very clear in a pretrial e-mail discussion that the defense had no articulated strategy to disclose to this jury that Petitioner had previously been sentenced to death on this very case.

A: . . . But that makes me think, since I'm seeing that and I'm culling it, that when we went into trial we didn't necessarily have a plan to bring this out.

Q: Okay.

A: Because I'm making suggestions saying, he, take a look at this. **We don't want the jurors to think he's been previously sentenced to death, so we**

need to change this language.

Sworn Interview of Larry Matthew, Feb. 12, 2014, pp. 16-17 (emphasis added)

The Court below then cites a number of instances in which retrial counsel introduced the fact that it was retrial counsel themselves who introduced the fact that Petitioner had previously been sentenced to death, apparently drawing from this the unsustainable and utterly foundationless conclusion that this too was evidence of "strategy".

"Considering" employing a tactic and not "having made a decision on that" do not qualify as "strategy".

> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In otherwords, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> *Strickland v. Washington,*
> 466 U.S. 668, 690, 691, 104 S.Ct. 2052, 2066 (1984).

Retrial counsel cannot claim that it made "strategic choices" in this case because they did not perform the "thorough investigation of law and fact relevant to plausible options" as required by *Strickland. Id.*, at 690, 691; 2066 (1984).

The defense team did not do any research on the advisability of disclosing to this

second jury that the Petitioner had been previously sentenced to death on this very case.

Q: Did you do any research on the issue of the advisability of telling the retrial jury that he had been previously sentenced to death on this very case?

A: No.

Sworn Interview of Lynn Burns, Feb. 12, 2014, pg 27.

Q: Did you do any research in case law and that sort of thing on the advisability of telling a resentencing jury who is not deciding guilt or innocense that the client had been previously sentenced to death on this very case?

A: I – see this is the thing. I know that at some point in time I did see the United States Supreme court case, I forget the name of it off the top of my head that dealt with that, where the jury that learned about the **other** capital sentence.

Q: *Romano*?

A: Yeah, I think that's it.

Sworn Interview of Larry Matthew, Feb. 12, 2014, pp 13-14 (emphasis added)

A discussion then ensued during the interview that whatever research Mr. Matthew may have conducted had occurred only *after* the start of the mitigation phase evidence. See generally, pages 22-24 of Mr. Matthews 2-12-14 Interview but briefly, a discussion was held when it first was disclosed that Petitioner had previously been on death row on this case.

MS. BLOMO: My impression is, it was – it was intimated with Wendy Hackney, maybe not completely clear, and that it came out more with Barbara Sheerer.

WITNESS: Okay - I marked it in my copy. I mean, I can tell you exactly

where when I got back to the office but it's ---- the first time that I found it to be nonresponsive, and I believe it was the first DOC witness.

* * *

A: So — and I believe those were the only two mentions on that date, which made me, again, I think, again, I 'm just speculating – that might have been when I when I went and did research.

Q: Okay.

A: – and maybe found the *Romano* case.

Sworn Interview of Larry Matthew, Feb. 12, 2014, pp. 23-24.

Here, we know there had been absolutely no investigation at all into the advisability of informing the jury that Petitioner had been previously sentenced to death on this very case prior to such information had began leaking out to the jury, (see Sworn Interview of retrial counsel Larry Matthew pages 13-14, 16-17, 23-24), and even this investigation led only to one wrong, off-point case, *Romano.* Later, on cross examination, Mr. Matthews admitted: "What possibly could have happened here? When you look at the beginning we're trying to avoid this coming in, why all of a sudden do we not care later?" (Sworn Interview of Larry Matthew, Feb. 12, 2014, p. 36).

All retrial counsel had was concern, fear and hope that Petitioner's previous death sentence would not be revealed. This does not constitute research. By their own admission immediately above, that it wasn't until this information began leaking out of the mouths of their own witnesses, after the hearing had begun, did Mr. Matthew begin doing anything remotely approaching research. Research began after the damage had

already begun does not constitute a "strategic choice" under *Strickland,* as such can be made only *after* a thorough investigation of the law and the facts.

The Court below points to Petitioner's limited cooperation in developing other aspects of mitigation as an excuse for retrial counsel's performance (MEO 4-24-14, pp. 11-12). This, however is unavailing.

> Nowhere in *Strickland* or in any other case has the Supreme Court stated that trial counsel need pursue mitigation evidence related to a defendant's mental health only if a defendant or his family specifically informs counsel of the defendant's background, despite trial counsel's existing knowledge that his client's mental health was a significant issue. To the contrary, *Strickland* states that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgements." *Strickland,* 466 U.S. at 691 (emphasis added). Thus, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.*, at 690-91. We acknowledge that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions," and in certain cases may be determinative. *Id.,* at 691. **But a defendant's failure personally to inform his counsel of possible avenues of investigation does not absolve his attorney from pursuing those avenues,** particularly where counsel is already aware of facts demonstrating that such an investigation may be fruitful.
>
> *Saranchak v. Pennsylvania Dept. Of Corr.,* 802 F.3d 579 (2015) (emphasis added)

The *Saranchak* court went on to point out that the ABA Guidelines likewise require as much.

> Those guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins,* 539 U.S. at 524 (quoting ABA

> Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") 11.4.1(c), at 93 (1989)). Further, "[t]he 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." ABA Guidelines 11.4.1(c). As the commentary to the ABA Guidelines explains, "[c]ounsel's duty to investigate is not negated by the expressed desires of a client." ABA Guidelines 11.4.1, commentary. *Supra.*

The ruling of the Court below that retrial counsel's actions were "strategic" flies in the face of all available evidence. It willfully ignores a perfectly clear record and is equally clear reversible error.

III. The Court below rejected the State's argument of "death row redemption" as the defense's excuse for the disclosure of having previously been on death row and instead substituted its own reasoning for the disclosure, thereby abandoning its role of neutral arbitrator and acted instead as an advocate in violation of due process of law.

Claim 12.B.6 Death Row Disclosure

This claim is set forth in the original Petition at page 75. In the Court's 06-06-13 Minute Entry Order (at pages 18-22) the court ordered simultaneous briefing which was accomplished by the parties on August 14, 2013 (Petition for Review, Appendix Items 8 and 9). Both retrial defense attorneys Lynn Burns and Larry Matthew were interviewed under oath of February 12, 2014 (Petition for Review, Appendix Items 13 and 14). An evidentiary hearing was held on March 28, 2014 with oral argument thereon on March 31, 2014 (Petition for Review, Appendix Items 15 and 16).

The court denied this claim in both its 04-24-14 Minute Entry Order (Appendix A) (together with the need for a limiting instruction) at pages 15-17 and in its 01-16-15

Comprehensive Ruling at page 34 (Appendix B).

In its Simultaneous Briefing of August 14, 2013, the State sought to rationalize the introduction of the previous death sentence of the Petitioner under theory sometimes known as "Death Row Redemption". This requires that the defendant undergo some fundamental transformation while on death row, usually "finding Jesus" or the like.

No such thing occurred here. Petitioner with no criminal record has always remained the same even-tempered, calm individual he has been throughout his life and the entirety of his incarceration. Even the Court below scoffed at the State's theory:

> "To be clear, the court does not adopt the State's contention that re-sentencing counsel directed mitigation efforts toward Defendant having "redeemed himself since the murder." See State's Simultaneous Briefing re: PCR claim at 4 filed August 14, 2013.
>
> 4/24/14 Minute Entry at page 15.

Indeed, such a thing could not have occurred because neither defense counsel had ever heard of such a defense:

> Q: Okay. In 2005 were you familiar with a capital case defense strategy of death row redemption?
> A: No.
> Q: Have you ever heard the term?
> A: No.
>
> Sworn Interview Larry Matthew, Feb. 12, 2014, pg 13

> Q: All right. In the time to the run up to the retrial, were you familiar with a concept called death row redemption?
> A: No.
>
> Sworn Interview of Lynn Burns, Feb 12, 2014, pg 24.
> Petition for Review, Appendix Items 13 and 14.

Had the Court below stopped there, the case would have been over. Had the Court

taken the admissions of defense counsel that they had conducted no research, let alone the "thorough research" required by *Strickland* in order to claim strategy, it could not have possibly reached the unsupportable conclusion that the defense decisions were strategic.

> Q: Did you do any research on the issue of the advisability of telling the retrial jury that he had been previously sentenced to death on this very case?
>
> A. No.
>
> Sworn Interview of Lynn Burns, Feb 12, 2014, pg 27.
> Petition for Review, Appendix Item 14

Likewise, had the Court below held the State to its untenable and misplaced "death row redemption" argument, their very own words, the case would have been over. The Court below would have had no honest choice but to find ineffective assistance in resentencing counsel, unrefutted by the State and would have had to remand for resentencing.

However, rather than do so, the Court below takes the extraordinary and unprecedented step of substituting its own reasoning, judgement and rationales for not just **one** of the parties but for **both.** There is literally no reported case in which a court has done so.

There are reported cases however, where the trial court begins acting as an advocate for **one** of the parties.

> We think the balance is adversely tipped against the defendant in a criminal trial where the judge's role loses its color of neutrality and tends to accentuate and emphasize the prosecution's case.[1] A trial judge's isolated questioning to clarify ambiguities is one thing; however, a trial judge cannot assume the mantel of an advocate and take over the cross-examination for

the government to merely emphasize the government's proof or to question the credibility of the defendant and his witnesses. A judge's slightest indication that he favors the government's case can have an immeasurable effect upon a jury.[2] A trial judge should seldom intervene in the questioning of a witness and then only to clarify isolated testimony. A trial court should never assume the burden of direct or cross-examination.

[1] See *United States v. Hickman*, 592 F.2d 931, 934-35 (6th Cir. 1979); *United States v. Sheldon,* 544 F.2d 213, 218 (5th Cir. 1976); *United States v. Hill,* 332 F.2d 105 (7th Cir. 1964); *United States v. Brandt,* 196 F.2d 653, 655-56 (2d Cir. 1952).

