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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SAMUEL V. LOPEZ,	)	**CAPITAL CASE**
	)	**EXECUTION DATE: MAY 16**
Petitioner,	)	
	)	CIV-98-0072-PHX-SMM
vs.	)	
	)	MOTION FOR RELIEF FROM
TERRY STEWART, et al.,	)	JUDGMENT PURSUANT TO
	)	FED. R. CIV. P. 60(b) OR IN THE
Respondents.	)	ALTERNATIVE PETITION FOR
	)	WRIT OF HABEAS CORPUS

COMES NOW Petitioner, Samuel Lopez, and moves this Court pursuant to Article III of the United States Constitution, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, 28 U.S.C. § 2241, *et. seq*., and Federal Rule of Civil Procedure 60(b) to grant him relief from its judgment denying his Petition

for Habeas Corpus Relief because there has been a significant change in procedural law under which he is entitled to relief from judgment. Alternatively, Petitioner seeks a Writ of Habeas Corpus overturning his unconstitutional capital sentence. In support of this Motion/Petition, Petitioner states the following:

I. MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)

A. *MARTINEZ V. RYAN*, CASE NO. 10-1001, ANNOUNCED A CHANGE IN FEDERAL HABEAS PROCEDURAL LAW THAT PROVIDES GROUNDS TO REOPEN PETITIONER'S FEDERAL HABEAS PROCEEDING UNDER FED. R. CIV. P. 60(B)

The United States Supreme Court Opinion in *Martinez v. Ryan*, Case No. 10-1001 holds, "as an equitable matter": "A procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id*., Slip. Op. at 8, 15. The court explained that counsel in initial-review collateral proceedings who fail to perform consistent with prevailing professional norms and as a result of negligence, inadvertence, or ignorance fail to raise claims of ineffective assistance of trial counsel are themselves ineffective and the prisoner is excused from failing to raise such claims at an earlier time. This holding modified the Court's holding in *Coleman v. Thompson*, 501 U.S. 722 (1991).

Martinez completely changes the legal landscape with respect to procedurally defaulted federal habeas claims of constitutionally ineffective assistance of counsel. Prior to March 20, 2012, if the cause of the default was ineffective assistance of post-

conviction counsel, then the claim was procedurally barred from federal review. No more. Recognizing this fact, Courts have already begun ordering supplemental briefing of the applicability of *Martinez*. *See e.g.*, *Smith v. Ryan*, No. CV-87-234-TUC-CKJ, 2012 U.S. LEXIS 38806 (D. Ariz. March 22, 2012); *Carter v. Ryan*, Case No. 2:02-cv-00326-TS, D.E. 504 (D. Utah March 22, 2012).

The equitable concerns expressed in *Martinez* are manifest in this case. The Court wrote, "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id*, Slip Op. at 7. The Court observed further, "And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id*. Such a result, the Court concluded is inequitable.

That is exactly what happened here. Petitioner deserves relief from this Court's now erroneous judgment.

B. PETITIONER PRESENTED HIS CLAIM AND THE EVIDENCE SUPPORTING IT IN HIS FIRST HABEAS PETITION, BUT THIS COURT FOUND THE CLAIM TO BE PROCEDURALLY BARRED. *MARTINEZ* REPRESENTS A CHANGE IN PROCEDURAL LAW WHICH WHEN APPLIED TO THIS CASE DEMONSTRATES THAT THE PROCEDURAL BAR RULING IS ERRONEOUS. PETITIONER IS ENTITLED TO REVIEW OF THE MERITS OF HIS CLAIM RAISED IN HIS FIRST HABEAS PETITION.

On March 20, 2012, the Supreme Court found that ineffective assistance of counsel in asserting an "ineffective-assistance-of-trial-counsel claim in a collateral proceeding" "may establish cause" to excuse a procedural default. *Martinez v. Ryan*, 566

U.S. ___ (No. 10-1001)(Mar. 20, 2012). *Martinez* represents a watershed change in the procedural law applied and relied on by this court. *Id*. (discussing Arizona District Court opinion that "Martinez had not shown cause to excuse the procedural default [] because under *Coleman, supra,* U.S. at 753-754, an attorney's errors in a post-conviction proceeding do not qualify as cause for a default."); *Wooten v. Norris,* 578 F.3d 767, 338 (8th Cir. 2009)("It is well established that ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default."); *Carter v. Werholtz,* 430 Fed.Appx. 702, 708 (10th Cir. 2011)("And we note that ineffective assistance of post-conviction counsel (who might have raised these ineffectiveness claims in Defendant's §60-1507 proceedings) would not be a cause that could excuse the default."); *Byers v. Basinger,* 610 F.3d 980, 986 (7th Cir. 2010)("But, we have held that an ineffective-assistance-of-post-conviction-counsel claim does not exhaust an ineffective-assistance-of-trial-counsel claim because the claims are more than a variation in legal theory."); *Haynes v. Quarterman,* 526 F.3d 189, 195 (5th Cir. 2008)("…Haynes also asserts that the alleged ineffectiveness of state habeas counsel supports the 'cause' prong of the 'cause and prejudice' exception to procedural default, but again … earlier precedent clearly foreclose this argument.").

In Petitioner's federal district court proceedings, procedural default was not asserted as a defense by Respondent until the very end of the proceedings. However, in its "Answer Regarding Procedural Status of Claims," Respondent argued with respect to other allegations of procedural default that "attorney error alone is insufficient [to

establish cause]," citing "*Coleman*" [*v. Thompson*, 501 U.S. 722, 750 (1991). *Id*., p. 12.

Respondent contended:

> In order to be 'cause,' the error must rise to the level of constitutionally ineffective assistance of counsel. *Id*. In the absence of a constitutional violation, the petitioner bears the risk in federal habeas of all attorney errors made in the course of representation.

Id., at 754.

This Court agreed and held.

> [P]etitioner has no constitutional right to counsel in state PCR proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989); thus no constitutional violation can arise from ineffectiveness of PCR counsel **and, even if alleged, it cannot serve as cause**. *Coleman*, 501 U.S. at 752; *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993).

Memorandum of Decision and Order, p. 15, n. 8 (U.S.Ariz. D.Ct. Jul. 15, 2008)(emphasis added). This was the law of the case when this Court found that Petitioner had not presented his ineffective assistance of sentencing counsel claim to the State court and was therefore procedurally barred from presenting it in federal court. D.E. 200, p. 13-15 (claim presented in state court "very narrow" and "different" from claim presented in federal court).

In holding that Petitioner's federally presented claim of ineffective assistance of sentencing counsel was unexhausted because it had not been presented and therefore procedurally defaulted, the Court went on to find the claim barred because:

> To properly exhaust the broad IAC allegations of Claim 1C, **PCR counsel should have included them in the PCR petition.** *See State v. Spreitz*, 190

> Ariz. 129, 146, 945 P.2d 1260, 1277 (1997). While constitutionally ineffective assistance of counsel can constitute cause for failure to properly exhaust a claim in state court, Petitioner had no constitutional right to counsel in state PCR proceedings, *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989); thus **no constitutional violation can arise from ineffectiveness of PCR counsel, and even if alleged, it cannot serve as cause**. *Coleman*, 501 U.S. 752; *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993).

Id., p. 15, n. 8 (emphasis added). Thus this court has already found that post-conviction counsel is at fault for not alleging Petitioner's allegations of constitutionally ineffective assistance of sentencing counsel.

Martinez establishes that this Court's holding that ineffective assistance in post-conviction cannot establish cause is in error. *Martinez* explained:

> To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of at trial.

Id., at p. 6. The *Martinez* court also noted:

> A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to effective assistance of counsel at trial is a bedrock principle in our justice system.

Id., p. 9. For that reason, the Court ruled:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective assistance claim in two circumstances…. The second is where appointed counsel in the initial-review collateral

> proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).

Martinez, at *11.

Lopez meets this standard. As shown below, his post-conviction counsel failed to abide by professional norms and failed to present Petitioner's substantial and meritorious claim of constitutionally ineffective assistance of sentencing counsel.

