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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, v. SAMUEL VILLEGAS LOPEZ Petitioner.	No. CR 163419 (Assigned to the Honorable Peter T. D'Angelo)

Petition
for
Post Conviction Relief

Law Offices of Robert W. Doyle
by Robert W. Doyle
Attorney for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, v. SAMUEL VILLEGAS LOPEZ Petitioner.	No. CR 163419 **PETITION FOR POST-CONVICTION RELIEF** (Assigned to the Honorable Peter T. D'Angelo)

Instructions: When the notice is complete, file it with the clerk of the superior court of the county in which the conviction occurred.

A person unable to pay costs of this proceeding and to obtain the services of a lawyer without substantial personal or family hardship should indicate this by requesting counsel in Question 6 of this notice and execute the AFFIDAVIT OF INDIGENCY on page 3. Preparation of Post-Conviction Relief Record form must be filed by the defendant if some portion of the record is needed and has not previously been obtained.

NO ISSUE WHICH HAS ALREADY BEEN RAISED AND DECIDED ON APPEAL OR IN A PREVIOUS PETITION FOR POST-CONVICTION RELIEF MAY BE USED AS A BASIS FOR A SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF.

1. Defendant's name and prison number (if any): SAMUEL VILLEGAS LOPEZ, #43833

2. Defendant's address: ASPC-Florence-CB6, P.O. Box 8600, Florence, AZ 85233

3. (A) Defendant was convicted of the following crimes:

First degree murder, kidnapping, sexual assault and burglary

(B) Defendant was sentenced on August 3, 1990, to death following a

(x) Trial by Jury ( ) Trial by a Judge without a Jury
( ) Plea of Guilty ( ) Plea on No Contest

in the Superior Court of Maricopa County with Judge Peter T. D'Angelo presiding.

(C) The file number of the case was CR163419.

4. Defendant has taken the following actions to secure relief from convictions or sentences:

(A) Direct Appeal: (x) Yes ( ) No
(B) Previous Rule 32 Proceedings ( ) Yes (x) No

5. Defendant was represented by the following lawyers at:
(provide name and address of counsel, if known)

Trial or change of plea: Joel Brown
Sentencing hearing: Joel Brown/George Sterling
Appeal (if any): George Sterling/James Rummage
Previous Rule 32 Proceedings (if any) _____

6. Defendant is presently represented by a lawyer. (x) Yes ( ) No
(if yes, provide name and address)

Robert W. Doyle
1010 E. Jefferson
Phoenix, AZ 85034-2222

If no, does the defendant request the court to appoint a lawyer for this proceeding?
( ) Yes ( ) No

7. Respond to this section only if the defendant requests counsel and has filed a previous Rule 32 petition in this case.

(A) Is a claim of ineffective assistance of counsel raised in this petition? ( )Yes ( )No
(B) Is this the first claim of ineffective assistance of counsel raised? ( )Yes ( )No
(C) If no, state what action is requested of the court and the reasons the court should take this action:

This Petition is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 19th day of December, 1994.

LAW OFFICE OF
ROBERT W. DOYLE

Robert W. Doyle

ROBERT W. DOYLE
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

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I. FACTS

On November 14, 1986 Petitioner Samuel Villegas Lopez was indicted on charges of first degree murder, kidnapping, sexual assault and burglary. Petitioner's jury trial began on April 16, 1987. At trial, the State called 19 witnesses including 5 experts. The State's first expert, Fred Carmack, was an expert in the area of fingerprint examination. This expert testified that Petitioner's fingerprints and prints found at the victim's apartment matched. The State called Dr. Thomas Jarvis, a medical examiner. Dr. Jarvis gave expert testimony about the victim's injuries and the cause of death. The State called Ray Moreno, a toxicologist who gave expert testimony about swabs and a blood sample taken from the victim. The State also called Benita Harwood, an expert in blood, semen and saliva analysis. Ms. Harwood testified that she performed a series of tests on blood and other samples. The State's next expert was Ray Gieszl, a criminalist and seriologist. Mr. Gieszl performed tests on blood found at the scene and believed to be from the attacker. Mr. Gieszl performed tests to determine both blood type and blood enzymes. He testified that blood found at the scene was consistent with Petitioner's blood. Mr. Gieszl also performed fiber analysis on hair found at the scene and Petitioner's hair. Mr. Gieszl could not exclude Petitioner as the source of the hair. No DNA testing was done in this case.