[2] See *United States v. Hick Hickman,* 592 F.2d 931, 934-35 (6th Cir. *1979); United States v. Karnes,* 531 F.2d 214, 216-17 (4th Cir. 1976); *United States v. Sheldon,* 544 F.2d 213, 218 (5th Cir. 1976); *United States v. Hoker,* 483 F.2d 359, 368 (5th Cir. 1973); *United States v. Wyatt,* 442 F.2d 858, 861 (D.C. Cir. 1971).

U.S. v. Bland, 697 F.2d 262, 265-266 (1983)

Here, however, the problem was far more pernicious and subtle. The Court below did not disclose it was leaning toward the State **during** the hearing by asking questions of witnesses, it waiting until **after** the hearing, when it rejected the State's "death row redemption" theory and substituted its own theory in an attempt to salvage the argument, that the bias was revealed. This gave Petitioner no opportunity to respond to these secret leanings and biases of the Court below

It starts, for purposes of brevity, at pages 15 of the 04-24-14 Minute Entry in which it rejects the State's "death row redemption" argument ("To be clear, the court does not adopt the State's contention that re-sentencing counsel directed mitigation efforts toward Defendant and having 'redeemed himself after the murder'") . . . But then goes on to recast the State's argument by offering its own opinion that "resentencing

counsel was not presenting 'death row redemption' as a mitigating factor" but rather "good behavior during post-sentencing incarceration" mitigation. (*Id.*, at 16, quoted language unattributed).

After two more paragraphs consolidating its grip as advocate for the parties, the court makes a truly astonishing conclusion: "for the jury to understand these achievements and contributions, **the resentencing jury was required (or was entitled to) information about Defendant's environment, including the fact that he was on death row at the time**." (04-24-14 MEO at pg 16) (emphasis added).

This assertion is not only unsupported by any reported case law (and the court below cites none) because there is none to cite, it is contradicted by literally every reported case, even those cases which hold such disclosure was harmless on its facts. A clearer example of biased result-reaching cannot be posited.

At this juncture neither of the parties could have realized they no longer retained a justiciable interest in the litigation, it was only the Court below which retained a justiciable interest in reaching what it considered reaching the "correct" result; one highly biased in favor of the State.

> Addressing Judge Hilliard's participation in the special action proceeding, the court of appeals held that it was "of the inappropriate 'I-ruled correctly' sort". *Hurles,* 849 P.2d at 4. The court explained that "at every level of the judiciary, judges are presumed to recognize that they must do the best they can, ruling by ruling, with no personal stake–and surely no justiciable stake–in whether they are ultimately affirmed or reversed." *Id.* The court stated that "[t]his principle, which is essential to impartial adjudication, does not change from direct appeal to special action, merely

because the judge is a nominal respondent in the later."

Hurles v. Ryan, 706 F.3d 1021, 1028 (2013) (emphasis in original) (withdraws and supersedes opinion 650 F.3d 1301)

The *Hurles* Court goes on to say:

> [28] The Supreme Court held long ago that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchinson,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." This most basic tenet of our judicial system helps to ensure both the litigants' and the public's confidence that each case has been adjudicated fairly by a neutral and detached arbiter.
>
> (*Id.*, at 1037)

The extent to which the court below commandeered the advocacy of both parties in order to reach the result it desired is literally unprecedented in the history of American Jurisprudence. For the Arizona Supreme Court to allow this to pass is unfathomable, whether it resulted from neglect or design, this case must be remanded for resentencing.

CONCLUSION

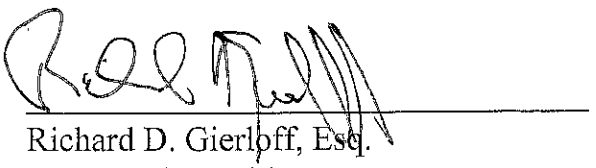
There was not any strategy employed in disclosing to the resentencing jury that Petitioner had been previously sentenced to death on this very case. No research at all, let alone the thorough research required by *Strickland* had been conducted, to support a claim of strategy.

Courts have uniformly held that it is error to disclose this fact to a resentencing jury, even when the previous death sentence was imposed on a different case and held to be harmless error on the facts of that particular case; it was held to be error nonetheless.

The Court below commandeered the case, unprecedently as an advocate for both sides, solely to reach the result it considered correct. In order to do so it had to ignore unanimous case law to the contrary in finding no error in disclosing the previous death sentence, shoulder aside the State's death row redemption argument and substitute its judgement for theirs and completely abandon its role as a neutral arbiter, disclosing unmistakable judicial bias.

This matter must be reversed and remanded for resentencing.

RESPECTFULLY SUBMITTED this 1 day of November, 2016



Richard D. Gierloff, Esq.
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the foregoing Petition for Writ of Certiorari, contains 7388 words, 395 sentences, 694 lines, 162 paragraphs on 27 pages in 13 point Times New Roman font, excluding the parts of the document that are exempted by Supreme Court Rule 33.2(b), as calculated by the Wordperfect Office X4 word count system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1 day of November, 2016

Richard D. Gierloff, Esq.
Attorney for Petitioner

APPENDIX A

Michael K. Jeanes, Clerk of Court
*** Filed ***
04/25/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1995-009046

04/24/2014

HONORABLE DAVID B. GASS

CLERK OF THE COURT
M. Lopez/E. Aguilar
Deputy

STATE OF ARIZONA

SUSANNE B. BLOMO

v.

JAMES CORNELL HARROD

RICHARD D GIERLOFF

APPEALS-PCR
CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

MINUTE ENTRY

The Court has reviewed the parties' simultaneous briefs filed August 14, 2013 (Defendant's *Supplemental Brief*; State's *Simultaneous Briefing re: PCR Claim*); responses filed August 30 and September 3, 2013 (State's *Response to Supplemental Brief*; Defendant's *Response to State's Simultaneous Briefing*, respectively); and the State's *Notice of Supplemental Record Citations and Authority* filed September 23, 2013. The Court has further considered the record in this case, arguments of counsel made at the hearing held on September 13, 2014, and evidence and argument made in connection with the Evidentiary Hearing held March 28, 2014.

Issue before the Court

In his Petition for Post-Conviction Relief, Defendant claimed:

> 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. He knew Petitioner from

> his work as a classification officer at SMU-2. During his testimony he disclosed that SMU-2 was on death row.
>
> Q. And at SMU-2, I'm assuming all the inmates were level 5?
> A. Death row inmates are P-5.
>
> The defense attorney seemed oblivious to the damage resulting from disclosing to the jury that Petitioner had previously been sentenced to death. This jury has 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, dramatically reducing their sense of responsibility to reach their own, independent decision.

Petition at 75 [citations to record omitted].

In his post-conviction petition, Defendant focused on a single witness's testimony, saying that resentencing counsel "stumbled into" the reference to death row, and that resentencing counsel compounded the error with subsequent questioning.

In its June 6, 2013 Ruling on Defendant's First Petition for Post-Conviction Relief, the Court shared its analysis and granted an evidentiary hearing as to Defendant's claim of ineffective assistance (IAC) of resentencing counsel regarding the "death row disclosure," saying:

> THE COURT FINDS that with the exception of a portion of Claim 12.b.6, ineffective assistance by trial counsel relating to death row disclosure in 2005, none of the remaining claims raised by Defendant present a material issue of fact or law that would entitle him to relief and no purpose would be served by any further proceedings regarding those claims.
> . . .
>
> IT IS THEREFORE ORDERED granting an evidentiary hearing regarding claim 12.b.6, ineffective assistance by trial counsel relating to death row disclosure in 2005.

ME dated June 6, 2013; corrected June 17, 2013.

The Court directed the parties to submit simultaneous briefs addressing:

> Whether trial counsel's assistance was ineffective (1) by opening the door to the evidence that Defendant had been on "death row" or "condemned row," and (2) by failing to seek some form of limiting instruction regarding that evidence.

FACTUAL REVIEW

The 2005 sentencing jury was told that Defendant had been found guilty of first degree murder by a previous jury (1997). At the aggravation phase, the 2005 sentencing jury found that Defendant was death-eligible by finding the aggravating factor of pecuniary gain.

At the second part of the sentencing trial, the mitigation phase, resentencing counsel presented mitigation evidence that included, among other evidence, the impact of execution on his family and friends and Defendant's good behavior (pre-crime, pre-trial, during trial, and post-sentencing). *See State v. Harrod* (*Harrod III*), 218 Ariz. 268, 283, 183 P.3d 519, 534 (2008). The mitigation presentation included evidence of Defendant's lifelong good behavior and included fourteen-plus mitigating factors, which are discussed in greater detail below. *See* Resentencing Trial, October 25, 2005, p. 39, ll. 1-16; *see also* Final Instructions Penalty Phase, at 3 (filed on October 25, 2005).

Standard for Review

The Court held an evidentiary hearing to assist in determining whether the "death row" and "condemned row" references first elicited by resentencing counsel and the subsequent related argument constituted sound sentencing trial strategy and tactical decisions or constituted deficient performance/IAC. *See Harrington v. Richter*, --- U.S.---, 131 S. Ct. 770, 790 (2011) (applying the holding in *Strickland v. Washington*, 466 U.S. 668 (1984)); *see also* Defendant's Response at 5.

Defendant can prevail under *Strickland* only if this Court concludes that (1) resentencing counsel's performance during the sentencing phase was deficient, and (2) there was a reasonable probability that, absent the deficient performance, the result of the resentencing proceeding would have been different. *See Strickland,* 466 U.S. at 687.

Actions of resentencing counsel that appear to be trial tactics will not support an allegation of ineffective assistance of counsel. *See State v. Espinoza-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984). Courts presume that counsel's conduct is trial strategy. *State v. Fisher*, 152 Ariz. 116, 118, 730 P.2d 825, 827 (1986), *citing Strickland v. Washington*, 466 U.S.