The Supreme Court's decision in *Martinez* applies here and constitutes an extraordinary circumstance under Rule 60(b)(6).

1. LOPEZ'S 60(B) MOTION IS PROPERLY PRESENTED HERE

Petitioner presented his claim of ineffective assistance of counsel in his amended petition, Amd.Pet.Writ of Habeas Corpus (Nov. 18, 1998), D.E. 27, and supported his claim with substantial evidence. D.E. 178-187.[1] This Court found that his claim had not been presented to the Arizona state court, and therefore was procedurally defaulted and procedurally barred. D.E. 200, pp. 13-15.

But as discussed above, for the first time the Supreme Court has ruled that ineffective assistance of post-conviction counsel in asserting an "ineffective-assistance-of-trial-counsel claim in a collateral proceeding" "may establish cause" to excuse a

[1] Petitioner's seeks review of Claim 1C as presented in the previous proceedings in this Court. Petitioner incorporates the record from those proceedings, including all of the records and statements previously provided to the Court. Many of those exhibits are also attached to this motion for ease of review given the May 16, 2012 execution date. *See* Exhibits 15, 17-30. Petitioner, however, continues to rely on the entire record in this Court.

procedural default. *Martinez, supra,* overruling Ninth Circuit precedent. *Martinez* represents an important change in the procedural law this Court applied and relied on when it earlier denied Petitioner's constitutional claim. *Id*.

Martinez thus is an extraordinary circumstance which entitles Petitioner to reopen these proceedings under Fed.R.Civ.P. 60(b)(6) so he can demonstrate his entitlement to relief. *See Moormann v. Schriro*, 2012 WL 621885 at *2 (9th Cir. Feb. 28 2012)(finding petitioner's 60(b) motion properly and "diligent[ly]" brought, and claims fully exhausted).

2. THE COURT'S DECISION IN *MARTINEZ* IS AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING RELIEF FROM JUDGMENT

It is settled law that Rule 60(b)(6) provides a vehicle for a federal habeas petition to seek relief from a judgment where the continued enforcement of that judgment is contrary to law and public policy.

> Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence. Rule 60(b)(6), the particular provision under which petitioner brought his motion, permits reopening when the movant shows "any . . . reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in Rules 60(b)(1)-(5). *See Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 863, n 11, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988); *Klapprott v. United States*, 335 U.S. 601, 613, 93 L. Ed. 266, 69 S. Ct. 384 (1949) (opinion of Black, J.).

Gonzalez v. Crosby, 545 U.S. 524, 528-529 (U.S. 2005) (internal footnotes omitted). The Court in *Gonzalez* held that when a habeas petitioner alleges a defect in the integrity of the federal habeas proceedings then such an attack is

permitted under AEDPA. *Id.*, at 532. *Gonzalez* distinguished motions attacking the integrity of the federal court's resolution of procedural issues (there a statute of limitations issue) from motions alleging a defect in the substantive ruling on the merits of a claim or motions raising new claims for relief.

This Court has found that allegations similar to those raised here, are cognizable under Rule 60(b). *See Moormann, supra*.

Applying *Gonzalez*, the Ninth Circuit has observed that,

> The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b) is the power "to vacate judgments whenever such action is appropriate to accomplish justice." Given that directive, we agree that "the decision to grant Rule 60(b)(6) relief" must be measured by "the incessant command of the court's conscience that justice be done in light of all the facts."

Phelps v. Alameida, 569 F.3d 1120, 1141 (9th Cir. Cal. 2009)(footnotes omitted)(quoting *Gonzalez*). Here, just like *Martinez*, no court has ever adjudicated Petitioner's substantial and meritorious claim of ineffective assistance of sentencing counsel which proves that Petitioner, if properly represented, would have been sentenced to life, not death. The "incessant command of the court's conscience that justice be done" demands Rule 60(b) relief. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); *Klapprott v. United States*, 335 U.S. 601 (1949).

Martinez is grounded in principles of equity. The Court's holding is born from the need to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel[.]" 2012 WL 912950, *5. The Court

recognized the inherent unfairness in failing to provide effective counsel in initial review collateral proceedings:

> Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert*, 545 U.S., at 619, 125 S.Ct. 2582. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

Id., p. *7.

That inequity is apparent here, where this Court has already found the failure to present Petitioner's IAC at sentencing claim was post-conviction counsel's error. *Martinez*, an Arizona habeas case, is a fundamental change in the procedural law relied on by this Court to deny relief. *Martinez* provides a clear defense to procedural bar for Petitioner and left without its application to his case, no court will have ever adjudicated his meritorious IAC sentencing claim.

C. PETITIONER'S APPOINTED COUNSEL IN INITIAL-REVIEW COLLATERAL PROCEEDINGS WAS INEFFECTIVE

In August 1994, post-conviction counsel Robert Doyle was appointed for Petitioner. On December 19, 1994, Doyle filed a twenty-page petition for post-conviction relief. See Petition for Post-Conviction Relief, attached as Exhibit 1. In his petition, Lopez alleged only three claims: ineffective assistance of counsel for failing to move for a change of judge; ineffective assistance of counsel at sentencing for failing to

object to the introduction of presentence reports, and failing to properly prepare expert witnesses at sentencing by failing to provide the expert witness with two reports that were otherwise in evidence and before the sentencer; and a due process violation due to the victim impact evidence. *Id*.

In February of 1995, a few months after filing the post-conviction petition, Doyle was contacted by lawyers from the Arizona Capital Representation Project (ACRP). Exhibits 2 and 3. The ACRP is a non-profit legal service organization that assists indigent persons facing the death penalty in Arizona through consultation, training and education. ACRP offered to assist Doyle with Petitioner's case free of charge. ACRP proposed assigning some of its lawyers to conduct a full investigation on behalf of Petitioner. Given that Lopez was the first capital case that Doyle had ever handled, he readily agreed. Exhibit 3.

Beginning in February 1995, ACRP lawyers began work on Petitioner's case, collecting relevant documents, records, and other materials regarding Petitioner and his family. They interviewed many witnesses, including Lopez himself, and many of his family and friends. ACRP lawyers worked independently of Doyle, but shared their findings with him. They also provided him with support and advice on handling capital post-conviction cases. Affidavit of Statia Peakhart, Exhibit 4.

According to ACRP internal memoranda, in mid April 1995, they provided Doyle a draft of a motion for discovery as well as a motion for leave to proceed *ex parte* in requesting funds for investigative and expert assistance. April 25, 1995 Memorandum, Exhibit 5. They also drafted a motion for an extension of time for Doyle to review and

file with the court. See Motion for an Extension of Time, Exhibit 6. It was ACRP's position that "it [was] critical to move for additional time," which they made clear to Doyle in their communications with him. Exhibit 5. Doyle was reluctant to file the draft motions, fearful that they would not be granted by Judge D'Angelo. Exhibit 3, Doyle Affidavit.

In fact, ACRP lawyers, in an attempt to convince Doyle to request an extension of time in which to file the post-conviction petition, asked Lopez to write a letter to Doyle suggesting he file for an extension. Peakheart Affidavit, Exhibit 4. Lopez complied with ACRP's request, and wrote a letter to Doyle requesting that Doyle ask the post-conviction court for more time. Letter from Lopez to Doyle, Exhibit 7. Doyle was offended by this letter and severed ties with the ACRP. Doyle Affidavit, Exhibit 3. On May 2, 1995, counsel from ACRP provided to Doyle a number of documents relevant to the Lopez case, and Doyle signed a document confirming the receipt of such. May 1, 1995 Memorandum, Exhibit 8. The documents provided to Doyle pertained to Samuel Lopez, his trial, and all members of his family except his father. *Id*. Those documents contained information that provided important mitigating evidence. Exhibit 4.