After the close of the State's case, the defense moved for a judgment of acquittal. After the denial of the judgment of acquittal and the offer of proof as to one potential defense, the defense rested. The defense called no witnesses and the Petitioner chose not to testify in his own defense. No experts testified on behalf of the defendant. The jury found the Petitioner guilty on four of the five charges, including first degree murder. The jury acquitted the Petitioner on one count of sexual assault.

On June 19th, and 25th, 1987 the trial court heard aggravation and mitigation evidence. The State put on evidence to prove the Defendant's prior convictions and that the murder was committed in an especially cruel, heinous or depraved manner. The

defense submitted a memorandum citing the Petitioner's intoxication as a mitigating circumstance. Prior to sentencing, the trial court considered a pre-sentencing memorandum filed by the Maricopa County Adult Probation Office. As part of the special verdict, the trial court found that Petitioner had previously been convicted of a crime involving violence and that the crime was committed in an especially cruel, heinous, or depraved manner. The court found that no mitigating circumstances existed. The trial court sentenced Petitioner to death on the first degree murder charge and to consecutive terms of imprisonment on all of the other counts.

Petitioner filed a direct appeal to the Arizona Supreme Court. On January 16, 1990, the Arizona Supreme Court rendered its opinion in this matter. The Arizona Supreme Court found no error at trial and affirmed the judgment and convictions. However, the Court found that Petitioner had not previously been convicted of a crime involving violence and that this statutory aggravating factor did not exist. State v. Samuel Villegas Lopez, 163 Ariz. 108, 786 P.2d 959 (1990). The court remanded the matter to the Maricopa County Superior Court for resentencing.

On July 13, 1990, the trial court held a new aggravation/mitigation hearing. The State opted to present no new evidence. The Defense called Dr. Phillip Keene to show that the murder had not been committed in an especially cruel, heinous, or depraved manner. The Defense also presented the video deposition of Dr. Otto Bendheim and evidence of pathological intoxication. On August 3, 1990, the trial court again sentenced the Petitioner to death.

Petitioner appealed the resentencing to the Arizona Supreme Court. The Court affirmed the sentence of death. State v. Samuel Villegas Lopez, 175 Ariz. 407, 857 P.2d 1261 (1993).

The Petitioner filed a Petition for Writ of Certiorari to the United States' Supreme Court. The United States' Supreme Court declined review. See Arizona v. Samuel Villegas Lopez, _____ U.S. _____, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994).

In 1994, Petitioner filed for Post Conviction Relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. Counsel was appointed for the Petitioner.

II. INEFFECTIVE ASSISTANCE OF COUNSEL - TRIAL

Samuel Lopez was arraigned on these charges on November 24, 1986 and this case assigned to the trial court. Sometime subsequent to that assignment, but well before trial, Petitioner requested that his attorneys consider a Motion for Change of Judge. Petitioner's request was based upon the fact that this particular trial judge had previously sentenced his brother, George Villegas Lopez, to death and his other brother, Jose Villegas Lopez, to life imprisonment for their roles in the death of Macario Suarez in 1985. See State v. George Villegas Lopez, 158 Ariz. 258, 762 P.2d 545 (1988). By the time of sentencing, the presentencing report mentioned the fact that the Petitioner's brothers had also been sentenced for murder. Despite the Petitioner's valid requests, counsel never filed any kind of motion.

There are two ways to pursue a Motion for Change of Judge in Arizona. A party is entitled to a change of judge without the need to show cause if requested within ten days of arraignment. Rule 10.2, Arizona Rules of Criminal Procedure. Even if the Petitioner had not timely informed his attorneys of the unusual family circumstance in this case, a Rule 10.2 Motion could still have been possible beyond the ten day limit. In State v. Vickers, 138 Ariz. 450, 675 P.2d 710 (1983), the Arizona Supreme Court held that there was an appearance of impropriety when a judge that had sentenced the defendant to death in a prior case also tried same defendant for another potential death penalty case. The court noted that counsel had made no motions for change of judge. However, the court stated:

> "In a death penalty case, which is treated differently from non-death penalty cases, we believe that there is an appearance of impropriety when a judge who has sentenced the defendant to death in a prior case, also tries the same defendant for another potential death penalty offense. The judge should have recused himself from trying this defendant for the second murder."

