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IN THE SUPERIOR COURT OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA Respondent, v. SAMUEL VILLEGAS LOPEZ Petitioner.	No. CR0000-163419 REPLY TO RESPONSE TO PETITION FOR POSTCONVICTION RELIEF

In its response to Lopez's Petition for Post-Conviction Relief ("Response"), the State contends that Lopez's ineffective-resentencing-counsel claim is precluded for three reasons: 1) Lopez "failed to raise the claim in his prior PCR petition," 2) "his claim does not fall within an exception" to preclusion because no "significant change in the law" applicable to him has occurred, and 3) no new facts that would probably change the sentence exist. Response, pp. 1, 3, citing Ariz.R.Crim.P. 32.2(a)(3). 32.2(g) and (e); 32.2(b). As Lopez explains below, the State is wrong on all bases.

I. Lopez Timely Asserted His Ineffective Postconviction Counsel Claim And His Claim Is Not Precluded.

Lopez explained in his Petition for Postconviction Relief ("Petition"), he did not assert postconviction counsel Robert Doyle's ineffectiveness in failing to investigate, research and litigate the ineffectiveness of Lopez's resentencing counsel, George Sterling, in Lopez's earlier state postconviction proceedings because then Arizona law did not provide a vehicle to do so. Petition, pp. 1-2. In *State v. Krum*, 903 P.2d 596, 599-600 (1995), the Arizona Supreme Court held a claim alleging appointed counsel provided:

> ineffective assistance on a prior PCR petition is not a valid, substantive claim under Rule 32 because, for petitioners like Krum, there is no federal constitutional right to effective counsel in a PCR proceeding.

Id.

The U.S. Supreme Court's decision in *Maples v. Thomas*, 132 S.Ct. 912 (2012), however, changed significantly the law on state postconviction counsel's duties. Petition, p. 2 ("This claim is not subject to preclusion because of [the] United States Supreme Court decision, *Maples v. Thomas*, [*supra*], which holds that a "client cannot be charged with the actions or omission of an attorney who has abandoned him."). *Id.* *Maples* held that appointed postconviction counsel's "near-total failure to communicate with petitioner or to respond to petitioner's" requests over "several years" "would suffice to establish extraordinary circumstances beyond his control," and "[c]ommon sense dictates" that a postconviction petitioner (like Lopez) cannot be held responsible for counsel's "acts or omissions." *Id*., p. 923. Relying on Justice Alito's concurrence in

Holland v. Florida, 130 S.Ct. 2549, 2563-2564 (2010), *Maples* addressed "the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client." *Id.*, at 2567-2568. In the latter setting, a petitioner, like Lopez, whose postconviction counsel has for all intents and purposes abandoned him, cannot "be faulted for failing to act on his own behalf when he lacks reason to believe his attorney[] of record, in fact, [is] not representing him." *Maples*, 132 S.Ct. at *924.

Here Lopez, an uneducated defendant who did not complete high school and has no understanding of the law, "never put any restrictions on what my lawyers could or could not do to investigate my case…." Ex. 37, p. 1. Instead, Lopez "always counted on my lawyers to represent me because I do not know how to represent myself." *Id.* Unfortunately, as explained in his petition, Lopez's trust was grossly misplaced. Petition, pp. 9-22. Lopez's court-appointed attorney at his capital trial and sentencing, Joel Brown, retained psychiatrist Otto Bendheim to evaluate Lopez, but Brown conducted no investigation of any kind into Lopez's background or his family history, and his only contact with Lopez's family was a single telephone call made shortly before Lopez's capital sentencing hearing.

The State's contention that Brown's blatant ineffectiveness at Lopez's sentencing trial was Lopez's fault because Lopez asked Brown to not subpoena his family to attend his sentencing hearing is, at best, misguided. Response, p. 7. As Lopez explained in his Petition, Brown's multiple failings were based on ignorance: Brown "had no concept of

investigation," "had never been trained on how to present a case in mitigation" "did not have an investigator assigned to the case" "was by myself" and "did not conduct a mitigation investigation." Petition, pp. 10-12; Ex. 39, p. 1. Brown "did not even know that [he] had done anything wrong until [trial and sentencing] Judge D'Angelo started to make a record about the fact that I did not present any mitigation." Ex. 39.