668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984). Disagreements in trial tactics will not support a claim of ineffective assistance of counsel provided the conduct had some reasoned basis. *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984).

Harrington said:

> Although courts may not indulge "*post hoc* rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland,* however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.

--- U.S. at---, 131 S. Ct. at 790 (citations and quotation omitted).

Relevance of Post-Sentencing Good Behavior in Prison

A long line of Arizona cases establish that good behavior while incarcerated, particularly long-term, post-sentencing good behavior is evidence of mitigation that the fact finder can consider:

- *State v. Stokley*, 182 Ariz. 505, 524, 898 P.2d 454, 473 (1995) ("Although long-term good behavior during post-sentence incarceration has been recognized as a possible mitigating factor, we, like the trial court, reject it here for pretrial and presentence incarceration.")

- *State v. Lopez*, 175 Ariz. 407, 416-17, 857 P.2d 1261, 1270-71 (1993) ("We believe, however, that we should subject claims of in-custody good behavior to close scrutiny. On this point, the facts offered in mitigation are not persuasive. . . . Given his overall prison record, the trial court found defendant's behavior in prison was not mitigating.")

- *State v. Atwood*, 171 Ariz. 576, 655, 832 P.2d 593, 672 (1992) ("The fact that a defendant is a model prisoner has previously been considered to be a mitigating circumstance.")

- *State v. Gillies*, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984) (Although defendant changed behavior after receiving a death sentence and "changes are commendable, persons sentenced to death frequently change their outlook on life. Balancing these human factors against former behavior militates in his favor, but not such as to require leniency, given the seriousness of his crimes.")

- *State v. Watson,* 129 Ariz. 60, 63-64, 628 P.2d 943, 946-47 (1981) ("In the instant case, based upon our independent view of the record, we believe that the two aggravating circumstances were outweighed by the mitigating circumstance. The fact that he has been a model prisoner and has attempted to further his education can and should be considered.")

Consistent with the above, our Supreme Court recently held that it is error to preclude a defendant from presenting evidence of good behavior. *See State v. Payne*, 233 Ariz. 484, 518-19, 314 P.3d 1239, 1273-74 (2013). In *Payne*, the trial court excluded as irrelevant the defendant's "evidence that he was a 'good inmate' as a mitigating factor." *Id. Payne* explained that "good inmate evidence can be mitigating, but it is generally afforded little weight," and went on to hold that excluding the evidence was error. *See id.* at 519, 314 P.3d at 1274.

Other jurisdictions further have held that in capital cases, sentencing counsel's failure to consider good behavior may constitute ineffective assistance of counsel. *See Robinson v. Schriro*, 595 F.3d 1086, 1108 (9th Cir. 2010). *Robinson* said, "In preparing for the penalty phase of a capital trial, defense counsel has a duty to conduct a thorough investigation of the defendant's background to discover all relevant mitigating evidence." *See id.* (internal citations and quotations omitted). *Robinson* held that the sentencing counsel's failure "to explore readily available sources of mitigating 'model prisoner' evidence concerning [the defendant's potential] for rehabilitation," as well as other potential mitigating factors, constituted ineffective assistance. *Robinson* went on, saying that capital sentencing counsel should have learned about a defendant's behavior while on death row, whether a defendant got along well with fellow inmates, whether a defendant received frequent visits from family members, whether defendant regularly attended church, and whether a defendant had achieved the lowest possible lowest security level classification for a death row inmate. *See id.* at 1110.

Here, the use of the "good behavior" evidence had particularly probative value. Resentencing counsel was able to show the jury how Defendant in fact behaved on death row. There was no aspect of speculation. Defendant had been on death row for a significant period of

time, and he was a good prisoner even though he could gain no better privileges as a result of his good behavior. In short, as a person, Defendant was a good prisoner and could contribute to the prison community.

Some Arizona cases have used strong, conclusory language that might suggest that because prisoners are expected to behave well in prison, the evidence is not mitigating.

- *State v. Finch,* 202 Ariz. 410, 418, 46 P.3d 421, 429 (2002) ("We have previously rejected personal growth and pretrial and presentence good behavior during incarceration as a mitigating circumstance because a defendant is expected to behave himself in [jail] while awaiting [sentencing].")

- *State v. Schackart,* 190 Ariz. 238, 252, 947 P.2d 315, 329 (1997) (After closely scrutinizing the evidence of in-custody good behavior, finding that "[i]n our judgment, therefore, his conduct was entitled to little if any mitigating weight, even considering the additional affidavits submitted three weeks after sentencing.")

- *State v. Spreitz,* 190 Ariz. 129, 150, 945 P.2d 1260, 1281 (1997) ("The sentencing judge also acknowledged that defendant had experienced personal growth in prison and had caused no problems, without specifically finding this to be a mitigating factor.. . . Thus, we decline to find defendant's good behavior while in the Pima County Jail a mitigating factor.")

In the direct appeal from the resentencing trial, our Supreme Court used strong and conclusory language similar to that used in *Finch* and in *Spreitz*. *See State v. Harrod* ("*Harrod III*"), 218 Ariz. 268, 284, 183 P.3d 519, 535 (2008) (relying on *State v. Finch,* 202 Ariz. 410, 418, 46 P.3d 421, 429 (2002)). In *Harrod III*, our Supreme Court agreed that Defendant proved "that his behavior was excellent during both his pre-trial and post-sentencing incarceration," although it was "not a mitigating circumstance . . . because inmates are expected to behave well in prison." *See id.* at 284, 183 P.3d at 535.

In making that statement in *Harrod III*, our Supreme Court was not suggesting that introduction of post-conviction good behavior in prison was irrelevant evidence that the sentencing jury could not and should not consider when evaluating mitigation. *See Payne*, 233 Ariz. at 518-19, 314 P.3d at 1273 -74; *see also Lopez*, 175 Ariz. at 416-17, 857 P.2d at 1270-71.

Lopez noted that ultimately the mitigation value of good behavior is a factual issue for the fact finder, which is subject to close scrutiny in subsequent proceedings:

> We believe, however, that we should subject claims of in-custody good behavior to close scrutiny. On this point, the facts offered in mitigation are not persuasive. Defendant was, at best, a model prisoner only while at the county jail awaiting resentencing. Before that, he had a long history of disciplinary problems while in prison, including several incidents while originally on death row. The trial court correctly observed that defendant would be expected to behave himself in county jail while awaiting resentencing. Given his overall prison record, the trial court found defendant's behavior in prison was not mitigating. We agree with the trial court. *See State v. Atwood,* 171 Ariz. 576, 655, 832 P.2d 593, 672 (1992) (finding that even where the defendant had changed his goals and behavior in prison, that was not enough to find that the defendant was a model prisoner and was therefore not a mitigating circumstance), *cert. denied,* 506 U.S. 1084 (1993).

See Lopez, 175 Ariz. at 416-17, 857 P.2d at 1270-71. In short, *Harrod III* found Defendant's good behavior was not mitigating, but it was an appropriate issue for the jury to consider.

Relevance of Execution Impact on Defendant's Family

If Defendant's resentencing trial were occurring today, controlling precedent would preclude the introduction of execution impact evidence. *See State v. Rose*, 231 Ariz. 500, 513-14, n. 3, 297 P.3d 906, 919-20, n. 3 (2013); *see also State v. Chappell*, 225 Ariz. 229, 238, 236 P.3d 1176, 1185 (2010). But in 2005, at the time of Defendant's resentencing trial, trial courts were still litigating whether execution impact was admissible and no appellate courts in Arizona had resolved the issue.

On direct appeal following the resentencing, the state does not appear to have challenged the admissibility of execution impact. In addressing execution impact, *Harrod III* said, "Harrod cites as mitigating evidence the impact of execution on his family and friends and love for and of family. This Court, however, gives minimal weight to family support." *See* 218 Ariz. at 283, 183 P.3d at 534.

Published opinions since the resentencing trial and since *Harrod III* have addressed the issue, ruling that a defendant may present evidence of the defendant's relationship with the

defendant's family, but a defendant may not present evidence of the impact that the defendant's death will have on the defendant's family. *See Rose*, 231 Ariz. at 513-14, n. 3, 297 P.3d at 919-20, n. 3; *see also Chappell*, 225 Ariz. at 238, 236 P.3d at 1185. One case pre-dates *Harrod III*, but was not discussed by *Harrod III*. *See State v. Roque*, 213 Ariz. 193, 222, 141 P.3d 368, 397 (2006) (exclusion of statements about suffering of defendant's family not abuse of discretion).

With regard to the admission of execution impact evidence, *Chappell* said:

> Although similar evidence has been admitted in some cases, in none of those cases was the admissibility of the execution impact evidence at issue on appeal. *See, e.g., Moore,* 222 Ariz. at 22–23 ¶ 134, 213 P.3d at 171–72; *Velazquez,* 216 Ariz. at 315 ¶ 74, 166 P.3d at 106; *State v. McGill,* 213 Ariz. 147, 162 ¶ 67, 140 P.3d 930, 945 (2006); *State v. Greene,* 192 Ariz. 431, 443 ¶ 58, 967 P.2d 106, 118 (1998).

225 Ariz. at 238, n. 8, 236 P.3d at 1185, n. 8. *Harrod III* appears to fall into the same category as those cases cited in note 8 in *Chappell*. The state does not appear to have preserved a challenge to the admissibility of execution impact evidence.

As discussed in the testimony during the March 28, 2014 evidentiary hearing and as established by the above-cited published opinions, execution impact was an issue that was being litigated at the time of the resentencing trial. Not every trial judge was allowing its introduction. Resentencing counsel was fortunate to have been able to present the evidence, particularly given the probative value of being able to present actual evidence of the impact of a death sentence.

Here, the use of the "execution impact" evidence, as with the use of good behavior evidence, had particular probative value. Resentencing counsel was able to show the jury how Defendant's previous death sentence had impacted his family while he was on death row. Again, there was no aspect of speculation. Defendant had been on death row for a significant period of time, and his family had suffered the impact. In short, the jury did not have to wonder if Defendant's family would suffer an impact. The evidence showed the jury the actual impact.