State v. Vickers, 138 Ariz. at 452, 675 P.2d at 712 (citations omitted). Had Petitioner's attorneys requested a change of judge under Rule 10.2, the time limit may have been set aside under the extremely unusual circumstances in this case.

Petitioner's counsel also failed to consider filing a Motion for Change of Judge for Cause under Rule 10.1 of the Arizona Rules of Criminal Procedure. A defendant is entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest of the assigned judge. Rule 10.1(a), Arizona Rules of Criminal Procedure. As no motion was even attempted, there was no record concerning the trial judge's potential bias or prejudice against the third member of the same family to stand before him accused of first degree murder. At the very least, the filing of such a motion would have transferred the matter to the criminal presiding judge for a decision whether, in a death penalty case, there was the appearance of bias or prejudice which could result in the need for change of judge.

Petitioner must show that counsel's performance fell below an objective standard of reasonableness, as defined by prevailing professional norms, and that the deficient performance resulted in prejudice to the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Atwood, 171 Ariz. 576, 832 P.2d 593 (1992). Counsel fell below prevailing professional norms, especially in light of the holding in Vickers. Petitioner has been sentenced to death twice by the same judge, demonstrating prejudice. In death penalty litigation, it has always been necessary to leave "no stone unturned" and no area of potential problem unexplored. Here, in the unusual circumstance of three family members standing before the same judge for sentencing on first degree murder charges, it was ineffective assistance of counsel for an attorney to fail to explore this matter at the Petitioner's request. For these reasons, the Petitioner is entitled to relief. The death penalty should be set aside and the matter reassigned to a new judge for resentencing.

III. INEFFECTIVE ASSISTANCE OF COUNSEL - SENTENCING

A. Failure to Object to Presentence Reports.

Prior to the first sentencing, a member of the Maricopa County Adult Probation Office prepared a presentence report. See Rule 26.4 , Arizona Rules of Criminal Procedure. The trial court considered this presentence report before passing sentence. Defense counsel made no objection to this report. A second report was prepared by a different Adult Probation Officer before the second sentencing.[1]

The presentence reports in this matter are seriously flawed. First, they contain many inaccuracies, all of them detrimental to the Petitioner. In particular, the presentence report writers used an unproven subsequent bad act in analyzing the case. The first presentence report contains the following specific comments detrimental to the Petitioner:

> "The Defendant was immediately considered an investigative lead in this case. He was known to reside in the immediate area and was considered by neighbors and police to be a known burglar."[2]

> "On November 3, 1986 the Defendant allegedly confronted a nineteen year old woman with whom he had previously dated. He dragged her to the rear alley of 2825 W. Melvin and then forced her into a vehicle that the Defendant had been living in. The Defendant is accused of sexually assaulting the victim. She managed to get away and call the police. They arrived on the scene and saw the Defendant seated in the car. He was immediately placed under arrest."[3]

The second presentence report also commented on this unproven bad act.

"The investigation continued and the defendant, Samuel Lopez, became a suspect. On November 3, 1986, Mr. Lopez was arrested after it was reported to the police that he had sexually assaulted a nineteen-year-old woman, who he had previously dated. According to the victim, Mr. Lopez dragged her to the rear alley of 2825 West Melvin and forced her into a vehicle in which the defendant had been living. The defendant allegedly sexually assaulted the victim, but she was able to flee and call police. Officers arrived and took the defendant into custody for that offense."[4]

Later commenting on these unproven allegations, one presentence report writer discussed them as follows:

"The Defendant reportedly tried to force his way into a woman's apartment the evening before the present offense. A few days afterwards he was accused of sexually assaulting another woman. I think the Defendant has proven that he is a danger to society and capable of committing the most heinous of crimes. I think the Defendant should be sentenced in such a fashion so that he will be permanently removed from the community. "[5]

Second, in the prior record section of the first report, the presentence report lists sixteen incidents as an adult. The second report repeats the information from the first report.[6] However, only five of these incidents actually resulted in a conviction for an offense: two previous felonies, two previous misdemeanors, and the present offenses. The other eleven entries are notations of arrests with no disposition noted, arrests with no charges filed, or arrests and charges later dismissed.