On May 3, 1995, Doyle moved for an extension of time to file a supplemental petition, requesting more time to finish the investigation and to file a supplemental petition if circumstances warrant. Motion to Extend Time For a Supplemental Petition, attached as Exhibit 2. The motion Doyle filed with the court was not the motion that ACRP had drafted, and did not include much of what was included in the ACRP motion. Doyle indicated to the court that "attempts to contact and learn more from family

members has met with resistance." *Id*. He further stated that "no members of the family came forward to help trial attorney Joel Brown" and "no members of the family offered evidence" during the second sentencing. *Id*. Doyle indicated that "for the first time" some members of the Lopez family were willing to discuss Petitioner and his upbringing, but that "none of them are willing to commit to signing affidavits." *Id*.

Unfortunately, Doyle's statements to the court were misleading and untrue. Doyle characterized Lopez's family as unwilling to assist counsel, and unwilling to commit to signing affidavits. The truth was that Doyle himself had no personal knowledge of the Lopez family because he had relied entirely on the investigation of the ACPR lawyers. *See* Exhibit 3, Doyle Affidavit; Exhibit 4, Peakhart Affidavit. Doyle himself had not conducted any investigation into Lopez's family, nor had he personally spoken to any of them. *Id.* Yet, Doyle asserted to the court that Lopez's family refused to participate in Lopez's defense, when in reality, no one had asked them to sign an affidavit or provide other assistance. ACRP Attorney Statia Peakhart explains:

> I never told Robert Doyle 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 Petitioner. It was my professional experience and opinion that we had only begun to scratch the surface of the trauma and mental illness that pervaded the Lopez family. I have recently been shown the continuance motion that Doyle ultimately filed which alleged that the family had refused to sign affidavits and had been previously uncooperative. I have no idea where he got this information from, particularly since Mr. Doyle had no contact with the family – ACRP did all the investigation and interviews for him. This statement was not my experience with or knowledge about the family and I know from my conversations with this family that I was the first person who ever interviewed them about their background and history as it related to Petitioner's capital case.

Exhibit 4, Affidavit of Statia Peakhart, p. 3.

In truth, the family would have been willing to sign affidavits. ACRP attorney, Statia Peakhart, believed that further investigation was necessary before the family was asked to provide affidavits. Exhibit 4, Affidavit of Statia Peakhart. Her belief was not unreasonable given the very preliminary nature of the investigation at that point. Exhibit 9, pp. 33-35.

Also on May 3, 1995, Doyle filed a Supplemental Petition for Post-Conviction Relief, in which he alleged, as he did in his initial petition, that trial counsel was ineffective for failing to move for a new trial judge. Supplemental Petition for Post-Conviction Relief, attached as Exhibit 10. In the supplemental petition, Doyle asserted the discovery of new evidence to support this claim. Doyle attached the presentence report for Lopez's brothers Jose and George Lopez. *Id.* Jose's presentence report referenced how "worthless" the Lopez brothers were, and George's report described Lopez and his brothers as "extremely dangerous individuals." *Id.* Judge D'Angelo, the presiding judge in both Jose and George's murder cases, read and relied upon these reports in their sentencing.

Doyle's own pleading makes clear he was on notice that there was something amiss with the Lopez family. Doyle himself notes it was commonly known among the lawyers of the Maricopa County courthouse that there were serious problems that affected the Lopez brothers. *See* Exhibit 3. Doyle remembered rumors circulating about the Lopez brothers and what was wrong with them. *Id.* It was commonly known that four of the Lopez boys were in prison (two of them on death row), but the older four boys

were believed to be relatively successful. *Id*. Despite knowing this, and despite the persistent rumors about the Lopez family, Doyle failed to investigate that crucial question. Capital lawyers are professionally obligated to follow up on these "red flags." Lawyers that have failed to investigate such information have repeatedly been found constitutionally ineffective by the United States Supreme Court. See Exhibit 9; *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), *Porter v. McCollum*, 558 U.S. ____, 130 S. Ct. 447 (2009), and *Sears v. Upton*, 561 U.S. ____, 130 S. Ct. 3259 (2010).

Sometime in early May 1995, the tensions between Doyle and ACRP came to a head. When Doyle received the letter Lopez had written him asking that Doyle seek more time from the court, Doyle severed all ties with ACRP. Exhibits 3 and 4. Although ACRP were the only members of the defense team who had or were conducting any investigation on behalf of Petitioner, Doyle severed their connection. *Id.*

Doyle did contact Dr. Bendheim during post-conviction, providing him additional materials, including both trial testimony and witness interviews of Pauline Rodriguez and Yodilia Sabori. Exhibit 11. These exhibits were in the sentencing record and before the sentencing judge, but sentencing counsel had not thought to provide them to Dr. Bendheim. Based on this new information, Dr. Bendheim was able to make a "more certain diagnosis:" Lopez was pathologically intoxicated at the time of the crime. *Id.*

Judge D'Angelo, sitting as the post-conviction judge, denied relief without a hearing, concluding, without any analysis, that "counsel's performance" was not

ineffective, and no "reasonable probability" existed of "different" result. Exhibit 12. The Arizona Supreme Court denied review of that decision, without explanation. Exhibit 13.

When Doyle severed ties with ACRP, he abandoned the mitigation investigation entirely in dereliction of his professional obligations. After all, ACRP were volunteers. If he did not feel he could work with ACRP, the case was still his responsibility. Although Doyle had the documents collected by ACRP, and had been kept abreast of their investigation, which included a wealth of information about Lopez and his family, Doyle unilaterally ended the investigation where they had left it. And he did this despite the fact that he was on notice that there was something amiss with the Lopez family.

Russell Stetler, a mitigation specialist with decades of experience, who is employed by the Administrative Office of the Courts as National Mitigation Coordinator has reviewed Petitioner's case and explains:

> In a capital case, competent counsel have a duty to conduct life-history investigations, but generally lack the skill to conduct the investigations themselves. Moreover, even if lawyers had the skills, it is more cost-effective to employ those with recognized expertise in developing mitigation evidence. Competent capital counsel have long retained a "mitigation specialist" to complete a detailed, multigenerational social history to highlight the complexity of the client's life and identify multiple risk factors and mitigation themes. The Subcommittee on Federal Death Penalty cases, Committee on Defender Services for the Judicial Conference of the United States, for example, noted in 1998 that mitigation specialists "have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review."

Exhibit 9, pp. 12-13.

The prevailing professional norms at the time, as reflected in the ABA Guidelines and ABA Criminal Justice Standards also made clear Doyle's duties to investigate. Stetler explains:

> The 1989 edition of the ABA Guidelines reflected a national consensus among capital defense practitioners based on their practices in the 1980s. These Guidelines were the result of years of work by the National Legal Aid and Defender Association (NLADA) to develop standards to reflect the prevailing norms in indigent capital defense. NLADA published its Standards for the Appointment of Defense Counsel in Death Penalty Cases … in 1985. The ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), NLADA developed its expanded Standards for the Appointment and Performance of Defense Counsel in Death Penalty Cases … over the course of several years.

Id., p. 14. These standards are key "guides to prevailing professional norms." *Id.*, p. 15. But one fact is certain:

> A social history cannot be completed in a matter of hours or days.... It takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socio-economic status, religious and cultural practices, the existence of intra-familial abuse, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion….

Id., p. 16. These barriers require "an experienced mitigation specialist" to "break" them down "and obtain accurate and meaningful responses." *Id*. This key task is not easy or quick. Stetler opines:

> [A]n experienced mitigation specialist requires, at minimum, hundreds of hours to complete an adequate history-even working under intense time pressure.

Id.

According to Doyle, it was commonly known among the lawyers of the Maricopa County courthouse that there were serious problems that affected the Lopez brothers. Exhibit 3. Doyle remembered rumors circulating about the Lopez brothers and what was wrong with them. *Id*. It was commonly known that four of the Lopez boys were in prison (two of them on death row), but the older four boys were perceived to be relatively successful. *Id*. Despite knowing this, and despite the persistent rumors about the Lopez family, Doyle failed to answer, much less investigate, that crucial question. Had Doyle investigated, he would have discovered that the Lopez family is enormously damaged by the abusive environment in which they were raised.