Trial Tactics, Not Sheer Neglect

PCR counsel argues that allowing the sentencing jury to learn that Defendant had been on death row was the result of resentencing counsel's sheer neglect. PCR counsel argues that resentencing counsel had no real strategy for dealing with the evidence. *Strickland* and

Harrington, however, direct this Court to presume that the disclosure that Defendant had been a death row inmate constituted resentencing counsel's strategy.

Here, compelling objective evidence contradicts PCR counsel's argument and in fact supports the Court's presumption:

- Resentencing counsel was evaluating whether to introduce evidence of Defendant's previous death sentence throughout their representation:
    - In May, 2005, five months before the penalty phase began, resentencing counsel discussed the issue with the resentencing court and indicated that they were going to make a conscious decision on the issue. *See* Resentencing Trial, May 27, 2005, p. 13, ll. 1-19. During the May 27, 2005 hearing, resentencing counsel told the resentencing court that they were considering mitigation that included evidence of execution impact and Defendant's character, both based on the fact that Defendant previously had been sentenced to death. *See id.* at p. 13, l. 1 to p. 14, l. 6. The resentencing court asked resentencing counsel if it was their "intention to raise the issue that a judge had already imposed the death penalty on Mr. Harrod." *See id.* at p. 14, l. 7 to p. 15, l. 20. Resentencing counsel responded, "We haven't made a decision yet, Judge, but obviously we would like to have that option available if we should choose to open that door." *See id.* at p. 14, ll. 10-12. Resentencing counsel went on to recognize some additional challenges to keeping the evidence out, including the fact that it would leave the jury with questions and the realities of what it would take to keep it out. *See id.* at p. 14, ll. 20-23.
    - In August, 2008, two months before the resentencing trial began, resentencing counsel addressed the issue when working on a jury questionnaire when resentencing counsel sought to omit the word "resentence." *See* Evidentiary Hearing Transcript, March 28, 2014, p. 88, l. 6 to p. 90, l. 25. But resentencing counsel would have sought that limitation even if they were planning on introducing evidence of the death sentence in the penalty phase because they would not want it introduced and it would not be relevant to the earlier aggravation phase. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 104, l. 4 to p. 105, l. 17.
- Resentencing counsel, not the state, elicited the testimony regarding "death row" or "condemned row" statements. That testimony was part of the presentation of evidence of Defendant's mitigation evidence. In particular, resentencing counsel

recognized its unique and important role in the presenting the execution impact evidence. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 66, l. 17 to p. 68, l. 12.

- Resentencing counsel introduced recorded testimony of Officer Diane Deloria Focht that Defendant had been on "condemned row." Officer Focht was a correctional health officer III at the Arizona Department of Corrections. The timing of Officer Focht's testimony is telling. Officer Focht's testimony was recorded between 4:54 and 5:16 a.m. on October 18, 2005, shortly before the mitigation phase began at 10:30 a,m. that same day. The testimony was not played for the jury until October 19, 2005. During that testimony, resentencing counsel elicited testimony about Defendant being on "condemned row." That earlier recorded testimony and disclosure could not have taken resentencing counsel by surprise during the mitigation phase. Further, resentencing counsel made no effort to seek to redact or limit Officer Focht's testimony before the mitigation phase began. The timing coupled with resentencing counsel's actions also show that the other witnesses' testimony did not take resentencing counsel by surprise.

- The "death row" and "condemned row" references were more pervasive than originally presented by either resentencing counsel or the State, or even as initially discovered by the Court. The specific references occur throughout the course of the penalty phase, including the penalty phase from October 18, 19, 20 and 25, 2005 (Days 12-15 and the verdict on Day 16, October 26, 2005). Extensive excerpts showing the references to "death row" or "condemned row" from the mitigation phase transcripts are set forth at the end of this ruling in Addendum.

- During the evidentiary hearing, under questioning by PCR counsel, resentencing counsel would not concede that they "did not have a deliberate strategy of intentionally eliciting the fact that he [Defendant] had been previously sentenced to death." *See* Evidentiary Hearing Transcript, March 28, 2014, p. 96, l. 17 to p. 97, l. 6. Resentencing counsel, instead, explained, "[T]he more I reflect on it, the more it looks like -- well maybe it wasn't necessarily something that was sought at the time, that then was going to go ahead and go through with what she had said on the 27th, which is why nothing was done to stop it because in the end it was going to be coming out." *See* Evidentiary Hearing Transcript, March 28, 2014, p. 102, l. 25 to p. 103, l. 5. Resentencing counsel also acknowledged that if the evidence had raised any concerns during the mitigation phase, they would have done something about it. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 96, l. 17 to p. 97, l. 6; *see also* Evidentiary Hearing Transcript, March 28, 2014, p. 108, l. 17 to p. 110, l. 5.

- Resentencing counsel acknowledged that she purposely elicited the testimony about Defendant's public security score being a level 5 to show that Defendant would be a good prisoner because "that is the sort of person he is." *See* Evidentiary Hearing Transcript, March 28, 2014, p. 61, l. 4 to p. 66, l. 20). In that regard, resentencing counsel had to explain why Defendant's security level could not go down and why he was housed at SMU-2 so that the jury would not conclude that Defendant was a member of a security threat group or had disciplinary problems. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 64, ll. 1-14.

- Resentencing counsel acknowledged that in presenting the execution impact, the fact that Defendant had been sentenced to death previously showed to the resentencing jury that the evidence was not speculative, but in fact was the actual impact that Defendant's family had experienced while Defendant was on death row. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 66, l. 17 to p. 68, l. 12. The opportunity to present actual execution impact evidence was something that resentencing counsel sought and it was an important part of the mitigation theory. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 110, l. 6 to p. 112, l. 1. And the fact that Defendant's family had actual experience living with Defendant's death penalty was unique and powerful evidence. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 112, ll. 2-18.

In reviewing this issue, the Court recognizes that the complained-of "death row" and "condemned row" statements occurred under challenging circumstances for resentencing counsel, which include the following:

- The dearth of mitigation available to Defendant, including very little social history, family background, and mental health history. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 54, ll. 5-16.

- Defendant's unwillingness to participate in the mitigation hearing process because Defendant could not present evidence of residual doubt. *See State v. Harrod*, 218 Ariz. 268, 276, n. 7, 183 P.3d 519, 527, n. 7 (2008); *see also* Resentencing Trial, October 20, 2005 at p. 31, l. 9 to p. 35, l. 9.

- Resentencing counsel's inability to present remorse because Defendant would not participate in the mitigation hearing and would not allocute. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 51, l. 17 to p. 52, l. 1).

- The challenges in presenting execution impact, which could be presented only through a family friend because family members would not appear and testify. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 54, ll. 16-19.

- The restrictions Defendant imposed. *See State v. Harrod*, 218 Ariz. 268, 277, 183 P.3d 519, 528 (2008). Defendant hampered resentencing counsel's mitigation efforts by placing limitations on evidence that resentencing counsel could present during mitigation. Specifically, Defendant refused to "put [his family] through any more than they have." *See* Resentencing Trial, October 18, 2005, p. 49, l. 13 to p. 50, l. 1. *See also* Resentencing Trial, October 20, 2005 at p. 5, l. 20 to p. 6, l. 1 ("Mr Harrod has more or less throughout the course of the trial directed that he didn't want his family members to participate.. . . And we fought with them tooth and nail over the past two years to try to get them to testify . . .."); Resentencing Trial, October 20, 2005 at p. 22, ll.11 - 16 ("Mr. Harrod has been adamant -- over the last three years been adamant . . . he doesn't want this family members on the stand, because they would be subject to cross-examination. He has been adamant about that."); Resentencing Trial, October 25, 2005 at p. 18, l. 2 to p. 33, l. 24 (Mitigation Colloquy between the resentencing court and Defendant). Defendant further "waived his presence during the penalty phase except for the portion where he may choose to address the jury." Resentencing Trial, October 18, 2005 at p. 4, ll. 5-8. Ultimately, Defendant declined to remain in the courtroom (or to allocute) when the resentencing court denied Defendant's request to be able to argue residual doubt during any allocution. *See* Resentencing Trial, October 20, 2005 at p. 31, l. 9 to p. 35, l. 9.

- The need to provide an explanation for what would otherwise be a lengthy gap in Defendant's background and behavior evidence. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 47, ll. 7-15. Between the crime (1988) and the resentencing trial (2005), 17 years had elapsed. Between initial verdict (1997) and the resentencing trial (2005), 8 years had passed. Defendant appears to have been arrested originally in 1995, so that adds an additional 3 years spent in pre-trial incarceration. Counsel was faced with the challenge of accounting for over 10 years of Defendant's life, or leaving the jury with a vacuum.

- Defendant's exemplary post-sentencing behavior while incarcerated. *See* Evidentiary Hearing Transcript, March 28, 2014, p. 61, l. 4 to p. 66, l. 20.

- Resentencing counsel's ultimate goal of securing a life sentence at the end of the resentencing trial.

The above, particularly the fact that defendant had been incarcerated for the previous ten years (one-fifth of his adult life), left resentencing counsel with little to present. Nonetheless, resentencing counsel identified 14 factors, including "good behavior" during four specific timeframes including pre-crime, pretrial, trial (including courtroom behavior), and post-sentencing incarceration.

So even with the above limitations, resentencing counsel was able to present the following non-statutory mitigating factors:

- Uncharged co-perpetrator;
- Impact of execution on defendant's family and friends;
- Lack of criminal history;
- Mental abuse by father during childhood;
- Alcoholic father;
- Past good conduct and character;
- Absence of other violent acts;
- Commission of the offense was out-of-character;
- Educational accomplishments;
- Good behavior pre-crime and pre-trial;
- Good behavior during trial;
- Good behavior during post-sentencing incarceration;
- Love for and of family; and
- Divorced parents.