There are two serious problems with the presentence report. First, a presentence report must be free from bias and innuendo. State v. Dixon, 21 Ariz. App. 517, 521 P.2d

148 (1974). The presentence report writers gave a great deal of credence to a sexual assault accusation against the Petitioner which had never been proven, let alone even charged by the government. Second, the mere fact of arrest is not an aggravating factor without further proof. A sentencing court considering the imposition of a more severe punishment may not infer wrongful conduct from arrest or detention alone without looking at underlying facts, Brothers v. Dowdle, 817 F.2d 1388 (9th Cir. 1987). A trial court may not aggravate a sentence based upon the mere report of an arrest, with no evidence of underlying facts to demonstrate that a crime or some bad act was probably committed by the defendant. State v. Shuler, 162 Ariz. 19, 780 P.2d 1067 (1989). Of sixteen reported previous incidents, a full two-thirds of those are accusations that had never been reduced to a conviction. These unproven and unsubstantiated crimes outnumbered the actual previous convictions of the Petitioner by more than two- to-one. Using these non-items as noteworthy events in the report denied the Petitioner due process of law.

Petitioner received ineffective assistance of counsel where there was no challenge to these presentence reports. Petitioner must show that counsel's performance fell below an objective standard of reasonableness, as defined by prevailing professional norms, and that the deficient performance resulted in prejudice to the defense. State v. Atwood, supra. Counsel's failure to challenge these reports and their innuendoes fell below prevailing professional norms for a death penalty sentencing. Petitioner is prejudiced by the sentence of death twice imposed and by the failure of counsel to make a record for better review. Petitioner is entitled to relief in the form of a new sentencing before a different judge with a new report.

III. INEFFECTIVE ASSISTANCE OF COUNSEL - SENTENCING

B. Failure to Properly Prepare Expert Witness.

Petitioner's trial counsel hired Dr. Otto Bendheim to meet with Petitioner for mitigation purposes. Dr. Bendheim met with Petitioner at the Madison Street Jail. Prior to sentencing in 1987, Dr. Bendheim gave Petitioner's trial lawyer a diagnosis of pathological intoxication. However, Dr. Bendheim's diagnosis was tentative for lack of further corroboration. Petitioner's lawyers at the first sentencing did not present Dr. Bendheim's report to the Court.

In 1990, Petitioner's lawyer for resentencing contacted Dr. Bendheim. Petitioner's second lawyer added more materials to the items presented to Dr. Bendheim. Specifically, Petitioner's second lawyer gave Dr. Bendheim the police reports from November 3, 1986 and an earlier presentence report. Dr. Bendheim found these items of use in his diagnosis and was able to strengthen his diagnosis of pathological intoxication. Dr. Bendheim's earlier report and more recent recorded deposition testimony were presented to the Court as mitigation evidence. The Court did not find that any mitigating circumstance existed at the second sentencing.

On review of the current record, current counsel for the Petitioner contacted Dr. Bendheim again. During this interview, Dr. Bendheim was given four items not previously submitted:

1). The pretrial statement of Pauline Rodriguez.[7]

2). The pretrial statement of Yodilia Sabori.[8]

3). The trial testimony of Pauline Rodriguez.[9]

4). The trial testimony of Yodilia Sabori.[10]

On review of these four items, Dr. Bendheim was able to even further strengthen his diagnosis of pathological intoxication.[11] There are two important points about these latest submittals to Dr. Bendheim. First, these items are not newly discovered. The statements and testimony of these two witnesses existed and were part of the record

well before the sentencings in 1987 and 1990. The State submitted the first two items to its expert in 1990.[12] However, neither of the Petitioner's previous attorneys submitted these items for Dr. Bendheim's consideration. Second, and more importantly, these statements are stronger evidence of pathological intoxication than any items previously submitted to Dr. Bendheim. Unlike the other materials submitted, these items are the testimony of people who not only knew Petitioner well, and saw him the night of the offense, but also saw the radical and sudden shift in Petitioner's demeanor only hours before the death of the victim.

Petitioner must show that counsel's performance fell below an objective standard of reasonableness, as defined by prevailing professional norms, and that the deficient performance resulted in prejudice to the defense. State v. Atwood, supra.

Deficient performance is easily demonstrated in this case. As previously noted, the four items most recently submitted to Dr. Bendheim all existed before either the first and second sentencing. Dr. Bendheim's 1986 report and 1990 deposition testimony both clearly state what items were submitted to him for his consideration. These most recently noted items were never submitted. As to the Petitioner's actions, these statements are especially strong because these two people knew Petitioner. They knew he had been drinking that night, they saw a radical and sudden change in his demeanor and they saw this happen no more than hours before the offense. Failure to grasp the significance of these items and to include them in the materials submitted to Dr. Bendheim constituted deficient performance below prevailing professional norms.