Doyle relied entirely on the ACRP to conduct the essential mitigation investigation. When a conflict emerged with ACRP, Doyle's response was to simply cut all ties with ACRP, without discussing his decision and its implications with Lopez. Doyle's actions resulted in abandoning the investigation, and the meritorious claims that the investigation would have (and did) support. Not only did Lopez not consent to Doyle's actions, but Lopez was completely unaware of them. In fact, Doyle's actions were contrary to Mr. Lopez's wishes. "I told [Doyle] that I wanted him to work with ACRP and follow their advice." Exhibit 16, p. 1.

Doyle's conduct fell below the standard of competent counsel when he "failed to conduct an investigation that would have uncovered" witnesses and records "graphically describing" his "nightmarish childhood…" *Williams v. Taylor*, 529 U.S. at 395. Doyle's

decision not to investigate was not strategic. Indeed, Doyle admits that the evidence previously presented to this Court was the type of evidence he would have presented to the judge in post-conviction. Exhibit 3. Doyle's duty to conduct a thorough investigation was not only clear but well known:

> The ABA Guidelines have always emphasized the quality of legal representation during "all stages: of the case (see Guideline 1.1 in both the 1989 and 2003 editions). The extensive Commentary to Guidelines 10.15.1 (Duties of Post-Conviction Counsel) in the 2003 revision draws on the national experience litigating these cases in the 1990s and is instructive:
>
> > …[W]inning in collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and argument-those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal, are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system.… [T]he appreciable portion of the task of post-conviction counsel is to change the overall picture of the case…
> >
> > "collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7…. [T]he trial record is unlikely to prove either a complete or accurate picture of the facts and issues in the case. That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

Exhibit 9, p. 22, citing 30 Hofstra L. Rev. 913, 1085-1086 (2003).

D. PETITIONER IS ENTITLED TO HAVE HIS HABEAS PETITION REOPENED AND FOR THIS COURT TO ADJUDICATE THE MERITS OF HIS INEFFECTIVE ASSISTANCE OF SENTENCING COUNSEL CLAIM

1. PETITIONER HAS A SUBSTANTIAL CLAIM OF INEFFECTIVE ASSISTANCE OF SENTENCING COUNSEL

Because of post-conviction counsel's breach of duty to Lopez, no court has ever reviewed the powerful mitigation in his case. Likewise, trial counsel Joel Brown never conducted any meaningful investigation into Lopez's upbringing. Much like Doyle, Brown never sought to obtain any relevant documents regarding Lopez and his family and never attempted to interview Lopez's family. As Brown explains in his affidavit:

> At the time I represented Petitioner, I had never been trained on how to present a case in mitigation. Back then, we did not have trial teams or mitigation specialists like we do now. When I look back now on how we did things back then it seems like we were in the dark ages.

Exhibit 14, Brown Affidavit. Mr. Brown continues:

> I did not have an investigator assigned to the case. I was by myself. I had no concept of aggravation or mitigation. I did not conduct a mitigation investigation."

Id.

Following his review of Lopez's trial transcripts, Stetler concluded:

> 38. [Petitioner] was arrested on November 3, 1986. He was indicted eleven days later and went to trial facing the death penalty in April; scarcely five months had elapsed. He was represented by a single lawyer, Deputy Public Defender, Joel T. Brown. The jury convicted Petitioner of capital murder and other charges on April 27. Two months later, there was a presentence hearing before Judge D'Angelo, and the public defender summarized his luckless preparation on the record as follows:

> Judge, we do not have anything to present at this point. I would like to leave it open for me getting in contact with his family, Petitioner' family by the sentencing date. I've been trying this week, I have not had any success at doing that.
>
> If it's going to be a matter of it being an extended hearing, I would inform your court of that. At this point I haven't had any luck. The only person is his mother. I haven't had any luck in trying to reach her.
>
> I don't know if you want to proceed to argument. I would also ask that to be precluded. As far [as] Dr. Bendheim, I do not intend to call him, based on my conversation with Dr. Bendheim two days ago. I have not received his report. I would like the benefit of the report before we proceed to any sort of argument. (Tr. 12-13, June 19, 1987.)

Argument was reserved until the sentencing date, six days later, by which time the court had already written its Special Verdict.

39. On June 24, 1987, Mr. Brown filed a Sentencing Memorandum consisting of three pages, plus notifications of service. The Memorandum pointed out – correctly – that Petitioner's prior conviction for resisting arrest did not involve the use or threat of violence, and thus did not constitute an aggravating factor under Arizona law. (The Arizona Supreme Court later agreed.) The rest of the slight Memorandum argued from the trial record that Petitioner was impaired on the night of the capital offense by virtue of intoxication. Two young women had testified that they had been talking to Petitioner on the evening of the murder; he left them and returned a few minutes later heavily intoxicated. He was "totally changed" according to the witnesses. Mr. Brown concluded, "Defendant's diminished capacity at the time of the offense, considered along with the fact that he is still a very young man without a prior history of assaultive behavior demonstrates enough mitigating factors so as to mandate a sentence of life imprisonment."

40. The trial court expressed concern on the record when the Sentencing occurred on June 25, 1987. As soon as the parties stated their appearances, the Court asked Mr. Brown to explain what he had done to prepare for sentencing:

> THE COURT: At the time of trial the court was concerned over the lack of any evidence presented on behalf of the

> defendant. I believe I so expressed to counsel, either formally or informally. . . .
>
> The court is now concerned with the fact that but for the sentence memorandum received just yesterday, the defense failed to present any mitigating circumstances to the court at the hearing, pursuant to A.R.S. 13-703B.
>
> If it does not violate any attorney-client privilege, I'd like the defense counsel to state on the record what effort his office made to determine any mitigating circumstances as might have reflected in favor of the defendant.

(Tr. 2-3, July 25, 1987.)

The defendant was not offered an opportunity to assert or waive any privilege. Mr. Brown proceeded to blame Petitioner and his family for failing to provide any mitigation. This was his response to the court's inquiry:

> MR. BROWN: Your Honor, after the trial in this matter, our office did hire Dr. Otto Bendheim to go to the jail to examine Petitioner, for the purpose of a presentence matter pursuant to Rule 26.5. Our office paid for that. That was done. . . .
>
> Additionally, I have, last Friday, at the time of the hearing, I told the court that I was having trouble contacting family members. I was able to contact both his mother and his brother, Frank. They were both fully aware of this setting. I told them at the last setting I had asked the court if that was possible that I could contact these people later, I would like the opportunity to present them today.
>
> Both people were fully aware of the time, location. I gave them my number. Petitioner, Frank, I spoke to him as recently as yesterday afternoon. He gave me every indication that he would be here today.
>
> I can tell you that I talked to his mother. His mother gave me indications that she may not appear, that she was having some sort of problems. I've talked to Petitioner about this. I think Petitioner will tell you he's strongly opposed to me subpoenaing those people in, either his mother, his brother, or

> any other persons. I think Petitioner can tell the court that he strongly opposed me actually having those people subpoenaed in.
>
> Is that true?
>
> THE DEFENDANT: Yes. (*Id*. at 3-4.)

* * * *

42. The trial court …clarified that the public defender's office had done absolutely nothing else to investigate potential reasons to spare Petitioner's life:

> THE COURT: What other efforts has your office made to determine the existence of any mitigating circumstances?
>
> MR. BROWN: Your Honor, offhand, those are [sic] only ones I thought of. …(*Id*. at 8.)

Mr. Brown also volunteered that the psychiatrist evaluating Petitioner for sentencing also found him competent and that Petitioner was fully apprised of all the relevant reports and scientific examinations. *Id*. at 8-9. After a recess, the court returned to read its Special Verdict. Petitioner declined to say anything in response. Mr. Brown's remarks were only seven lines – fifty-seven words in which he relied on what he had said in his three-page Memorandum. The court sentenced Petitioner to death. *Id*. at 15.