See Harrod III, 218 Ariz. at 283, 183 P.3d at 534.

Importantly, the evidence of the previous death penalty was highly probative on two of resentencing counsel's mitigation arguments, Defendant's good behavior as a prisoner post-sentencing (Evidentiary Hearing Transcript, March 28, 2014, p. 61, l. 4 to p. 66, l. 20) and execution impact (Evidentiary Hearing Transcript, March 28, 2014, p. 112, ll. 2-18).

At the Evidentiary Hearing on March 28, 2014, resentencing counsel could not remember all the details of the case and a trial conducted more than eight years ago. Resentencing counsel could not remember making a final decision on whether to object to the evidence of the previous death sentence or whether to seek a limiting instruction. But not remembering does not mean they did not consider it and did not make a conscious decision back then. And the objective evidence supports the presumption that they did engage in that analysis and adopted a strategy that included using that evidence to strengthen two key mitigating factors, good behavior and execution impact.

Resentencing counsel ultimately pleaded with the jury to impose a life sentence rather than a death sentence. To support their arguments, resentencing counsel had to help the jury understand the prison environment and the classification system, which implicitly raised the question of Defendant's classification for the intervening years.

Resentencing counsel provided the jury with an understanding of prison living conditions. They reassured the resentencing jury that the community would be safe if the resentencing jury imposed a life sentence. Resentencing counsel argued that Defendant's past good behavior while on death row justified the resentencing jury's imposition of a life sentence. Resentencing counsel's case was designed to enable the resentencing jury to picture Defendant as a life-sentenced prisoner, rather than as a person deserving of a death sentence. To defuse any fall-out from an escape attempt or hostage situation, resentencing counsel built its case for a life sentence one witness at a time, addressing classification and living conditions, including using a defense expert who had sat on a Blue Ribbon panel to make recommendations regarding prisons and prisoners. Far from stumbling through the trial, resentencing counsel skillfully traversed very difficult terrain.

THE COURT THEREFORE FINDS that given all of the above, even in the absence of the presumption, objective evidence shows that that resentencing counsel did not "stumble into" the "death row" and "condemned row" testimony, but instead allowed its introduction as part of resentencing counsel's strategy, specifically strategy related to Defendant's good behavior as a prisoner post-sentencing and as execution impact evidence.

Objective Reasonableness

The Court next determines the objective reasonableness of resentencing counsel's decision to disclose to the jury that defendant resided on death row and that, by implication, defendant had previously been sentenced to death and also resentencing counsel's decision not to seek a limiting instruction regarding that evidence. *See Strickland,* 466 U.S. at 687.

In evaluating the reasonableness of resentencing counsel's actions, the Court is cognizant of the fact that "[t]he defendant has the burden to prove mitigating circumstances by a preponderance of the evidence. A.R.S. § 13–703(C); *Baldwin,* 211 Ariz. at 472 ¶ 14, 123 P.3d at 666. Any relevant mitigation evidence that supports a sentence less than death is admissible. *Ellison,* 213 Ariz. at 144 ¶ 132, 140 P.3d at 927." *State v. Tucker*, 215 Ariz. 298, 321-22, 160 P.3d 177, 200-01 (2007). Likewise, resentencing counsel was acutely aware that they bore the burden of proof.

The Court evaluates the reasonableness of resentencing counsel's actions in light of the barriers that Defendant himself put in resentencing counsel's way. *See Strickland,* 466 U.S. at 687. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* Defendant limited the available evidence. He limited his family's involvement and ultimately no family member testified on his behalf. Defendant also absented himself from the proceedings, leaving resentencing counsel to defend and empty chair, which also deprived resentencing counsel of his assistance during the mitigation phase. Finally, Defendant's decision not to allocute deprived resentencing counsel of the ability to present any evidence of remorse.

Admission of "Condemned Row" and "Death Row" Testimony

PCR counsel took the position that, though admissible, evidence of Defendant's good behavior and execution impact came at too high a cost because it resulted in the jury learning that Defendant had been on death row. PCR counsel discounts the fact that Defendant's resentencing presented unique challenges for resentencing counsel, unique challenges that were the result of a significant change in the law that allowed Defendant the benefit of having the jury decide whether to impose the death penalty.

The analysis used in "death row redemption" cases provide assistance when, such as here, "post-sentencing good behavior" mitigation is presented. *See People v. Murtishaw*, 247 P.3d 941 (Cal. 2011). 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." *See* State's Simultaneous Briefing Re: PCR Claim at 4 (filed August 14,

2013). Resentencing counsel was not presenting "death row redemption" as a mitigating factor but rather "good behavior during post-sentencing incarceration" mitigation.

The evidence presented in a "death row redemption" case, however, involves showing the defendant's positive behavior while incarcerated. In *Murtishaw,* for example, the mitigation presentation relied on that defendant's discipline-free prison record. *See id.* at 590. Introduction of the supporting evidence meant that the jury necessarily learned of that defendant's prior death verdict. *See id.*

Although *Murtisha*w is a "death row redemption" case, its analysis applies. Here, as in *Murtishaw*, resentencing counsel presented evidence of a near-spotless prison record during Defendant's incarceration. Defendant only had two write-ups for minor infractions, including failing to stop talking quickly when directed to do so and having a soap dish in the wrong location. Defendant also maintained a P-5/I-1 classification throughout his incarceration, assisted administration as a trustee, and assisted inmates with correspondence and legal pleadings. For the resentencing jury to understand these achievements and contributions, the resentencing jury required (or was entitled to) information about Defendant's environment, including the fact that he was on death row at the time.

Whether the evidence of good behavior is introduced under a redemption theory or not, the goal of the evidence is to show that the Defendant merited leniency. *See Payne*, 233 Ariz. at 518-19, 314 P.3d at 1273-74. A trial court commits error by excluding evidence of a defendant's good behavior. *See id.* Further, defense counsel in a capital case may provide ineffective assistance by failing to investigate good behavior in prison during the sentencing phase. *See Robinson*, 595 F.3d at 1108-11.

THE COURT FINDS that resentencing counsel's introduction of evidence that Defendant had been on death row was objectively reasonable and was the result of resentencing counsel's strategic and tactical decisions and was not a product of neglect or oversight.

Not Seeking a Limiting Instruction Regarding "Condemned Row" and "Death Row" Testimony

The Court sought the parties' assistance in determining whether the "death row" and "condemned row" references made during the mitigation phase, and by the prosecutor in closing, required either that resentencing counsel request, or that the trial court *sua sponte* give, a limiting instruction to the jury.

A limiting instruction is required where evidence presented has a "proper scope" or purpose. *See* Rule 105, Ariz. R. Evid. Rule 105 says:

> If the court admits evidence that is admissible against a party or for a purpose--but not against another party or for another purpose--the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Ariz. R. Evid. 105.

The Court is not convinced that a limiting instruction is appropriate under Rule 105. PCR counsel has not proffered and the Court cannot conceive of a workable limiting instruction in this situation. Resentencing counsel wanted the jury to consider Defendant's response to the previous death sentence and its affect on Defendant and his family in deciding whether the mitigation evidence was sufficiently substantial to call for leniency. The evidence was offered by resentencing counsel on behalf of Defendant. It either was appropriate for the jury to consider or not.

In that regard, with or without a limiting instruction, the important issue was correctly instructing the resentencing jury so that the resentencing jurors were not misled as to their duties, which the resentencing court did. *See* Final Instructions, Penalty Phase, filed 10.25.2005 at 2-6. The resentencing court specifically instructed the resentencing jurors that "[y]ou alone decide whether the mitigation is sufficiently substantial to call for leniency . . .." Further, the resentencing court made it clear that the resentencing jurors were not to "consider any information presented during this phase of the trial as a new aggravating factor." *Id.* at 4. This Court presumes that the resentencing jury followed the resentencing court's instructions. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006).

Further, other courts have declined to require an instruction that a jury not consider a previous death verdict. *See Romano v. Oklahoma,* 512 U.S. 1 (1994) (jury not misled by failure to give limiting instruction); *People v. Ramos*, 938 P.2d 950 (Cal. 1997) (omission of limiting instruction to disregard prior death sentence not error); *People v. Murtishaw*, 247 P.3d 941, 954-55 (Cal. 2011) (no limiting instruction required).

Assuming an appropriate limiting instruction could be crafted, deciding whether to seek a limiting instruction involves strategic and tactical decisions by trial counsel. "In general, the decision not to request a limiting instruction is 'solidly within the acceptable range of strategic tactics employed by trial lawyers in the mitigation of damning evidence.'" *See Musladin v. Lamarque,* 555 F.3d 830, 846 (9th Cir. 2009) (quoting *United States v. Gregory,* 74 F.3d 819, 823 (7th Cir. 1996)); *see also People v. Ledesma*, 140 P.3d 657, 691 (Cal. 2006).

Ledesma involves an analogous situation in that the jury was told that the defendant had been on death row before. *See Ledesma*, 140 P.3d at 691, n. 8. In discussing defense counsel's failure to seeking a limiting instruction regarding evidence of the defendant's previous death penalty, *Ledesma* explained:

> Whether it was preferable to leave the jury to speculate that defendant had been convicted and was under a death sentence for another murder the jury knew nothing about, or instead permit the jury to become aware of the circumstances that led to his being retried and rely upon the jurors to do their duty and decide the case solely on the evidence before them, is a matter upon which reasonable counsel might differ. Under such circumstances, we decline to second-guess the strategic decisions of defense counsel.

See id. (citations omitted).

This Court, however, is cognizant of the issue raised in *Musladin*. *See* 555 F.3d at 845-47. As *Musladin* noted, a significant consideration in deciding whether to seek a limiting instruction is deciding whether the limiting instruction will do more to draw the jury's attention to the evidence. *See id.* at 845. But here, as in *Musladin*, that consideration "vanished during closing arguments." *See id; see also Albrecht v. Horn,* 485 F.3d 103, 126-29 (3d Cir.2007).