Petitioner was also prejudiced by this failure. First, the Petitioner has been sentenced to death twice by the trial court. Second, the impact of Dr. Bendheim's diagnosis has been considerably weakened because it only gradually reached its current level. Think, for example, how much stronger Dr. Bendheim's testimony could have been in either 1987 or 1990 had all the relevant evidence been presented to him at one time. The undoubted impact of a more complete and stronger diagnosis in either 1987

or 1990 could have made a world of difference to the Petitioner. Third, the best evidence of pathological intoxication had not come to Dr. Bendheim's attention until now. A significant part of the problem with Dr. Bendheim's earlier diagnosis' was lack of information concerning the Petitioner's condition on the night of the offense. This is exactly what the materials from Pauline Rodriguez and Yodilia Sabori add; firsthand observation that night by people who knew the Petitioner and relevant to pathological intoxication. For all of these reasons, the Petitioner was prejudiced by the failure of his earlier attorneys to present these most relevant pieces of information to Dr. Bendheim. Petitioner is entitled to relief in the form of a new sentencing before a different judge where Dr. Bendheim can give his best testimony in one piece.

IV THE VICTIM IMPACT LETTERS PROCURED BY THE COURT DENIED PETITIONER HIS RIGHT TO DUE PROCESS.

On May 20, 1987, an official of the Maricopa County Adult Probation Office submitted a presentence report for the Petitioner. Attached to that report and the supplement were 25 letters from the victim's acquaintances.[13] These letters were procured at the request of the presentence report writer.[14] The letters came from three basic sources: the victim's family, the victim's co-workers, and members of the victim's church congregation. A review of these letters reveals the following:

1. Fifteen of the twenty-five letters specifically discuss the character of the crime. These letters characterize the crime as hideous[15], cruel[16], brutal[17], foul[18], horrible[19], senseless[20], and vicious[21].

2. Four letters directly address the character of the defendant. These letters characterize the Petitioner as a person capable of horrible and diabolical acts[22], a menace to society[23], and inhuman[10]

3. Eleven letters specifically call for the judge to impose the death penalty. These letters characterize this sentencing request as for the ultimate punishment[25], the maximum penalty or sentence[26], or simply for the death sentence[27].

4. Eight letters specifically refer to the victim as a good Christian, a God-fearing person, or make other similar references to the extent of religion in the victim's life[28].

5. Six letters request that God aid the trial judge in his decision, asking that God guide that decision[29], and that the Lord bless the trial judge[30].

Victim impact letters procured by the State denied the Petitioner his right to Due Process under the United States and Arizona Constitutions. In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529 , 96 L.Ed. 2d 440 (1987), the United Supreme Court held that victim impact evidence is inadmissible at a capital sentencing hearing. In its holding, the United State's Supreme Court found that the death penalty must be suitably

directed and limited so as to minimize the risk of a wholly arbitrary and capricious action. The imposition of the death sentence should not turn on arbitrary factors such as the character of the victim or the family's ability to articulate its grief. Evidence which creates qualitative distinctions among victims does not provide a principled way to distinguish cases in which the death penalty was imposed from the many cases in which it was not. Noting that the death penalty was a punishment different from all other sanctions, the United States Supreme Court found that the heightened Due Process requirements of the death sentence required the exclusion of victim impact evidence.

In Payne v. Tennessee, ____U.S. ____, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1990), the United States Supreme Court found that the Eighth Amendment erects no per se bar to the admission of statements regarding the victim and the impact on the victim's family. In Payne, the United States Supreme Court held that victim impact statements are admissible to balance the presentation of mitigation evidence, because the court allows the defendant to present virtually any evidence in mitigation. However, the Supreme Court's holding in Payne did not completely overrule its holding in Booth[31]. Booth had excluded all victim impact statements. Payne had allowed the admission of statements regarding the victim and the impact on the victim's family. Booth had gone beyond those factors and prohibited the admission of statements regarding the family's opinions and characterizations of the crime, the defendant, and the appropriate sentence.

In this case, the letters discuss the victim and the impact on the victim's family at length. However, the letters go far beyond what is allowed under Payne. The letters contain harsh words describing the crime. Several letters make statements as to the character of the defendant. Finally, eleven letters specifically call on the trial judge to sentence the Petitioner to death. Whether or not a defendant is sentenced to the death penalty should be based upon the character of the defendant and the circumstances of

the crime. The additional matters in these letters deny the Petitioner his Due Process Rights under Booth and Payne.