To summarize a few key points, at the time of Petitioner's first trial, the public defender's office had every reason to focus its efforts on his mitigation case, since the defense experts on the physical evidence had apparently confirmed the strength of the prosecution's evidence of culpability. Nonetheless, six days before sentencing, the deputy public defender had failed to contact any member of Petitioner's family. He had some contact with Petitioner's mother and brother (Frank) in the final days before sentencing. One mental health expert was consulted, but he was provided with absolutely no social history information because no records had been obtained and no witnesses had been interviewed. It is my considered professional opinion that the first trial counsel's performance fell well below the prevailing norms of 1986-87 in his failure to conduct a thorough mitigation investigation.

Exhibit 9, Stetler Affidavit, pp. 24-26.

Like Brown, Sterling also failed to conduct an investigation into Mr. Lopez's family background and upbringing. Ms. Peakhart was the first person to interview the family "about their background and history as it related to Mr. Lopez's capital case." Exhibit 4, p. 6. And Ms. Peakhart opines that she "had only begun to scratch the surface of the trauma and mental illness that pervaded the Lopez family" before Doyle cut off ties. *Id*.

Because no lawyer during Lopez's state trial and post-conviction proceedings ever uncovered the actual conditions of Sammy Lopez's tragic life, no court has ever adjudicated this compelling mitigation evidence.

If permitted to proceed on his Sixth, Eighth, and Fourteenth Amendment claim of Ineffective Assistance of Sentencing Counsel, Petitioner would be able to show powerful mitigation which establishes a substantial claim of constitutionally ineffective assistance at sentencing. In fact, former trial counsel Joel Brown after reviewing this evidence, swore that it "is very valuable mitigation. I wish I had presented it at Mr. Lopez's sentencing hearing." Exhibit 14, p.1.

2. PETITIONER CAN SHOW PREJUDICE FROM COUNSEL'S UNPROFESSIONAL ERRORS

Lopez "was born into a volatile, chaotic, and unpredictable environment to cold, unaffectionate, and distant caretakers." Exhibit 15, Affidavit of Dr. George Woods, p. 3. Little is known about the background of Petitioner's father, Arcadio Lopez, other than that he was born in Tombstone, Arizona. It is known that Arcadio was a life-long alcoholic who suffered depression, and who repeatedly and brutally beat and raped his

common law wife, Petitioner's mother, Conception Lopez (she is known as Concha). The beatings were so terrible that Petitioner and his brothers often feared their father had killed their mother. Without provocation or justification, Arcadio beat and terrorized Petitioner and his brothers as well, threatening to kill them. *Id*., at p. 4-6. Although Arcadio was arrested once, he soon was released and returned to terrorizing his family. *Id*., at 46. Petitioner explains in his affidavit:

> My dad was a violent drunk. He used to beat my mother in front of all of us. He didn't just hit her once and stop. He hit her over and over until she was bloody. We tried to protect her, but then he beat us too. We were afraid of our dad the way some kids are afraid of monsters.

Exhibit 16, Lopez Affidavit.

Petitioner felt protective of his mother, Concha Villegas. Ms. Villegas was also raised in abject poverty and never learned how to parent children. Ms. Villegas is limited intellectually and emotionally. Lopez's mother came from a large, extremely impoverished family who migrated from Mexico to a small farming town in Texas. Concha was regularly beaten by her harsh mother for minor infractions. Her punishments included being forced to stand outside for hours in the hot sun without water, or whipped with a belt if her clothing was torn, or her shoes not shined to her mother's standards. And, when any one child engaged in some perceived transgression, her mother punished them all. Exhibit 15, p. 17-31.

Concha attended a segregated school for Mexican children. After school, she worked in the cotton fields where crop-dusting planes flew overhead, spraying pesticides directly on Concha and her family, and on the open water barrels from which they drank.

Id. When Concha was seventeen years old, she was raped and impregnated by a close friend of the family, who was much older than Concha. When her mother discovered what had happened, she blamed Concha, and beat her because she had "dishonored" her family. *Id*., pp. 24-27. She was banished to a back room of the small family house so that no one could see her. Once her child was born, Concha's mother made her leave her newborn child, and exiled her from the family home. Concha moved to Arizona where an aunt lived. *Id*.

In Arizona, while working in the agricultural fields, as she had in Texas, Concha met Petitioner's father, Arcadio, who operated the bus that she and the other workers took to the fields. One day, Arcadio showed up at Concha's apartment with his possessions and moved in with her against her wishes. *Id*., pp. 28, 33-35. Arcadio was a brutal man who raped and beat Concha repeatedly. As discussed more below, Concha's life experiences left her profoundly grief-stricken, traumatized and unable to protect herself against Arcadio's physical and sexual abuse, or to properly raise Petitioner and his seven brothers. She did not display love or affection for her children, and neglected them.

Dr. Woods explains the import of Concha's abuse:

> It is also important to understand Concha's own abuse history, cultural beliefs, and genetic heritage and how they found expression in the manner in which she reared Sammy and his siblings. Her deep religious and cultural beliefs gave her a path, if not the strength, to survive major stressors during the course of her life and are represented in her language, beliefs about family, and her self concepts. Concha's determination to keep her family together at all costs—even when the price was chronic brutality at the hands of the children's father—springs from her strong cultural beliefs about her obligations as mother, even though she was not able to actualize those beliefs with any of her children, due to her own trauma and neglect.

Id. p. 8.

The trauma Petitioner suffered thus began at the hands of his father who was "violent and unpredictable," and whose alcoholic rages and mental illness worsened over Petitioner's childhood. Petitioner lived in constant fear.

> I often sat at the window and kept a lookout for my dad. I felt like this was my job when I was a little boy. When I saw him, I told my mom to run and hide, and I ran and hid too. My mom worked and fed us and tried to protect us from my dad. She was the only one on our side and the only person that kept us alive. Every day I was afraid that my dad was going to kill her, and without my mom around, I would die too.

Exhibit 16. Dr. Woods explains that because Petitioner was in "constant danger" as a child, fearing for his own life as well as the lives of his mother and brothers, he developed an "anticipatory stress response" characterized by "symptoms of hyperarousal, hypervigilance, high anxiety, agitation, guardedness, paranoia, and sleeping difficulties." Exhibit 15, p. 4. To this day, Lopez's "ability to respond appropriately to emotional stimuli," known as affective dysregulation, "is grossly impaired." *Id*., p. 4.

The omnipresent chaos and danger in Lopez's childhood caused him to experience, among other things, "night terrors," a "common symptom in children who are traumatized." *Id*., p. 5. Lopez's family vividly describes Lopez's suffering as a child that worsened "after a particularly brutal beating from [his father.]" His family found him "crouched in the corner of the kitchen in the middle of the night shaking with fear. Sammy's mother was the only one who could wake him; once awake, Sammy burst into tears." *Id*.

Besides living in constant terror in his own home, Lopez lived in "profound conditions of neglect and poverty." School records document both these conditions. When he was just seven years old and enrolled in school for the first time, school officials reveal "he suffered from frequent tooth pain, cavities, repetitive tonsillitis, and ear infections." School personnel and others told Concha that Lopez needed to be examined by appropriate medical personnel, but his mother was too poor and ill-equipped to obtain the help he needed. *Id*., p. 69.

Lopez was described as a sad, fearful, lonely boy with low self-esteem, who, not surprisingly given his background, mistrusted others. *Id*., pp. 55-58. In a desperate attempt to control the stress and anxieties he suffered, he developed "certain behaviors, like keeping his belongings in perfect order." *Id*. This behavior, known as obsessive compulsive spectrum disorder, is consistent with Lopez's "attempts to control his overwhelming anxiety secondary to his traumatic stress." Without "these mechanisms or his self-medicating" through paint sniffing and alcohol, Lopez's affective dysregulation would take over, and [his] chaotic behavior would ensue." *Id*., p. 58.

When Lopez was seven years old, he suffered yet another loss. His sister, Gloria, was born with a serious birth defect that required repeated hospitalizations. Lopez, his mother, and seven brothers and sisters believed her birth to be a miracle, and the family's salvation in the otherwise wretched world in which they lived. "My mom and my brothers and I were all so happy to have a little girl in our family. It didn't matter to us that she was deformed. We felt like she was an angel sent from God. She was the one bright spot in our lives." Exhibit 16, Lopez Affidavit. But in yet another tragedy to

befall this family, Gloria died at ten months old, following an unsuccessful surgery. Petitioner's mother reacted to the loss of her only daughter by falling even deeper into her already debilitating depression. As a result, she was even less capable of caring for her eight sons. Petitioner's father's reaction was quite different: he abandoned his family and never returned. Exhibit 15 , pp. 59-60.