The record also shows that when Brown—who never met or interviewed Lopez's family or obtained or reviewed any records about Lopez's family—telephoned "[Lopez's] mother" about attending Lopez's sentencing hearing, she "indicat[ed] that she may not appear, that she was having some sort of problems." R.T. 6-25-87, p. 4; Ex 39, p.1. Brown did not seek a continuance of the penalty proceedings so he could meet with Lopez's family and investigate Lopez's family and background. *See* Petition, pp. 11-12, citing Ex. 25, p. 9, ¶s 14-15 (noting the ABA's publications of its "Standards for Criminal Justice (2nd edition 1980) Standard 4.4-1 of the Defense Function described the duty to investigate as follows: 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.' *Id*., at 4:53."

Respondent faults Lopez because he "did not indicate that his childhood was dysfunctional," citing the "author of the 1987 presentence report" who "noted" that Lopez "did not mention any traumatic or serious events while he was growing up." Response, p. 8. As Lopez has shown, and Respondent does not (and cannot) dispute, his childhood was far more than dysfunctional: it was filled with abject poverty, chronic brutality committed first by Lopez's father against his wife and Lopez who later

abandoned the family and then by Lopez's mother's boyfriend, neglect and chaos. Petition, pp. 38-47. Lopez cannot be faulted for failing to expose his family's tragic, abusive life to a presentence report writer. His trial counsel was obligated to investigate and discover those facts. *See Porter v. McCollum*, 130 S.Ct. 447, 453 (2009) ("It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.' *Williams v. Taylor*, 529 U.S. 362, 396 [] (2000).").

Had Brown met and interviewed Lopez's family and collected available records, he would have discovered the reasons Lopez's mother and brother were reticent to appear in court, or communicate with the court's presentence report writer. Response, p. 7. It was not, as Respondent surmises, that Lopez and his mother "experienced difficulties" when Lopez had been paroled "several years" earlier. *Id*.. Had Brown investigated, he would have discovered powerful evidence supporting a life sentence: a family born into abject poverty ruled over by Arcadio Lopez, a violent, terrifying alcoholic father who beat and raped Lopez's mother, beat Lopez and his siblings so brutally that he nearly killed them, and then abruptly abandoned them all. Petition, pp. 35-45. Brown also would have discovered that Lopez's mother's own ghastly childhood and adult experiences where she was repeatedly raped and beaten left her traumatized and unable to care for, much less protect or aid, Lopez throughout his life. *Id*.; Ex. 15, pp. 13-35.

Respondent agrees that Lopez's "dysfunctional childhood" is indeed "sympathetic." Response, p. 8.[1] But it is far more than that. These facts were central to understanding the cognitive impairments Lopez developed from childhood and suffered throughout his life, including at the time of the crime. Ex. 15, pp. 3-7, 53-67.

Brown did know that Lopez's brothers Jose and George, had been indicted on unrelated first degree murder charges that separate counsel in Brown's office were handling. But even that knowledge did not spur him into action. Petition, p. 9; Exs. 7 & 8. Absent an advocate armed with the results of a thorough investigation into the crime and Lopez's background and social history, Lopez's death sentence was inevitable.

II. The Resentencing

Respondent relies on Lopez's 1990 resentencing trial where his appellate counsel George Sterling was now appointed to represent Lopez, and argues that Sterling "attempted to strengthen the evidence of intoxication that Joel Brown had presentenced in 1987." Response, p. 9. To support its proposition that Sterling competently represented Lopez, Respondent cites Sterling's presentation at the resentencing hearing of Dr. Bendheim's videotaped testimony where Bendheim "tentatively opined that Lopez suffered from pathological intoxication," Sterling's argument that Lopez was a model