While not specifically discussed in either Booth or Payne, there are two further disturbing problems about these letters. First, several of the letters specifically note that the Adult Probation Officer who wrote the presentence report solicited the letters.[32] One letter points out this connection precisely. It is addressed to Judge D'Angelo in care of the Probation Officer from the Maricopa County Adult Probation Office and begins:

> "This letter is for the purpose of responding to your two requests as follows: 1. My relationship with my sister. 2. The punishment for the person committing the crime of murder.[33]

Of twenty-five letters received, eleven specifically reference the Adult Probation Officer who wrote the first presentence reports.[34] The Maricopa County Adult Probation Office is an arm of the Superior Court of Arizona. Its employees are part of the judicial branch of government. The record makes it very clear that an employee of the judicial branch of government solicited letters from the victim's family and friends specifically requesting their input on the punishment that the Petitioner should receive. This is precisely the kind of evidence that Booth found denied a defendant's right to Due Process.

Finally, there is another matter not specifically addressed in Booth nor Payne; the interjection of religious beliefs into the capital sentencing process. Nine letters make considerable references to the principles and beliefs of Christian religions.[35] Six letters specifically call on a Christian God to guide the trial judge in rendering sentence.[36] These extraneous and irrelevant pleas to the religious principles of the trial judge add a level of emotional overlay to the proceedings which impermissibly tainted them. A central theme of American law is the separation of church and state. The pleas in these letters for divine guidance and for the judge to uphold Christian principles cross the

boundary over into arbitrary emotional factors which have no place in a capital sentencing.

In Arizona, the Arizona death penalty statute allows the judge to consider only evidence that bears upon aggravating circumstances. State v. Atwood, 171 Ariz. 576, 656, 832 P.2d 593, 673 (1992). Victim impact evidence does not tend to prove aggravating factors and the trial judge may not give aggravating weight to victim impact evidence. The trial court may use such evidence as is relevant to rebut evidence offered in mitigation. Atwood, supra. In this case, mitigation evidence was offered concerning intoxication, pathological intoxication and the ineffectiveness of the weapon used. The victim impact letters do not address these mitigating factors in any relevant fashion.

In Arizona, the trial judge is presumed in imposing sentence in a capital case to focus on the relevant sentencing factors and to set aside irrelevant, inflammatory, and emotional factors. State v. Beaty, 158 Ariz. 232, 244, 762 P.2d 531, 519 (1988). In this case the extent of the letters, their pleas for vengeance and their exhortations to irrelevant and emotionally charged religious principles rebut the presumption that the trial judge was able to ignore them. The transcript of the imposition of sentence in 1987 is remarkably short; only nineteen pages to send a man to his death.[37]. However, there is one clear error in even the short comments by the judge. At one point the trial judge stated, "Undoubtedly she was either fighting the defendant and/or begging for her life."[38]. While there was testimony regarding defensive wounds, there was absolutely no evidence to show that the victim at any point begged for her life or ever said anything at all. There was no testimony as to any statements made at the time of the crime and no other evidence from which the trial court could possibly have reached this conclusion. The sheer weight of the victim impact evidence, its references to many irrelevant yet highly damaging matters, and a clear error of fact by the trial judge at

sentencing are sufficient to rebut any presumption that the victim impact evidence had no effect upon this sentencing.

V. NEWLY DISCOVERED EVIDENCE

At the Petitioner's trial in 1986, the State called five expert witnesses. These experts testified on scientific analysis of blood, semen, vaginal fluid, hair, fingerprints, palm prints and other items of physical evidence. The defense called no expert witnesses. Since the time of this trial, DNA testing has become an important tool in criminal cases. DNA testing was first ruled admissible evidence in the criminal context by an appellate court in 1988. The Supreme Court of Arizona first considered the issue in 1993. State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993). Currently, courts in more than 40 states have considered DNA evidence in hundreds of cases. DNA evidence potentially tells us two things:

1) A declared match means that the samples could have come from the same individual;

2) If the samples do not match they must have come from different individuals.