Here, during closing arguments, the state highlighted Defendant's time on death row, arguing that because Defendant was on death row while incarcerated at the Department of Corrections, the jury should not be surprised that he was well-behaved because we expect our prisoners to behave well and follow the rules. *See* Resentencing Trial, October 25, 2005 at p. 69, l. 16 to p. 71, l. 7. The evidence and the argument also made it clear that if Defendant was on death row, it was related to his conviction in this case because the evidence showed that Defendant had no criminal record.

Both the Ninth Circuit in *Musladin* and the Third Circuit in *Albrecht* found that the failure to request a limiting instruction was ineffective assistance of counsel when the state highlighted the evidence to such a point that defense counsel had no reason to be concerned about drawing the jury's attention to it. *See Albrecht,* 485 F.3d at 128; *Musladin*, 485 F.3d at 846-47.

Musladin and *Albrecht*, however, are distinguishable. Here, resentencing counsel was using the evidence of Defendant's time on death row to show the mitigating value of both his

"good behavior" and execution impact evidence and to highlight its probative value. Resentencing counsel was not looking at a situation where resentencing counsel did not want to draw attention to it. Indeed, resentencing counsel wanted to use and did use the evidence. Given the facts of this case, the analysis from *Musladin* and *Albrecht* is not applicable here.

THE COURT FINDS that based on the above, resentencing counsel's not seeking a limiting instruction regarding the evidence that Defendant had been on death row was objectively reasonable and was the result of resentencing counsel's strategic and tactical decisions and was not a product of neglect or oversight.

Even Assuming Deficient Performance, No Reasonable Probability of Different Result

Once a jury finds beyond a reasonable doubt that at least one statutory aggravating factor exists, the jury must determine whether the death penalty should be imposed. *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 472, ¶ 17, 123 P.3d 662, 666 (2005) (discussing A.R.S. §§ 13-703, -703.01). In making that determination, "each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence". *See id.* This assessment is not mathematical, but instead must be made in light of the facts of each case. *See id. (citing State v. Gretzler,* 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983)).

Based on the specific case facts, the jurors must evaluate and consider the mitigating circumstances in determining whether the appropriate sentence for a specific defendant is death. This point remains true whether defendant presents the evidence or the juror finds mitigation in the evidence in the record. *See* A.R.S. §§ 13-703(E), -703.01(G) & (H). Each juror must decide in his or her own discretion whether the evidence is "sufficiently substantial to call for leniency." *See id. (discussing* A.R.S. §§ 13-703(E), -703.01(G) & (H)). In explaining the phrase, "sufficiently substantial to call for leniency," *Baldwin* said:

> It means that the mitigation must be of such quality or value that it is adequate, in the opinion of an individual juror, to persuade that juror to vote for a sentence of life in prison. A mitigating factor that motivates one juror to vote for a sentence of life in prison may be evaluated by another juror as not having been proved or, if proved, as not significant to the assessment of the appropriate penalty. Each juror must determine whether, in that juror's individual assessment, the mitigation is of such quality or value that it warrants leniency in a particular case.

Baldwin, 211 Ariz. at 473, 123 P.3d at 667.

Here, the jury instructions given at the resentencing trial and the arguments made to the jury told the jury that each juror was responsible to make his or her own decision. *See* Final Instructions Penalty Phase, filed on October 25, 2005. The final instructions did not mislead the resentencing jurors about their role and responsibilities such that any juror felt less responsibility for the verdict. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985); *see also State v. Prince*, 226 Ariz. 516, 534, 250 P.3d 1145, 1163 (2011) ("*Caldwell* applies only to affirmative comments that mislead the jury.") (citing *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S.Ct. 2004 (1994)).

No evidence even suggests that the arguments misled the jury about its responsibility. *See Prince*, 226 Ariz. at 534, 250 P.3d at 1163. The "death row/condemned row" statements were elicited in the context of the mitigation presentation, in response to resentencing counsel's strategy of presenting a basis for leniency. The state responded to that evidence by questioning witnesses and in closing argument. The state "may argue all reasonable inferences from the evidence but cannot make insinuations that are not supported by the evidence." *See Harrod III*, 218 Ariz. at 278, 183 P.3d at 529 (citing *State v. Hughes,* 193 Ariz. 72, 85, ¶ 59, 969 P.2d 1184, 1197 (1998)) (internal quotations omitted). Here, the comments by the state during closing were limited to three occasions at the beginning of closing.[1] The comments were not an affirmative attempt to mislead the jury as to its role in sentencing, but rather were a proper comment on the evidence.

No evidence suggests that "the admission of evidence regarding [Defendant's] prior death sentence affirmatively misled the jury regarding its role in the sentencing process so as to diminish it sense of responsibility." *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

THE COURT THEREFORE FINDS no prejudice when it considers the totality of the evidence before the resentencing jury. *See Strickland*, 466 U.S. at 695. Removing the evidence that Defendant had been on death row or securing a limiting instruction would have afforded

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[1] The State's closing occurred on October 25, 2005, and is memorialized over 9 pages in the transcript. *See* Resentencing Trial, October 25, 2005 at pp. 67-76. The prosecutor alludes to "death row" three times, when arguing the strength and quality of the mitigating factors in connection with "incarceration both before conviction in 1997 and after...." The State argued: "...Keep in mind that four, five years while he was at the Department of Corrections he was on **death row**. He was in lock down 24/7. His chance of causing problems are greatly reduced...;" "...If you give James Harrod a life sentence, he is not going to be on the H-pod. He is not going to be on **death row**, he is going to be in essentially obtained Level 3 custody where he is in general population and he enjoys all types of freedoms and privileges...;" and "Counsel talks to you about the fact that while he was on **death row** he was in a cell. Well, as John Gunter told you, Jeanne is also in her own grave..." *See* Resentencing Trial, October 25, 2005 at pp. 69-71.

little relief in the weighing process for the resentencing jury, given the nature of the aggravation. The resentencing jury was properly instructed and was not misled about its role in any way, let alone in a way to diminish the resentencing jury's sense of responsibility. Even were this Court to assume deficient performance by counsel, there was no reasonable probability that, absent the alleged deficient performance, the result of the resentencing proceeding would have been different. *See Strickland,* 466 U.S. at 695.

Conclusion

Accordingly, based upon the above,

THE COURT FINDS that resentencing counsel's representation did not fall below prevailing professional norms and that the Defendant failed to establish prejudice because he offered no credible evidence that the resentencing outcome would have been different but for the admission of the "death row/condemned row" evidence.

THE COURT FURTHER FINDS that a limiting instruction was not required and that resentencing counsel's representation did not fall below prevailing professional norms and that the Defendant failed to establish prejudice because he offered no credible evidence that the resentencing outcome would have been different but for the resentencing court giving a limiting instruction on the use of the "death row/condemned row" evidence.

IT IS THEREFORE ORDERED denying Defendant's Petition for Post-Conviction Relief.

IT IS FURTHER ORDERED that any motion for reconsideration shall be filed no later than June 27, 2014. The Court will address whether further briefing or oral argument is needed after that date.

Signed by the Court this date, April 24, 2014.

DAVID B. GASS
JUDGE OF THE SUPERIOR COURT

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1995-009046 04/24/2014

Addendum

"Death row/Condemned row" References Identified in the Transcripts

During the aggravation phase, seven witnesses testified, including the victim's sister, the victim's brother, daughter, and an acquaintance of the victim; one of the victim's co-workers; and two former MCSO detention officers). None of those witnesses mentioned "death row" or "condemned row."

Officer Diane Deloria Focht/Security Officer III ADOC

(Deposition videotaped on October 18, 2005 between 4:54-5:16 a.m. and introduced on October 19, 2005. *See* Resentencing Trial, October 25, 2005 at p. 7)
(See Exhibit 310 "Videotaped deposition of Diane Foght") (misspelling in original)

Resentencing counsel/opening (Resentencing Trial, October 18, 2005, a.m., at pp. 9-19):

> In this phase the focus is going to change. You will hear of the impact of Jeanne Tovrea's death on the people she loved. But other than that, the focus is now own [sic] James Harrod. In spite of the fact that he has chosen not to be present during this phase, the focus will be totally on him, his involvement in the circumstances. The focus will be on who he is as a person, who that man is. And you will put some value judgments on that.
>
> Each and every one of you, individually, holds the life of James Harrod in your hands during this process.
>
> In order to do that, to make an educated valuation of who this man is, it's important that you know who he was before April 1st, 1988, because James Harrod is more than the events of April 1st, 1988. It's important that you know what his life was like before those events, what his history was, what others thought of him, who the people were that he associated with, and how he affected their lives.
> . . .
>
> A lot has happened to each of you since that time period. A lot has happened to James Harrod. You are going to be balancing things and weighing who this person is.

> So not only is it important what happened before April 1st, 1988, it's also important who James Harrod has become since that event, since the events that took Jeanne Tovrea's life. Because certainly the traumatic event of April 1st, 1988, would affect anybody involved in them.
>
> What has his life been like since? What sort of life has he led since those events? Has he accomplished anything? Has he failed at anything? What has happened to him? What sort of man is he today? How has he dealt with the consequence? You heard over and over again that another jury convicted him of first-degree premeditated murder. How has that affected his life? How has he dealt with that? What has he done since then? That's important for you to know also.
>
> What effect has this had on him, and where has he gone since then?

Resentencing Trial, October 18, 2005, a.m., at pp. 9-11.

> Each and every one of you, individually, will weigh the information and the aspect of James Harrod's life, his character, his history, his propensities, and his deeds.

Resentencing Trial, October 18, 2005, a.m., at p. 13.