[1]Respondent questions Lopez's silence about his horrific upbringing and childhood experiences where he lived in constant fear and "danger" for his own life, as well as the lives of his mother and brothers, from his father's brutal beatings. Response, p. 8; Pet.PCR, pp. 37-47. Lopez, uneducated and untrained in the law, and suffering multiple, longstanding impairments that included addiction to alcohol, "paint, glue, and gasoline" did not know, and could not know the relevance of these facts. More importantly, it was not Lopez's obligation to disclose these facts to counsel: it was counsel's obligation to conduct a thorough investigation of Lopez's family life, and he did not. Pet.PCR, pp. 45-47; See Ex. 15, ¶s 168-175.

prisoner and presentation of "testimony from a detention officer" in support. *Id.*, p. 10. Respondent also notes the "record reflects" "Sterling had a court appointed investigator, conducted an investigation, sought out mitigating evidence, issued subpoenas for school, DES, CPS, mental health, and other records, retained experts, and presented what was available." *Id*., p. 11. As Lopez explained earlier, Petition, pp. 15-16, the evidence demonstrates only that Sterling had a court appointed investigator and some records were collected.

Sterling's request for records from various agencies and the appointment of an investigator does not demonstrate his competence. Tragically, Sterling, like Brown, too, never investigated Lopez's family background, or interviewed persons who knew Lopez. Petition, pp. 13- 17. Instead, as Lopez explained, Petition, pp. 14-16, Sterling contacted Bendheim again, provided him two documents from Lopez's trial records, and taped Bendheim's deposition for the resentencing. Exhibit 26. Based on these two documents, Bendheim testified he "could state pretty firmly" that Lopez was subject to "unusual reactions of behavior and conduct" when intoxicated by drugs and alcohol, and absent those intoxicants, he "speculate[]d, but on fairly good grounds that this murder would not have occurred." *Id*., pp. 11-12.[2]

[2] Respondent's contention that "Lopez did not suffer from psychological problems [or] mental illness" because Dr. Bendheim did not opine so is without support. Response, p. 11. Because Sterling failed to investigate Lopez's background, Bendheim was not provided the results of a competent investigation into Lopez's life, and as a result, did not know the persistent trauma and chaos in which Lopez lived throughout his childhood and early adulthood. Respondent does not dispute the credibility, conclusions, or methodology of Dr. George Wood's affidavit which explains in great detail Mr. Lopez's social history and resulting medical and mental impairments.

Respondent's reliance on Sterling's statement during the 1990 resentencing proceedings that he had "presented as much mitigation to the court as he could find" is misplaced. Response, p. 11. Like Brown, Sterling, too, never investigated Lopez's background, and never met, talked to, or interviewed his family, friends and others who knew him. Had Sterling investigated Lopez's background and social history as the law required, he would have discovered powerful mitigating evidence supporting a life sentence, and disproving Respondent's contention "that Lopez did not suffer from psychological problems [or] mental illness…." *Id*. See Exhibit 15, ¶s 189-206; Pet., 30-47. In fact, Lopez suffered "chronic and horrific violence," "neglect and mistreatment," and "witnessed" "physical and sexual assaults" against his mother. Petition, p. 46. His cognitive impairments resulted in his impulsive acts, mental inflexibility, perseveration and produced "overwhelming traumatic induced stress." *Id*., p. 47.

Respondent's reliance on the "1987 and 1990 presentence reports" noting Lopez's father had abandoned the family when Lopez was eight years old, the family suffered economic hardship, and Lopez was living in a car at the time of the crime, too, does not demonstrate competent representation. But the presentence reports did provide Sterling bright red flags about Lopez's background and experiences that Sterling utterly failed to investigate as the law required, and Lopez was prejudiced by his inaction. Respondent implicitly concedes as much in noting the sentencing judge's analysis of the mitigating evidence Sterling presented:

> He found that the proffered mitigating circumstances had not been proven by a preponderance of the evidence. He therefore found no mitigating circumstances sufficiently substantial to call for leniency.

Response, p. 12. As Lopez explained, on this capital sentencing record where Sterling entirely failed to investigate Lopez's family and background and present the key and readily available mitigating evidence, the trial judge's findings supporting his decision to sentence Lopez to death, and the Arizona Supreme Court's opinion affirming Lopez's death sentence is unsurprising. *Id*. Petition, pp. 14-16.