Although Lopez and his family never knew what happened to Arcadio, records show that after he abandoned the family, he moved to California. There, he worked sporadically in the agriculture fields, and was frequently arrested for drunkenness. He eventually drank himself to death when he was only 56 years old, from "liver failure due to cirrhosis, lying in a field surrounded by empty beer and wine bottles." *Id*., p. 28-29.

Arcadio's abandonment of his family had three immediate and direct consequences. It left Lopez and his siblings uncertain, and thus anxious, as to whether his father was truly gone from the family or instead would return at some unknown time and continue to beat and terrorize them. It required Lopez's oldest brother Junior, who was in the 9th grade at the time, to drop out of school so he could work and care for Lopez and his six other brothers, and it deepened even more his family's abject poverty and harsh living conditions. *Id*., pp. 60-61.

Unfortunately, because Junior was still a child, and knew only the child rearing practices of his father to emulate, Junior continued to physically abuse and threaten Lopez and his other siblings. *Id*., pp. 62-65. When Lopez tried to intervene in one particularly terrible beating Junior was inflicting on their younger brother, Joe, Junior turned his anger and fury on Lopez, punching him repeatedly about the face and head

with his fists. Apparently realizing that he was doing what his father had done, Junior suddenly stopped the beating, and ran out the door. *Id*. Like his father, Junior too soon abandoned his mother and younger brothers. He married, moved out of the family home, and rarely had contact with his mother and brothers. Exhibit 15.

But before Junior left, Lopez's family suffered yet another terrible trauma. While walking home from the store, Concha was brutally assaulted and raped. When her attacker released her, she ran home nearly naked, where Lopez and some of his brothers were. Because the family had no telephone to call for help, Concha went to a neighbor's house where she was able to contact the police and get a ride to a medical facility for treatment of her injuries. *Id*., pp. 61-62. As Dr. Woods explains, the "witnessing of sexual assaults and abuse of loved ones can often be more devastating for children than if they were actually sexually assaulted and abused themselves." *Id*., p. 62.

Shortly after this latest catastrophic event, Concha allowed another man to move into the family home: Pedro. Like Arcadio, Pedro was an alcoholic and a physically abusive and dangerous man. Also like Arcadio, Pedro provided no financial assistance to the family. He kept guns in the house and liked to shoot up the house. He terrorized Lopez, beating him up, pointing a gun at him, and threatening to kill him. *Id*., pp. 65-67. Soon, his children from his prior marriage began moving in with Concha and her children. *Id*. Petitioner explains:

> Pete never liked me. One time he woke me up in the middle of the night and pointed a gun in my face, threatening to kill me. I hid his gun after that, and when Pete noticed it was gone, he turned red and threatened to kill me again if I didn't return his gun. Pete insisted that my mom kick me and my younger brothers, Joe and George, out of the house. She did.

Exhibit 16, Lopez Affidavit.

> Lopez lived in the poorest of neighborhoods in Southwest Phoenix:
>
> Southwest Phoenix is a racially segregated and violently charged community reserved for the metal recycling industry, foundries, and impoverished Latino families. Even among this impecunious community, Sammy's family stood out as being extremely poor.

Exhibit 15, Woods Affidavit, p. 4. It has long been known that "[e]arly and chronic poverty has the worst effects on child development. Chronic poverty is dehumanizing as it damages parents' capacities for maintaining any kind of hope." *Id.*, p. 36. For Lopez, his poverty and the disadvantages he experienced "led to inadequate nutrition, inadequate housing and homelessness, inadequate child care, higher exposure to environmental toxins, such as the industrial and gas/diesel pollutants that surrounded their neighborhood, exposure to community violence, and lack of access to health care." *Id.* Records document that at one of Concha's homes, it was so cold that the water froze. *Id.*, pp. 58-59.

"Latino families living in Southwest Phoenix experienced pervasive racism and segregation. Poverty, drugs, and crime plagued the community and destroyed dreams of a better future." Exhibit 15, pp. 35-36. Because of the Lopez family's poverty, Concha constantly changed residences because she was unable to pay the rent. Once, Concha was evicted for failure to pay the rent, and with nowhere to go, she and her children moved their belongings and stayed overnight in the neighborhood park. *Id.*, pp. 35-39. A neighbor who knew the Lopez family explained:

> Concha and her boys were my neighbors for many years in the 1960's and 1970's. Our children were friends with her children and Concha and I were friends. Our neighborhood was not just poor, but filled with drugs and crime. We had to work all day to keep food on the table and have a roof over our heads. That meant our children were left to the many dangers of the neighborhood. I have experience with the dangers. Two of my seven children were in prison for many years. Another son was shot in our neighborhood. Concha's life was even harder because she did not have a husband to help her.

Exhibit 17, Declaration of Donitilla Servin.

Lopez's only escape from this pervasive neglect and abuse was the school he attended. He enjoyed school and worked hard to succeed there. Exhibit 15, pp. 68-70. But his family's instability made it difficult for Lopez to keep up with the other students. His "intense fears" and preoccupation that he, his brothers and mother would not survive the ever-present danger in his home from his father, and then Pedro, as well as the neighborhood violence and racism where he lived, also surely interfered with his success at school. As Dr. Woods explains:

> The constant mortal terror in the Lopez family prevented Sammy from developing what many of us take for granted: the comforting certainty that the world is a safe and secure place and that caretakers are ready, willing, and capable of providing us with safety and comfort. Emotions in Sammy's family were dangerous, erratic and pathologically extreme. Like all children, Sammy and his brothers craved affection from their mother, which provides the sense of security needed for normal development. Suffering, however, from her own severe psychological impairments, Concha could not provide her sons with the love and attention they so desperately needed.

Id., p. 7. Neuropsychological testing reveals that Lopez suffers significant brain damage that also would have contributed to his academic failures. But because he was well-behaved and well-liked, he was socially promoted to the next grade despite his inability to master the class materials. *Id*., p. 68.

Frustrated, bewildered and depressed, Lopez left school in the ninth grade. *Id*., p. 9. He soon turned to the same methods of survival that his older brothers used to get through each day: consuming alcohol and drugs. He sniffed paint daily, eventually suffering neurological damage. He was "homeless, living in cars, staying in the neighborhood park and the local cemetery." In a "desperate attempt to obtain money for drugs," he began to rob houses in the neighborhood when the residents were not at home. *Id*., p. 7. As one of his brothers explained, "[d]rinking and taking drugs was the only way [we] knew to bury all the bad feelings that were too much for a kid to handle." *Id*., p. 72.

Had a proper investigation been conducted, it would have revealed "the prevalence of alcoholism and drug addiction" in Lopez's immediate and extended family is remarkable and widespread. Alcoholism contributed to the chronic and pervasive interpersonal violence, poverty, chaos, and rejection that characterized [his] early life and potentiated other stressors he faced." Exhibit 15, p. 29.

"The relationship between chronic exposure to trauma, early childhood neglect, and alcoholism" is well documented in Lopez's immediate family, and his maternal relatives. *Id*., p. 30. Lopez's "father, mother, many of his brothers, and numerous maternal relatives display symptoms of depression, alcoholism, and post traumatic stress disorder that have significantly impaired their ability to function…." Their intoxication, like that of Lopez, "is frequently accompanied by bizarre changes in their behavior." *Id*.