Counsel then focused on jury's role, as individuals; the decision to give him life; counsel's goal of providing a complete picture of defendant before and after the crime; and mitigation (what it is and what it is not)

> You will also receive information about what life in prison is. We are not talking country club. We will talk about the prison environment, the classifications, and it by no means puts society in any danger.
>
> We will talk about the security and how secure and protected society and guards and fellow inmates, how are they kept safe, and how the individuals involved in this system treat each other? Life in prison is an extremely severe punishment and you

> need to be aware of that consequence, and what the effects are on human beings. This is a weighing process, ladies and gentlemen. A weighing process that you individually do, and personally.

Resentencing Trial, October 18, 2005, a.m., at p. 17.

Counsel reminded the jurors that they could not add aggravating factors, or make the aggravating factor more serious.

> Make a personal and individual determination of the weight of the mitigation, the factors involved in Mr. Harrod's character, his accomplishments, his deeds, his efforts, where he has been since, what sort of person he has become since the events of April 1st, 1988.

Resentencing Trial, October 18, 2005, a.m., at pp. 18-19.

State/opening (Resentencing Trial, October 18, 2005 at pp. 19-22):

> What you're basically going to hear from the defense is that [Defendant] has made a good adjustment to prison, and that somehow that should outweigh what he did.

Resentencing Trial, October 18, 2005, a.m., at p. 20.

Wendy Hackney/ADOC Correctional Lieutenant (Resentencing Trial, October 18, 2005, a.m., at pp. 84-99):

DIRECT EXAMINATION

In discussing thank you notes for Defendant and attempts to establish trust with visitors:

> Visitors, especially **death row** visitors, were not apt to talk to staff. They were unhappy with the way they were treated. ...Mr. Harrods' family was appreciative of her efforts.

Resentencing Trial, October 18, 2005, a.m., at p. 95

CROSS EXAMINATION

Established that facility was the most secure in the system

Barbara Shearer/Correctional Officer III, DOC (Resentencing Trial, October 18, 2005, a.m., at pp. 99-123):

Discussed PI score and "life in prison." In describing her work history, notes that she met Defendant when she went to the Henry pod, which is **condemned row,** for 4-6 months.

Resentencing Trial, October 18, 2005, a.m., at p. 101.

Indicated that Defendant had no gang ties. In explaining her duties as a classification officer, said:

> When an inmate is incarcerated, they judge where that inmate is going to be placed by his crime, the length of the sentence. There's a lot of different things that go into it, but you determine where that inmate is going to be placed. In the case of Harrod, it was he caused the death of another person, so therefore, his public risk score is going to be high.
>
> The fact that he was **sentenced to death** that means his public score is going to remain high the whole time his [sic] is incarcerated. It can never go down. His institutional score would be determined by whether if her was a security threat group, whether if he was on drugs at the time of his crime, prior institutional adjustment, institutional adjustment during – prior to his initial classification; all these factors go into determining it . . ..
>
> Q. You mentioned two different things, you mentioned the public scores and institutional score, and can you explain that?
>
> A. Correct we call it a PI score. Public risk is what the department deems his risk to the general public. His public risk score for [sic] is a five and has always been. His institutional risk score can go from one to five.
>
> And I'm sorry let me back up. Public risk score can go from one to five with some inmates, but if they are **death row** it's five always.

Q. If they're not on **death row**?

A. If they're not on **death row** it can – well, it can go down all the way to a one.. . .

Q. Now, an inmate that's been convicted of premeditated, first-degree murder how low can his public score go possibly?

A. You mean if he's not going to be on **death row**?

Q. Correct.

A. If he's not going to be on **death row**, if starts out as a five or commits murder, then he's automatically going to start at a five, and the lowest possible public risk score is a three.

Resentencing Trial, October 18, 2005, a.m., at pp. 104-06.

Then described conditions/privileges gained at various levels

CROSS EXAMINATION

Q. Condemned row is where you met the defendant . . .?

Steve Fulton/ADOC: Resentencing Trial, October 18, 2005 at pp. 11-16)
(Highlighting identifies testimony specifically complained-of by Defendant.)
(***Italicized bolding*** identifies references identified by Court in its Ruling.)
(**Bolding** identifies additional references.)

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

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

Q. I'm sorry?

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

Resentencing Trial, October 18, 2005 a.m. at p. 11.

Explained the P-5 score (based on committing offense) and the I-1 score (not an institutional threat; privileges) and that Defendant's classification never changed.

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

A. ***Death row*** inmates are P-5.

Q. P-5?

A. Yes, ma'am.

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

A. We had outside work group for ***death –row*** – Okay. All inmates are assessed to do ***death row*** penalty are P-5s. P-5 is your public risk score. The institutions score dictates your job assignments and benefits or privileges.

Q. Whether or not you were on ***condemned row***, or whether you were on any level 5, what sort of jobs would have been available for somebody with a low—

A. Again, it's depending on your I-score.

Q. If their I-score permitted them to work?

A. For the other ***non-death-row*** inmates, we didn't have P-5s working. The only ones that were allowed out on work was ***death-row*** inmates. They had a garden that they dealt with outside, outside of the living area that they maintain for a period of time.

Q. So what you're telling me is that the inmates on ***condemned row*** had a privilege that the other level 5s did not?

A. Yes.

Resentencing Trial, October 19, 2005 a.m. at 12-13.

CROSS EXAMINATION (Resentencing Trial, October 18, 2005 a.m. at pp. 13-14)

Q. Mr. Fulton, this work program they had for **death-row** inmates, when was that?

A. The – They had that years before . . .

A. They had an outside work crew for ***death row*** for a long time. That started back at CB-6 that I'm aware of, where they had the farm area out by the – by the – outside of the central unit.

Q. They stopped that, though, because of some violence, did they not?

A. Yes.

Q. They don't have it anymore?

A. No.

Q. And it was violence among the ***death-row*** inmates?

A. No. I believe that was stopped because there was an incident where there was a wife of an inmate tried to break her husband out.

Resentencing Trial, October 19, 2005 a.m. at p. at 13.

REDIRECT EXAMINATION (Resentencing Trial, October 18, 2005 a.m. at pp. 14-16)

Focused on that the particular program had stopped, and whether anything was available to **death-row** inmates?

A. I'm not aware of it.

Q. And I believe you said that this was a program that was opened only to the **death-row** inmates and that the other level 5s do not have a work program.

A. The ***death-row*** inmates, they had a garden that they would work out in the back of SMU-2.

(Counsel then clarified that somebody who had committed first degree murder would be public level 5 on admission; could have a P-5/I-1 score and be entitled to privileges, but would not be eligible for the work program.)

Resentencing Trial, October 19, 2005 a.m. at pp. at 14-16

3 additional witnesses testified
(2 ADOC correctional officers testified and a neighbor)

Officer Diane Deloria Focht/Security Officer III ADOC
(Videotaped Deposition on October 18, 2005 at 4:54 a.m.-5:16 a.m. *See* Resentencing Trial, October 25, 2005 a.m. at pp. at p. 7; introduced October 19, 2005)
(See Exhibit 310 "Videotaped deposition of Diane Foght") (misspelling in original)

This interview does not appear in the official transcript because it was played as a recording, which was marked as an exhibit. The following paraphrases the discussion, rather than directly transcribe the testimony.

DIRECT EXAMINATION

In explaining her duties, Officer Focht said she "walked her pods every day. . . . **Condemned row** is a little bit different . . . in the number of inmates as compared to the general population." She said that she had contact with Defendant three to four times a week.

CROSS EXAMINATION

She explained that SMU II is the most secure facility that DOC runs. Inmates are restricted to cell 24 hours a day and have no direct contact with other inmates, "but they can talk." Inmates are not allowed to have physical contact with anyone. They expect people to follow the rules. She also explained that she was not familiar with facts and circumstances of Defendant's case.

Officer Focht also said that is was not possible for Defendant to be housed anywhere else, explaining that "No . . . we put them on **condemned row** . . . for their own safety."

Deputy Warden/ADOC (Resentencing Trial, October 19, 2005 a.m. at pp. 24-49):

> Q. What sort of inmate is housed at the Eyman Complex SMU-2?
>
> A. They are inmates that are sentenced to ***condemned row***, STGs, which are security threat group inmates, and inmates that have institutional problems that get their classification scores up to a five institutional score, which is the highest we can go, and then they come there for disciplinary type reasons.

Resentencing Trial, October 19, 2005 p.m. at p. 25.

Counsel then elicited testimony about the public score (crime or behavior in crime, the weapon, if it was used, the length of the sentence) and the institutional score (based on age, whether any gang activity, prior incarceration, behavior)

> Q. Now, an inmate that comes to your facility that's been convicted of first degree murder, premeditated murder, not receiving a death sentence but receiving a life sentence, where would they enter the facility at?

Resentencing Trial, October 19, 2005 p.m. at 29-30.

Counsel then elicited testimony about the physical and living environment, witness knew of James Harrod:

> Q. Did you know where he was when he was at the Department of Corrections, where was he located? Do you know?
>
> A. The actual cell location?
>
> Q. Or the pod.
>
> A. I know he was on our ***condemned row***, but I couldn't tell what his cell location was.
>
> (Then established standards for someone coming in with a life sentence)

Resentencing Trial, October 19, 2005 p.m. at p. 31.

Q. (The Court) The objection is overruled. You may answer the question. Do you recall it?

A. If I had experience with other **condemned row** inmates that went to medium type custody.

Q. Correct.

A. Yes, I have. I've been a deputy warden at both medium level yard and level five.

Q. Can you make any observation with these particular types of inmates?

A. In my experience I've found them to be better than average inmates as far as behavior inside the institution goes.

Resentencing Trial, October 19, 2005 p.m. at pp. 38-39.

CROSS EXAMINATION

Q. To make it clear, when you talk about **condemned row** that's **death row**.

A. Yes, it is.

Q. And Mr. Harrod has been on **death row** while he's been at SMU-2?

A. The entire time he's been there, yes.

Q. And as a **death row** inmate you never get off level five, I guess?

Resentencing Trial, October 19, 2005 p.m. at pp. 41-42.

Charles Riveland, Defense expert

Served on 2004 Blue Ribbon Committee to assess AZ prison system following hostage incident.