II. Postconviction Counsel's Ineffective Representation.

In his Petition, Lopez identified the facts and law supporting his request for relief. Lopez explained that his petition is not barred by Arizona's preclusion rule, Ariz.R.Crim.P. 32.2(a)(3), as Respondent alleged. Petition, pp. 1-2. Lopez also set forth the facts showing that his appointed counsel's conduct in his earlier postconviction proceedings is strikingly similar, if not identical, to postconviction counsel's actions in *Maples*: counsel appointed to represent Lopez in his vital postconviction proceedings abandoned Lopez. Postconviction counsel, Robert Doyle, who if he had read Lopez's presentence reports alone would have been on notice of the need to undertake a thorough investigation into Lopez's background, did not meet or interview any persons who knew Lopez or his family, friends, and neighbors, and conducted no investigation of any kind. Petition, pp. 19-20; Exhibit 27.

Doyle did "talk[] to [trial/sentencing counsel] Joel Brown about Mr. Lopez's case because I would see him around the courthouse," but does "not remember talking to attorney George Sterling"—the attorney who represented Lopez in his direct appeal to the Arizona Supreme Court following his conviction and death sentence, and in the new sentencing proceedings the appellate court ordered when it rejected an aggravating circumstance the trial judge had earlier found. Exhibit 27. But as explained in Lopez's petition, discussions with Brown would have yielded Doyle little aid. Like Brown, Sterling, too, never met Lopez's mother, his brothers, neighbors, or friends who knew him, or conducted any investigation into Lopez's life history, or collected available social history records on Lopez and his family. Petition, pp. 10-11; Ex. 39. Doyle addressed his inaction:

> At the time I represented Mr. Lopez, I was a sole practitioner and did not have a staff investigator or other resources available to me to conduct a social history investigation…. I never personally spoke to any member of Mr. Lopez's family.
> Shortly after I began representing Mr. Lopez, an attorney with the Arizona Capital Representation Project volunteered to help out with the investigation in the case. I initially accepted their help….
> Ultimately, the lawyers at the ACRP were of no help to me. They wanted me to ask for more time and more money. I did not feel those requests would be granted by Judge D'Angelo.

Ex 27, p. 1.

Respondent does not dispute these key facts: Like trial counsel Brown and Sterling before him, Doyle conducted no investigation of any kind into Lopez's background in these key postconviction proceedings. Petition, pp. 10-20; ER 27. Had he done so, he would have discovered the reasons "Lopez's family did not offer any opinion regarding

his sentence" "despite the presentence report writer's efforts to obtain information." Response, p. 7. It was not as Respondent surmises: that "Lopez and his mother did not appear to have a particularly close relationship." *Id.* As Lopez explained, Doyle never investigated Lopez's background or met any of his family because he had relied entirely on the trial record and the limited investigation counsel from the Arizona Capital Representation Project ("Project") had conducted. Ex. 28, pp. 4-6; Ex.

Respondent notes that "Doyle had spoken with Joel Brown and one of Lopez's other previous attorneys about the case, and Doyle knew that Lopez and his family had been uncooperative with counsel." Response, pp. 13-14. But as discussed above, Brown, like Sterling and Doyle, never met Lopez's family, so it appears that Doyle's representations in that regard were untrue.. In any event Doyle's alleged discussion with Lopez's prior counsel did not absolve him of his obligation to investigate Lopez's background and interview relevant witnesses, including Lopez's family members. Like "the counsel in *Wiggins [v. Smith*, 539 U.S. 510, 524 (2003)]," Doyle "ignored pertinent avenues for investigation of which he should have been aware…."

