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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 SUPPLEMENT TO PETITION FOR POST-CONVICTION RELIEF

Petitioner offers the following brief reply to the State's Response to Lopez's Supplement to his post-conviction petition.First, this court must answer the threshold question of whether the State of Arizona should recognize the right to effective counsel under *Strickland* on initial collateral review when collateral review is Petitioner's first opportunity to raise his cliam of ineffectiveness of sentencing counsel. It should. The cornerstone of all death penalty jurisprudence is that the sentence must be reliable. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific

case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (U.S. 1976). If there is no reliability in sentencing, then the sentence is unconstitutional. *Johnson v. Mississippi,* 486 U.S. 578 (1988). A sentence cannot be reliable without constitutionally effective counsel. *Porter v. McCollum*, 130 S.Ct. 447 (2009).

Public policy demands that any State who sentences one of its citizens to death must provide competent counsel at trial, sentencing, and at post-conviction. To provide anything less risks the execution of a citizen who, though he has committed a terrible crime, is not the worst of the worst for whom the death penalty should be reserved. It also undermines the faith that the public can place in the integrity of the judicial system. *See* Bright, Stephen, *Casualties of the War on Crime: Fairness, Reliability, and the Credibility of Criminal Justice Systems*, 51 U. Miami L. Rev. 413, 415 (1997) ("This lack of fairness seriously undermines the reliability of the results reached in many cases and the trust which citizens are willing to place in the court system."). This Court should take the brave step of declaring that this State provides such a right.

Second, the State's circular argument on the merits of the IAC of post-conviction counsel claim highlights the need for a hearing in this case. Cherry-picking amongst the facts presented, the State ignores reality: Joel Brown has sworn under oath that he did not know what he was doing when he represented Mr. Lopez, that Mr. Lopez "was a quiet client. He was not demanding. He was not a difficult client." Exhibit 39, p.1. Further, he has sworn under oath, "I had no concept of mitigation." *Id.* Moreover, he has sworn

under oath that the evidence presented in this matter "is very valuable mitigation. I wish I had presented it at Mr. Lopez's sentencing hearing." *Id.*

Likewise, the State ignores the fact that post-conviction counsel never spoke to Mr. Lopez's family. This fact is critical because it clarifies that when post-conviction counsel told the court that the family members were unwilling to sign statements, he had no basis in fact for saying so. Exhibit 27, p. 1. Counsel has further sworn "I do not remember talking to attorney George Sterling." *Id*. Attorney Statia Peakhart was the only attorney who spoke to Mr. Lopez's family in state post-conviction and she has sworn under oath, "I never told [post-conviction counsel] that the family was unwilling to sign affidavits. I would not have told him that because that was completely untrue. I found the Lopez family to be cooperative and willing to help Mr. Lopez. Also, I have no idea where he got this information from since [post-conviction counsel] had no contact with the family – ACRP did all of the investigation and interviews for him." Exhibit 28, pp. 5-6.

The State ignores that it was post-conviction counsel's responsibility to conduct the necessary investigation and that if he felt like he wasn't getting what he needed from the volunteers at ACRP, then it was HIS responsibility to seek help from the Court.

The State's Response ignores post-conviction counsel's sworn affidavit, that "I found Mr. Lopez to be a nice guy and I liked him." Exhibit 27, p. 1. The Response does not address the undisputed fact that post-conviction counsel has sworn: "I never personally spoke to any member of Mr. Lopez's family" and: "I did not intentionally or strategically withhold any evidence from the court. Current counsel for Mr. Lopez

provided me with a number of declarations from family members and an expert witness detailing Mr. Lopez's upbringing and resulting mental difficulties. If I had been provided with such statements at the time of Mr. Lopez's post-conviction proceedings, I would have filed them in support of his petition." *Id.*, p. 2.

The problem in post-conviction litigation, and indeed any litigation, is that it takes time to obtain such records. The ACRP told post-conviction counsel this obvious fact, but post-conviction counsel refused to even attempt to obtain additional time. Even if the judge had said no to his request for more time, post-conviction counsel would have at least preserved the issue for federal review. "Effective trial counsel preserves claims to be considered on appeal, *see, e.g.*, Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings, *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000)." *Martinez v. Ryan*, 2012 WL 912950, *8 (2012). Post-conviction counsel, however, chose to do nothing.

The State also ignores the ACRP April 25, 1995 Memo that states quite clearly that the ACRP was not suggesting that post-conviction counsel not comply with the Court's order, but that it was critical that he also request the Court to allow sufficient time to complete the investigation. However, "[Post-conviction counsel] kept saying things which made clear that he did not understand what I was saying." Attachment E to Exhibit 28, p. 38.

The State has never contested a single opinion of mitigation expert, Russell Stetler whose sworn affidavit clearly demonstrates trial and post-conviction counsel's professional failings, and the resulting prejudice Lopez suffered.

The State's contention that Sterling conducted a competent investigation because he filed a *Brady* motion that essentially asked the prosecutor to do his investigation for him is nonsense. The argument is akin to one rejected time and again by the United States Supreme Court.

> We have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented, App. to Pet. for Cert. 30B. True, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker, *Strickland*, *supra*, at 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674. But we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. *E.g.*, *Williams*, *supra*, at 398, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (remorse and cooperation with police); *Rompilla v. Beard*, 545 U.S. 374, 378, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (residual doubt). We did so most recently in *Porter v. McCollum*, 558 U.S. ___, ___, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (per curiam), where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief, *id*., at ___, 130 S. Ct. 447, 175 L. Ed. 2d 398. Not only did we find prejudice in Porter, but--bound by deference owed under 28 U.S.C. § 2254(d)(1) --we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed Porter's claim. *Porter*, *supra*, at ___, 130 S. Ct. 447, 175 L. Ed. 2d 398.

Sears v. Upton, 130 S. Ct. 3259, 3266 (2010).

Finally, the State's citation to the trial court's opinion about the underlying offense is not dispositive of the weight of Petitioner's claim. Because sentencing counsel did not investigate the circumstances of Lopez's life, the trial court had no idea, much less any understanding of, the person who he was sentencing to death. His comment therefore is uninformed and out of context because, as even the sentencing judge recognized, trial

counsel did nothing to find the facts supporting life. Just this week, in a tragic triple-murder case based on the very same single aggravator found here, the Arizona Supreme Court reduced the defendant's sentence to life,. *State v. Wallace*, No. CR-90-0341-AP, 2012 Ariz. LEXIS 85 (2012).

WHEREFORE, this Court should recognize the right to effective assistance of counsel in initial review collateral proceedings relating to ineffective assistance of trial counsel claims, order an evidentiary hearing, and ultimately, set aside Mr. Lopez's capital sentence.

Respectfully submitted this 29th day of March, 2012

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