Contrary to the courthouse rumors that the older boys were relatively successful, for most of Lopez's brothers, their alcoholism and/or drug addictions have resulted in legal problems. Lopez's older brother, Eddie, is an alcoholic who has been arrested

many times for alcohol related offenses. His brother Jimmy, too, is an alcoholic, although he apparently has avoided any legal ramifications resulting from his addiction. His brother, Steve, is an alcoholic, who was also addicted to inhaling organic solvents. He would sniff paint until he passed out. In 1978, Steve was arrested for armed robbery. Lopez's brother, Frank, suffers alcohol problems and has been arrested for drunken driving. Lopez's brothers, Joe and George, began drinking when they were 10 years old, and like Lopez, were heavy drinkers by the time they were teenagers, when they also began inhaling solvents, paints and glue and gas. *Id*., pp. 72-76. "Mental impairments in the family increased the likelihood of addictive disease, and many family members attempted to self-medicate with alcohol and drugs." *Id*., pp. 32-33.

Lopez quickly became addicted to inhaling these solvents and "continued to inhale these highly toxic substances into his adulthood despite their disastrous consequences." *Id.*, p. 79. Dr. Woods explains:

> Inhalants enter the blood supply within seconds to produce intoxication. Effects of inhalants can cause an intoxicating effect resembling alcohol. The effects produce a decrease in inhibition, loss of control, mood swings, violence, speech and coordination problems, hallucinations, and delirium. The recovery time varies from user to user; some can require hours to come down, others do not come down at all.

Id.

Given this family's significant impairments, it is not surprising that they did not contact Petitioner's lawyers. They did not know that they could or that they had any information that could help. It was the professional responsibility of the lawyer to seek this information out. Exhibit 9, Stetler Affidavit. This information would have provided

the support Dr. Bendheim needed to change his tentative diagnosis regarding Lopez's impairment to one that he could state with a reasonable degree of medical certainty: Lopez's backgrounds and history established relevant mitigating evidence supporting a life sentence. With the information and records about Lopez and his family that Dr. Bendheim did not have, Dr. Woods concludes:

> Sammy's friends and family have documented that he suffers from a pathological response to alcohol, becoming unpredictable, irrational, agitated, and at times psychotic. When Sammy drinks, even just a small amount of alcohol, he quickly and dramatically changes. Sammy's intoxication and addictive disease were the direct consequence of a devastating accumulation of risks that shaped his development and behavior. As a child, Sammy had to contend with multiple risks: family mental illness, abandonment, family addictive and neurological disease, poverty, and constant life threatening danger at home and in his community. Each alone constituted a significant obstacle to healthy development, but in combination they resulted in devastating mental impairments.

Exhibit 15, p. 7.

> Genetic heritage and acquired brain damage combined to leave Sammy with crippling mental impairments. As a pre-adolescent, Sammy exhibited clear diagnostic signs of acute trauma. This was not merely the product of neglect and mistreatment; it was also the effect of growing up in constant fear for his life and the life of his mother. The chronic and horrific violence Sammy suffered, the physical and sexual assaults he witnessed against his mother, and endlessly repeated abandonments and ongoing neglect by his attachment figures left Sammy utterly unprotected from this recipe for developmental disaster. He has spent his entire life reaping the tragic seeds of his childhood.

Id., p. 4. Dr. Woods explains that Lopez suffers:

> [I]mpaired cognitive ability to inhibit his behavior once that behavior has started as well as his inability to effectively weight and deliberate, particularly in a fast changing, chaotic environment.

Id., p. 90. His low average IQ and "brain impairment creates a vulnerability to atypical drug responses." *Id*. His "cognitive impairments are manifested by his inability to

organize. He acts impulsively, has mental inflexibility (concrete thinking), and perseverates. [His] inability to organize only augments his overwhelming traumatic induced stress." *Id*., p. 91.

The mitigating evidence and records were available to sentencing and post-conviction counsel had they investigated. They could have discovered and presented evidence demonstrating:

> Sammy's long-standing mental disorder is characterized by paranoia, delusion, confusion, suspiciousness, loss of contact with reality and disordered thinking. Sammy is cognitively concrete and measures his interactions with others against his delusional belief system that others will harm him. He holds onto this belief regardless of evidence to the contrary. This disorder affects all aspects of his life, including written and verbal communications with others, the safety of meals he is provided, special meanings of words that only he understands, and strict, but secret, rules that must be followed in interpersonal relationships. Sammy displayed signs of a thought disturbance at times present in his speech patterns. He perseverates, displays impoverished speech, and has a limited range of affect.

Exhibit 15, p. 93.

Petitioner's sentencing lawyer failed in his constitutional duty to uncover any of this important mitigating evidence. Had he done so, Petitioner would not have been sentenced to death. The claim here is similar to claims that the United States Supreme Court has found to constitute ineffective assistance counsel. *See Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard*, *Porter v. McCollum*, *Sears v. Upton*.

There can be no doubt that sentencing counsel was ineffective under *Strickland*. But post-conviction counsel failed in his professional obligations to investigate and present this evidence in post-conviction. There was no strategy or reason for this failure. Post-conviction counsel's professional failings constitute an extraordinary circumstance

under Rule 60(b)(6). 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." Exhibit 3, p. 2.

E. CONCLUSION: POST-CONVICTION COUNSEL'S INEFFECTIVENESS PREJUDICED LOPEZ AND ESTABLISHED CAUSE TO EXCUSE LOPEZ'S PROCEDURAL DEFAULT OF HIS INEFFECTIVE TRIAL COUNSEL CLAIM IN STATE COURT

Petitioner has provided this Court with ample evidence establishing that appointed contract counsel in this case failed to abide by the prevailing professional norms. He acted in direct defiance of his client's expressed wishes that he follow the advice of the project lawyers. Worse, he undermined Lopez's claim by representing, falsely as it turns out, that Petitioner's family had refused to sign affidavits. By failing to request additional time, funds and experts to investigate and present the claim, he failed to preserve any defect in the state court proceedings for federal review. "Effective trial counsel preserves claims to be considered on appeal … and in federal habeas proceedings." *Martinez, supra,* at *9 (internal citations omitted).

To be sure, Petitioner's family members are troubled. But that four of the nine children born to Mrs. Lopez end up in prison, and that the others struggle to survive every day as the result of the trauma and scars of the torture they experienced at the hands of

their brutal father, is rich mitigation. A lawyer faced with a client whose family isn't knocking down his door, has a duty to ask why and then to go and investigate. What he would have found had he only looked is a fractured family who suffer daily from their wounds and resulting mental illnesses. He would have found a family, all of whom were born on American soil, who never really felt like this was their home. A family who does not believe that the American judicial system is for them or cares about what they have to say. It is the lawyer's job to bring that family to the attention of the court and to tell their important story.

That did not happen here and it was not the fault of Petitioner. Claims of ineffective assistance of trial counsel require investigation and the gathering of evidence which "while confined to prison, the prisoner is in no position to develop the evidentiary basis for" " which often turns on evidence outside the trial record." *Martinez*, at *7. As discussed above, here the evidence supporting relief was almost entirely based on the fruits of an investigation conducted outside the record.

On these facts and law, Lopez requests this Court grant Lopez relief based on post-conviction counsel's "[i]nadequate assistance of counsel at initial-review collateral proceedings" when he failed to undertake a reasonable investigation--indeed any investigation--needed to establish the prejudice that resulted when Lopez's trial counsel failed to investigate Lopez's background and present mitigating evidence supporting a sentence less than death. *Id*., p. *5. Alternatively, Lopez requests this Court hold a hearing where Lopez can present the facts and witnesses demonstrating post-conviction

counsel's ineffectiveness in failing to investigate and litigate sentencing counsel's gross incompetence, and demonstrate the prejudice he suffered.

II. ALTERNATIVELY, PURSUANT TO ARTICLE III OF THE UNITED STATES CONSTITUTION, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND 28 U.S.C. § 2241 *ET SEQ*, PETITIONER PETITIONS THIS COURT FOR A WRIT OF HABEAS CORPUS TO RELEASE HIM FROM HIS UNCONSTITUTIONAL SENTENCE

A. CLAIM: PETITIONER RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner incorporates by reference the facts and law set forth in Section I, *supra*.