Unlike Brown, Sterling or Doyle, Project attorneys actually met Lopez's family and provided Doyle extensive documents supporting key mitigating evidence. Petition, pp. 19-20. Also, as Lopez explained in his petition, Project Attorney Statia Peakheart gathered and provided Doyle over 1500 pages of social history records—the first such records identified and obtained in Lopez's capital proceedings. Ex. 28, p. 4. Peakheart also told Doyle that other records were available and needed to be collected, and drafted "motions for Doyle" requesting needed funds and appointment of necessary experts. *Id.*

Doyle later rejected the Project's aid because they "were of no help to me," and "wanted me to ask for more time and more money [and] I did not feel that those requests would be granted by Judge D'Angelo." Ex. 27, p. 1. But Doyle's uninformed conclusions were at odds with the professional standards for capital post-conviction attorneys at the time. As a result of his hasty and injudicious action,[3] Doyle never learned about the longstanding and horrific trauma Lopez had suffered throughout childhood and into his adulthood, or about Lopez's attempts to medicate his pain by use of alcohol and inhalants, including glue and toxic solvents, before and at the time of the crime. Petition, pp. 26-29; 35-47. He never learned of the abject poverty in which Lopez lived throughout his life. Doyle's refusal to request more time to conduct the fundamental and necessary investigation he had yet to conduct was unreasonable. ER 25, pp. 2-3, 7-23. Doyle owed Lopez a duty of loyalty. *Webb v. Gittlen,* 174 P.3d 275, 279 (Ariz. 2008)("Attorneys are fiduciaries with duties of loyalty, care and obedience, whose relationship with the client must be one of 'utmost trust,'" quoting *In re Piatt,* 951 P.2d 889, 891 (Ariz. 1997). Doyle violated that duty when he failed to conduct any investigation into Lopez's background, and rejected the aid offered by the Project attorneys who were investigating Lopez's background and finding facts supporting a sentence less than death. Doyle's actions and inaction constituted far more than incompetence; he actively impeded Lopez's efforts to uncover the facts supporting a life sentence. In doing so, he was no longer acting as Lopez's agent.

[3] It appears that Doyle never even read the 1500 pages of documents delivered to him by Project Attorney Peakheart.

III. LOPEZ DILIGENTLY DISCOVERED AND PRESENTED HIS FACTS SUPPORTING RELIEF

Respondent's allegation that Lopez did not exercise diligence in discovering and presenting the documents and records here is without support. Respondent faults Lopez for not bringing these facts to the attention of this Court sooner, but fails to acknowledge his own role in causing Lopez to delay presentation of the facts to this Court.

Respondent does not tell the Court that as soon as Lopez was provided the funds and means to discover the facts supporting his ineffective counsel claim through the appointment of counsel with the federal public defender's office, he investigated the facts, interviewed witnesses, gathered documents and detailed those facts supporting relief in his federal habeas petition. In response to an order from the federal district court to raise any procedural irregularities with any of the claims in the petition, Respondent announced that the ineffective assistance of counsel claim as pled in the habeas petition was properly and fully exhausted. .

The Arizona District Court agreed, and set a schedule for the parties to submit their briefs.[4] Order, pp. 7, 25 (Ariz.D.Ct., Nov. 3, 2005)("Respondents concede that Petitioner properly exhausted Claims 1(C)…." Claim 1(C) alleged sentencing counsel's ineffectiveness…. Petitioner shall file a memorandum regarding the merits of Claim[] 1 (C) …. Id., p. 22. Lopez filed his brief demonstrating counsel's ineffectiveness at his capital sentencing hearing and supported his brief with his evidence The State's response to the facts it had previously considered, however, was a sea change. For the first time,

[4] That schedule was stayed by the District Court on two separate occasions in response to legal developments in other cases and not at the request of Lopez.

and without prior notice (or even a whisper) to Lopez or the federal court, the State now argued Lopez's facts supporting his claim had not been properly exhausted. Even more startling, the District Court accepted Respondent's aboutface, found Lopez's facts the State conceded were exhausted and, as noted above, the district court adopted Respondent's explicit concession of exhaustion were now unexhausted and denied Lopez relief. Lopez litigated the unfairness of Respondent's changed position in the federal courts. It was not until December of 2011 that those proceedings came to an end.

The facts do not demonstrate Lopez's lack of diligence. They do demonstrate Respondent's game-playing that should have no role in these life-or-death proceedings.

IV., LOPEZ'S CLAIM IS NOT WAIVED.