Resentencing Trial, October 19, 2005 p.m. at pp. at 49-78.

> A. [Hired to review records and share] opinion on if Mr. Harrod were sentenced to a life in prison, what kind of inmate would he be. To put it in simple terms, how would the system handle him in terms of classifying him? Where would they house him? What would he present in terms of a threat to staff, to other inmates? What would be the kinds of things that will occupy his time?

Resentencing Trial, October 19, 2005 p.m. at p. at 55.

Testified that prison classification systems rely on somewhat simplistic view that best predictor of future behavior is past behavior.

> A. [A]nd Mr. Harrod's behavior in the community for most of his life had no instances of violence other than the instant offense. Had no instances of violence. He did not have a criminal record. He was an individual that in the institution, both the Maricopa county jail and at the – in the Arizona Department of Corrections, tended to resolve problems by writing about them, either in grievance or in internal letters, which is that way that prison administrator's approve of, encourage, and that was probably the sum total of Mr. Harrod's behavior.

Resentencing Trial, October 19, 2005 p.m. at p. at 60.

Described classification system, living conditions, visitation, telephone privileges, mail restrictions, commissary.

> Q. Is there limitation changing from level to level on access to things like radios or televisions, or any type of entertainment?
>
> A. Well, yes, there are, and of course, even within level five there are several versions of level five. There is an actual classification of level five, but then there are other units within level five facilities that are basically the same. Segregation units, for example. **Death row** or **condemned row**, for example, and they each have their unique limitations. Some are statutorily driven, and some are policy driven. For example, on **condemned**

> **or death row**, state statutes states that the Arizona Department of Corrections may not expend funds for programs for inmates.

Resentencing Trial, October 19, 2005 p.m. at p. at 68.

Then described educational opportunities, work programs, typical day, recreation…the fact that the Arizona system at that time safely managed over 13 hundred inmates who have been convicted of murder who were not on **death row**; that most of those sentenced since the advent of life plus 25 "are doing more than the 25;" and of precautions Arizona takes to ensure safety of staff, and of the community.

Resentencing Trial, October 19, 2005 p.m. at pp. at 73-75.

CROSS-EXAMINATION (Resentencing Trial, October 19, 2005 p.m. at pp. at 78-84)

Focused on prison incident that had been in the news shortly before the resentencing hearing and his testimony for other criminal/capital defendants.

REDIRECT (Resentencing Trial, October 19, 2005 p.m. at pp. at 84-87)

With regard to the then recent prison incident and the focus on interagency cooperation in controlling the situation allowing two staff members to survive and allowing for containment so the community remained safe.

JURY QUESTIONS (Resentencing Trial, October 19, 2005 p.m. at pp. at 88-91)

Explained that he did not interview Defendant.

> A. In fact, I think of the death penalty case I've been involved in there have probably been 50 percent that I have interviewed and 50 percent that I haven't. It didn't seem that in this particular instance that after I reviewed all the records that I had access to, it didn't seem that there was anything I could learn from Mr. Harrod that would add to the information that I had from this volume of records.

Resentencing Trial, October 19, 2005 p.m. at pp. at 88-89.

Correctional Health officer/ADOC (Resentencing Trial, October 20, 2005 p.m. at pp. at 38-51):

> A. [My duties included] from dealing with minor trivial issues that the inmates may have to processing paperwork. Prepare inmates for release on condemned row. There was paperwork that was involved with processing an inmate. Maybe preparing him for his execution procedures. On a day-to-day basis interact with inmates if they presented me with issues that may be needed to be addressed . . ..

Resentencing Trial, October 19, 2005 p.m. at pp. at 38.

Then described living conditions on **condemned row** (see p. 39 and p. 45), a then new classification system, and explained that Defendant was "calm and collective [sic]."

Resentencing Trial, October 19, 2005 p.m. at pp. at 39-51.

Resentencing counsel/closing (Resentencing Trial, October 25, 2005 at pp. 44-67):

> These people are counting on me to say the right words to you, right words that will come across and convey to you that which I already know, that the life of James Harrod has value; that the life he lived prior the death of Jeanne Tovrea was valuable; that the life he lived after Jeanne Tovrea died was a value to others and to the community; that if allowed to live his life in prison, he would continue to be very much a human being trying to show his value and worth he has done in spite of the egregious act that he had been convicted of."

Resentencing Trial, October 25, 2005 at pp. 45-46.

> What did they tell you? Every single one of them said respectful, obeyed the rules, never verbally or physically violent, resolved his problems through writing an appropriate grievance process, achieved the best possible classification during the seven years at Department of Corrections, an remained at the lowest level given his sentence that he could achieve.
>
> And the expert, Charles Riveland, reviewed all his Department of Corrections records and says in eight years, only two minor disciplinary write ups. And they were for failing to stop

> when he was told to stop talking, and that he had too many personal possessions under his bed. That's pretty impressive when you think of what C.O.IV Barbara Shearer said that you received a write up for something as simple as not having your bed made properly or not having your soap dish in the right place. Based upon the review of James Harrod's past incarceration, it's very unlikely to have any future behavioral problems while incarcerated.

Resentencing Trial, October 25, 2005 at pp. 54-55

Resentencing counsel then described family support.

> [Defendant] saw the pain of them going through this process, and that it was his desire that he did not want them here in front of you. He wanted to spare them that pain. He didn't want them on the stand crying. He did not want them to have that pain.
> . . .
>
> You didn't hear from these people because they respected James's wishes. But, they couldn't help but be here so you could see. James doesn't want any more suffering for his family. He wants them to go on.

Resentencing Trial, October 25, 2005 at pp. 55-56.

> Each and every one of you individually must determine the weight and the value of the one aggravator and the mitigators that have been presented to you....It is your individual determination.
> . . .
>
> But, there is so very few times in our life that we actually literally have to make a determination of life or death. And I have to start thinking about what prepares an individual to make such a decision. And I'm talking about each and every one of you individually.
> . . .

> But each one of you has the right to give life here. It takes an agreement among all of you to vote for death. If just one of you feels that death is not an appropriate verdict, the verdict cannot be returned. Each one of you literally holds the ability to give James Harrod life or to take that life away.

Resentencing Trial, October 25, 2005 at pp. 60-62.

State/closing (Resentencing Trial, October 25, 2005 at pp. 67-76):

> How much weight do you want to give that? The fact that he is able to adjust to jail. Keep in mind that four, five years while he was at the Department of Corrections he was on **death row**. He was in lock down 24/7. His chances of causing problems are greatly reduced.
>
> . . .
>
> Counsel talks to you about the fact that while he was on **death row** he was in a cell....Jeanne is also in her own grave. And I can tell you that for the last 17 years, that's been a lot smaller than the cell that James Harrod has been in.

Resentencing Trial, October 25, 2005 at pp. 70-71.

> The mitigation has to be sufficiently substantial. That's the standard. And there really is no definition of what that means. It's really up to you to decide individually whether you think this mitigation is sufficiently substantial. And it has to outweigh the aggravation, which in this case we know was a contract killing for hire, which was months in the preparation.

Resentencing Trial, October 25, 2005 at pp. 74.

APPENDIX B

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
01/30/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1995-009046

01/06/2015

HONORABLE DAVID B. GASS

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

SUSANNE B. BLOMO

v.

JAMES CORNELL HARROD

RICHARD D GIERLOFF

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

COMPREHENSIVE RULING

The Court has the following motions before it:

1. Defendant's Notice of Filing, filed on August 24, 2014 (the Successive Petition);
2. Defendant's Motion for Reconsideration, filed August 9, 2013 together with Defendant's Motion to Re-urge the [2013] Motion for Reconsideration, filed June 26, 2014 (collectively the 2013 Motion); and
3. Defendant's Motion for Reconsideration filed on June 25, 2014 (the 2014 Motion).

Based on the following discussion, the Court ultimately concludes that none of the above merit relief.

***Nunc Pro Tunc* Corrections to Minute Entries related to Ruling**

The Court, initially, addresses two "housekeeping" matters:

1. Numbering; and
2. References to Claim 3.b.

IT IS THEREFORE ORDERED denying Defendant's 2013 Motion.

2014 Motion: Meritless Claims

Defendant's 2014 motion focuses on the Court's ruling regarding the introduction of evidence during the penalty phase informing the jury that defendant had spent time on death row.

Defendant's motion reiterates his position, which this Court already rejected. Contrary to defendant's 2014 Motion and previous argument, the evidence and record establish that resentencing counsel fully considered the issue as explained in the Court's 2014 Ruling. Defendant chooses to emphasize a few statements of counsel and then draw different conclusions from the evidence. When taken as a whole, however, the record does not support defendant's position.

Here, the record shows that resentencing counsel was engaged fully in defendant's defense, investigated the case fully, and considered all available options. Those options, however, were quite limited because of defendant's own choices, lack of participation, unwillingness to have his family participate in the defense, and unwillingness to allow resentencing counsel to explore other defenses. Under the facts of this case, defendant cannot block resentencing counsel's efforts out of one side of his mouth and then be heard to cry ineffective assistance of counsel out of the other. Difficult facts and decisions do not make counsel's assistance ineffective. Instead, it is the hallmark of effective assistance of counsel to make those tough decisions.

Resentencing counsel performed admirably under very difficult constraints. Ultimate success is not the standard for IAC. Resentencing counsel investigated and developed a sound strategy, even if not ultimately successful.

Defendant also urges the Court to reconsider its decision based resentencing counsels' inability to remember whether they specifically reviewed *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Court fully reviewed and addressed those arguments and rejected them. They do not warrant reconsideration. Evidence that defendant had spent time on death row is in fact evidence that a reasonable counsel might choose to introduce depending on the facts of the case. Here, the facts support resentencing counsel's decision to introduce that evidence. Nothing in the records even suggests that it decreased or minimized the jury's sense of responsibility.

IT IS THEREFORE ORDERED denying Defendant's 2014 Motion.