B. PETITONER'S CLAIM IS NOT BARRED AS SECOND OR SUCCESSIVE BECAUSE HIS CLAIM HAS ONLY NOW BECOME RIPE FOR FEDERAL REVIEW

Martinez, and its modification of the *Coleman* bar to the consideration of claims of ineffectiveness of post-conviction counsel in the ineffectiveness of sentencing counsel context, significantly changed the legal landscape to such an extent that a second-in-time habeas petition should not be treated as successive as that is "a term of art given substance in our prior habeas cases." *Slack v. McDaniel*, 529 U.S. at 486.

> The phrase "second or successive" is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. See *Slack v. McDaniel*, 529 U.S. 473, 486, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (citing *Martinez-Villareal, supra*); see also *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). **The Court has declined to interpret "second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application**. See, e.g., *Slack*, 529 U.S., at 487, 120 S. Ct.

> 1595, 146 L. Ed. 2d 542 (concluding that a second § 2254 application was not "second or successive" after the petitioner's first application, which had challenged the same state-court judgment, had been dismissed for failure to exhaust state remedies); see also *id*., at 486, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (indicating that "pre-AEDPA law govern[ed]" the case before it but implying that the Court would reach the same result under AEDPA); see also *Martinez-Villareal*, *supra*, at 645, 118 S. Ct. 1618, 140 L. Ed. 2d 849.

Panetti v. Quarterman, 551 U.S. 930, 943-944 (U.S. 2007)(emphasis added).

Procedurally, Petitioner's claim is akin to the claims considered in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). In *Martinez-Villareal*, the habeas petitioner raised a *Ford* claim in his first-in-time habeas petition. The claim was dismissed as unripe. Once federal habeas proceedings concluded and an execution warrant was issued, *Martinez-Villareal* filed a second-in-time habeas petition which was dismissed by the district court as barred as a second or successive petition. The Supreme Court reversed, holding that AEDPA did not intend to foreclose federal habeas relief from petitioner's whose claims were previously unripe. "If the State's interpretation of 'second or successive' were correct, the implications for habeas practice would be far-reaching and seemingly perverse." 523 U.S. at 644. The Court went likened the unripe *Ford* claim to claims previously dismissed for procedural reasons.

> We believe that respondent's Ford claim here -- previously dismissed as premature -- should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies. True, the cases are not identical; respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. **But in both situations, the habeas petitioner does not receive an adjudication of his claim. To**

> **hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.**

523 U.S. at 644-645 (emphasis added).

The Petitioner in *Slack* initially filed a habeas petition that contained exhausted and unexhausted claims. Because the petition was missed, it was dismissed so that the Petitioner could return to state court to exhaust. After exhausting, the petitioner filed a second-in-time habeas petition re-raising the claims that had been previously dismissed. The Supreme Court found that the previous dismissal on procedural grounds did not bar the consideration of the petition which was now ripe for federal adjudication. A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition." 529 U.S. at 485-486.

In *Panetti*, the Supreme Court found that the petitioner who did not raise a *Ford* claim in his first in time habeas petition could nevertheless file a second-in-time petition raising the claim which should be treated as a first petition since the claim was not previously ripe for adjudication.

All of these cases are bound by the same guiding principle, that AEDPA does treat newly ripe claims, claims that were previously unavailable for a federal merits review, as second or successive because to do so would be to "'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their

unexhausted claims.'" *Panetti* , 551 U.S. at 945-946, quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005). Such was not the intent of Congress, the court held.

Though Petitioner did previously present his ineffectiveness of sentencing counsel claim in his first-in-time petition for writ of habeas corpus, this Court did not adjudicate that claim on the merits. Instead, this Court found that the claim had never been presented to the state court and was procedurally barred because ineffective assistance of post-conviction counsel could not be cause to overcome the procedural default. This now clearly erroneous procedural ruling by this Court did not constitute an adjudication on the merits of the claim and 28 U.S.C. §2244 (b)(1) does not bar consideration of the claim and is in fact, inapplicable. Indeed, Petitioner's claim is not a second or successive petition because his claim has only just now become ripe for adjudication on the merits.

Like the claims in *Martinez-Villareal*, *Slack*, and *Panetti*, Petitioner's claim has only now become ripe because only now may he establish cause to overcome the procedural bar. "Until *Martinez* was decided, cause could not be shown in this manner because there is no constitutional right to counsel in [post-conviction] proceedings… nor a constitutional right to effective assistance of counsel in [post-conviction] proceedings. ***Martinez* has opened an avenue for cause that *Coleman* previously foreclosed**." *Bilal v. Walsh*, 2012 U.S. Dist. LEXIS 43663, *3-4 (E.D. PA March 29, 2012) (emphasis added)(attached as Exhibit 31).

Here, too, Lopez "'was entitled to an adjudication of all the claims presented in his earlier undoubtedly, reviewable application for federal habeas relief,'" and that is what he seeks under *Martinez*. As the Supreme Court explained: AEDPA's "purposes, and the

practical effects of our holdings, should be considered when interpreting AEDPA. This is particularly so when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Panetti*, *supra*, 551 U.S. at 945-946, *citing Rhines v. Weber*, 544 U.S. 269, 275 (2005). "And in *Castro* we resisted an interpretation of the statute that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Panetti*, *supra*, citing *Castro v. United States*, 540 U.S. 269, 380-381 (2003). Justice Kennedy recognized the procedural anomaly, and inequity, in a post-conviction lawyer's ineffectiveness resulting the complete denial of judicial review by any court of a substantial claim of ineffective assistance of counsel. claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. See, e.g., Fox Film Corp. v. Muller, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158 (1935); Murdock v. Memphis, 87 U.S. 590, 20 Wall. 590, 22 L. Ed. 429 (1875); cf. Coleman, supra, at 730-731, 111 S. Ct. 2546, 115 L. Ed. 2d 640. "[I]f counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Martinez, supra,* *17. Such a result here is troublesome and inequitable.

C. PETITIONER'S CLAIM IS NOT SUBJECT TO PROCEDURAL BAR

As previously stated, petitioner can establish that his post-conviction counsel provided ineffective assistance in that his counsel's performance was not in compliance

with objective professional norms for post-conviction counsel and petitioner was prejudiced by his post-conviction counsel's unprofessional errors. See Section I, *supra*, incorporated herein by reference. Petitioner has a serious and substantial claim of ineffective assistance of sentencing counsel that has not been adjudicated by any court. See Section I, *supra*, incorporated herein by reference.

D. PETITIONER IS ENTITLED TO A HEARING ON HIS CLAIM

Like the habeas petitioner in *Bilal*, Petitioner's post-conviction counsel here failed to present his claim of ineffective assistance of sentencing counsel, as previously found by this Court. Under *Martinez*, Petitioner is entitled to show that his post-conviction counsel's failures constitute ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984).

> [I]t is appropriate to allow Petitioner the opportunity to demonstrate that his [post-conviction] attorney was ineffective for failing to pursue, in the initial [post-conviction] proceeding, Petitioner's first claim of trial counsel ineffective assistance. **The best way to do that is to conduct an evidentiary hearing** where [post-conviction] counsel could explain why he failed to pursue the defaulted claim.

Bilal, *supra*, at *4 (emphasis added).

III. CONCLUSION

Had he only looked, Petitioner's post-conviction counsel would have discovered powerful facts supporting a sentence less than death—facts that neither Petitioner's trial counsel nor his resentencing counsel investigated. Petitioner was unable to assert his post-conviction counsel's ineffectiveness in earlier proceedings because longstanding Arizona law did not recognize the existence, much less validity, of such a claim. See, e.g., *State v. Krum*, 903 P.2d 596, 599-600 (1995)("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.). *Martinez* now provides Lopez the means to obtain relief based on his post-conviction counsel's flagrant errors and omissions in those key proceedings, and Lopez's motion seeking relief under Rule 60(b)(6) is "made within a reasonable time." Fed.R.Civ.P.60(c)(1). Based on the facts and law presented, Lopez requests this court grant him relief, or alternatively a hearing where he can present his facts and evidence demonstrating his entitlement to relief.

Respectfully submitted this 9th of April, 2012.

/s/ Kelley J .Henry
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