Respondent contends that *Maples* does not apply to Lopez because *Maple*s "only establishes that abandonment of PCR counsel can be used as cause to overcome a procedural default in a federal habeas proceeding, which involves a different forum." Response, pp. 16-17. Respondent provides no support for that contention, and Petitioner has found none.

Respondent's alternative contention is that Doyle did not abandon Lopez because he filed a postconviction petition asserting ineffective sentencing counsel claims, a supplement to the petition, and a reply. Response, p. 17. *Maples*' appointed postconviction counsel also filed a postconviction petition asserting Maples' constitutional violations, and a reply. *Maples, supra*, 132 S.Ct. at 917.

Doyle did indeed constructively abandon Lopez when he failed to conduct any investigation into the facts of the crime, or into Lopez's family background, and rejected the aid and product of attorneys who were investigating Lopez's background and interviewing his family and other witnesses, just as *Maples*, and other federal and state courts have recognized. *See* Response, p. 17; *Rouse v. Lee*, 339 F.3d 238, 250, n. 14 (4th Cir. 2003)(en banc), *cert. denied*, 541 U.S. 904 (2004)(procedural default caused by counsel's "utter abandonment" of petitioner "constituted extraordinary circumstances external to the party's conduct" and established cause.); *Manning v. Foster*, 224 F.3d 1129, 1135 (9th Cir. 2000)(attorney's errors are not attributable to client when attorney "does not actually represent the client."); *Puckett v. State*, 834 So.2d 676, 681 (Miss. 2002)(out-of-time appeal allowed where "actions of former counsel were such as to rise to the deprivation of fundamental due process."); *Williams v. State*, 834 S.W.3d 464, 469 (Tenn. 2001)("If a defendant erroneously believes that counsel is continuing to represent him or her, then the defendant is essentially precluded from pursuing remedies independently.").

IV. Newly Discovered Material Facts Support Relief

Respondent next contends the facts Lopez discovered when he was able to conduct the thorough investigation the law required, but Doyle refused to conduct, were not new because he "was aware of" his childhood and "could have provided" the information to his prior counsel. Response, pp. 18-19. It is counsel's duty, not the impaired, traumatized client facing (or under) a sentence of death, to conduct a thorough investigation. As the U.S. Supreme Court recently explained in *Porter*, *supra*:

> It is unquestioned that under the prevailing professional norms at the time of Porter's [1988] trial, counsel "had an obligation to conduct a thorough investigation of the defendant's background. *Williams v. Taylor*, 529 U.S. 362, 396 [](2000). The investigation conduct by Porter's counsel clearly did not satisfy those norms….
> At the postconviction hearing, [counsel] testified that he had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family. In *Wiggins v. Smith*, 539 U.S. 510, 525 [ ] (2003), we held counsel 'fell short of … professional standards" for not expanding their investigation beyond the presentence investigation report and one set of records they obtained, particularly "in light of what counsel actually discovered" in the records.

Id., at 453.

Just like Porter's counsel, "[h]ere counsel did not even take the first step of interviewing witnesses or requesting records." *Id*. Doyle did not interview any of Lopez's family. Petition, pp. 19-20; Exhibit 27-28. Lopez explained:

> Ms. Peakhart was the first attorney who explained to me why my family and my background mattered for my case. I was really happy to understand this, and I accepted ACRP's help investigating my background. Since Mr. Doyle was representing me at the time, I told him that I wanted him to work with ACRP and follow their advice. I even wrote Mr. Doyle and told him that I wanted him to ask for more time so that the ACRP could finish their investigation on my case. I never wanted my post-conviction attorney to waive any of my claims. I told him that. I'm not educated. I don't even have a high school education. I don't understand what lawyers know about the law. It's just too complicated for me. From the moment I was arrested for Mrs. Holmes's murder, I knew that the best thing I could do was follow my attorneys' advice. I never put any restrictions on what my lawyers could or could not do to investigate my case. I have always counted on my lawyers to represent me because I do not know how to represent myself.

Exhibit 37, p. 1.

Respondent's final contention--that none of the newly discovered facts Lopez presented "constitute newly discovered material facts because it would not have

'probably' changed the sentence and the "aggravation was extremely weighty"—is easily disproven. Petition, p. 19. To support that contention Respondent relies on the trial judge's "aware[ness] that Lopez was brought up in poverty and an absent father," and "additional information about his childhood would not have changed the sentence." *Id*., pp. 19-20. Respondent's reliance is mislaid. The facts presented in the Petition and here demonstrate far more than Lopez's poverty and absent father. Dr. Watson's tests revealed significant neurological impairments including frontal lobe impairments.

> Sammy's frontal lobe impairment results in his inability to understand or explain abstract consequences, think logically, incorporate new information (and adjust his thinking based on this new information), or understand the consequences of his actions. Additionally, Sammy's frontal lobe deficits impaired his ability to shift mental states.

Exhibit 15, para. 191, p. 90

> Sammy's IQ was in the low average range. His neuropsychological impairments were greater than one could infer from his IQ scores. Sammy's brain impairment creates a vulnerability to atypical drug responses.
>
> Sammy's impaired cognitive functioning means that he is unable to appropriately comprehend the fast flow of information, has a diminished ability to understand and process information, to communicate, to learn from experience, to engage in logical reasoning and to understand the reactions of others around him. Sammy does not have a wealth of commonly understood information about the world to rely upon and is easily led to conclusions which an unimpaired person could easily see as inaccurate when weighed against other information.

Id., para. 194-195, pp.90-91.

> Mitigation expert Russell Stetlet notes:
>
> the red flags that would have prompted reasonable attorneys at every stage of representation in state court to conduct additional investigation. Suffice it to say at this point, that despite the efforts of the volunteers who tried to assist him in the ninety days between February and May 1995,

> postconviction counsel simply failed to conduct a thorough mitigation investigation and provided the court with no new reasons to spare Mr. Lopez's life. Mr. Doyle himself had done no investigation outside the trial record at all.

Ex. 25, pp. 35-36, and pp. 37-46 (detailing red flags that required investigation).

In *Porter*, 130 S.Ct at 451, where the defendant shot and killed his girlfriend and her boyfriend, the Supreme Court found the facts unknown to the sentencer showed Porter who "suffered from brain damage that could manifest in impulsive, violent behavior"—"[a]t the time of the crime," "was substantially impaired in his ability to conform his conduct to the law…." *Id.* The facts here that the trial judge did not hear because postconviction counsel conducted no investigation and rejected the aid of volunteer counsel demonstrate the same: the trial judge never knew about Lopez's longstanding brain damage and his horrific childhood history of abuse that impaired his ability to conform his conduct to the law, and supported a sentence less than death.

CONCLUSION

Based on these facts and law, Mr. Lopez respectfully requests that this Court grant him a new post conviction proceeding represented by competent counsel where he can present his ineffective assistance of sentencing counsel. Lopez also requests an evidentiary hearing, where he can present available evidence and witnesses supporting sentencing relief, and any other relief that this Court finds just and proper.

Alternatively, as Lopez noted in his Petition, he requests this Court stay the proceedings pending the Supreme Court's resolution of *Martinez v. Schriro,* U.S.S.Ct.

No. 10-1001 (2011), that presents the same issue Lopez presents here: whether Lopez has a Sixth Amendment right to competent counsel in his crucial state postconviction proceedings. Respondent opposes Lopez's request "[b]ecause *Martinez* has not yet been decided…." Response, n. 2. But given the central importance of that decision to resolution of the issues presented here, and in other pending capital cases, the U.S. Supreme Court is holding a number of cases presenting the same issue as Lopez presented here, and in many of those cases, has granted stays of execution. *See e.g.*, *Marcel Wayne Williams v. Arkansas*, U.S.S.Ct. No. 10-10782 (docketed June 1, 2011); *Foster v. Texas*, U.S.S.Ct. No. 22-6427 (docketed September 16, 2011); *Middlebrooks v. Colson*, U.S.S.Ct. No. 11-5067 (docketed July 1, 2011); *Sanders v. Commonwealth of Kentucky*, U.S.S.Ct. No 11-5941 (docketed August 22, 2011). This Court, too, should hold these proceedings in abeyance pending that decision.

Respectfully submitted this 19th day of March, 2012

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