State v. Bible, 175 Ariz. 549, 581, 858 P.2d 1152, 1184 (1993). The Arizona Supreme Court has determined that DNA testing is generally accepted in the relevant scientific community and is admissible in Arizona. State v. Bible, supra. While some methods of determining random match probability figures are inadmissible, State v. Bible, 175 Ariz. at 585, 858 P.2d at 1158 (1993), the general underlying theory of DNA is acceptable. If testing shows that samples do not match, then the conclusion is that they are from different individuals. If testing shows that samples do match, the conclusion is that they may be from the same individual. State v. Bible, 175 Ariz. at 590, 858 P.2d at 1193 (1994). State v. Hummert, 170 Ariz. Adv. Rep. 17 (Div. 1 7/26/94). At the current time, DNA testing is a tool of exclusion in Arizona.

The availability of DNA testing at the present time qualifies as newly discovered evidence under Arizona law. The requirements for newly discovered evidence are:

1) The evidence must be discovered after the trial;

2) The Petitioner must act with due diligence;

3) The evidence relied upon must not be merely cumulative or impeaching;

4) The evidence must be material to the issue involved; and

5) It must be evidence that would probably change the verdict if a new trial were ordered.

State v. Fisher, 141 Ariz. 227, 686 P.2d 750 (1984), cert. denied 469 U.S. 1066. Taking each of these factors into consideration,

1) Discovery. The claim of newly discovered evidence was not raised by any of the Petitioner's previous attorneys. The landmark cases in Arizona on this evidence, Bible and Hummert, were not decided until 1993 and 1994. It is only now that the availability and admissibility of DNA evidence can be properly considered in an Arizona court.

2) Due Diligence. As previously noted the landmark Arizona cases were rendered this year. Petitioner has shown proper due diligence.

3) Cumulative or Impeaching. DNA evidence in this case would be neither cumulative nor impeaching. There was no expert evidence of any kind submitted by the defense at trial. The DNA evidence would also not be offered for the purpose of impeaching the State's experts, but rather submitted on a wholly separate scientific theory.

4) Materiality. The defense in this case was that the Petitioner was not the person who left blood and semen at the scene. DNA testing could absolutely exclude the Petitioner and absolutely confirm the defense that the Petitioner was not present.

5) New Trial. Petitioner must show that this evidence would probably change the verdict if a new trial were ordered. Evidence that could exclude the Petitioner as the guilty party would certainly warrant a new trial.

At this time, the defense has no scientific analysis of DNA testing to submit. However, portions of the samples tested by the prosecution and defense for other

purposes in 1987 still exist. Exhibit #66, a vial of dried blood found in a silverware tray, is preserved with the other exhibits by the Clerk of the Court.[39] The "rape kit" taken by the Phoenix Police from the victim is currently being preserved by the Phoenix Police Department.[40] Both of these items could now be submitted for testing by an appropriate expert or laboratory.

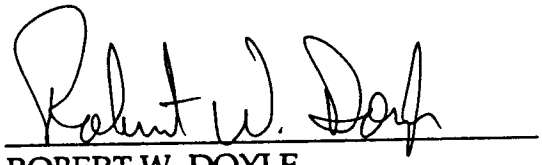
The relief requested by the Petitioner at this time on this count is different than that usually requested in a Petition for Post Conviction Relief. Claims that DNA testing would now require a new trial are premature. The relief requested at this time is that the Court order that the samples be made available to the defense for the purpose of DNA testing and that appropriate funds be allocated for these testing procedures. Once these tests are performed, a determination that this evidence excludes the Petitioner would support this Petition for Post Conviction Relief and call for a new trial.

VI. CONCLUSION

For the foregoing reasons, Petitioner is entitled to relief. As to the claim in Section II of this Petition, appropriate relief is a new trial. As to the claims in Sections III and IV, the appropriate relief is a new sentencing before a different judge. As to the claim in Section V, the appropriate relief is to allocate sufficient funds for DNA testing and to make usable samples available.

RESPECTFULLY SUBMITTED this 19th day of December, 1994.

LAW OFFICE OF
ROBERT W. DOYLE



ROBERT W. DOYLE
Attorney for Petitioner

VII. FOOTNOTES

1. See Exhibits 1 and 2, attached.
2. Exhibit 1, page 2.
3. Exhibit 1, page 2.
4. Exhibit 2, page 1.
5. Exhibit 1, page 8.
6. Exhibit 1, pages 4 - 6; Exhibit 2, pages 4 - 5.
7. See Exhibit 30, attached.
8. See Exhibit 31, attached.
9. Record of Transcript, 4/21/87, pages 65 - 78.
10. Record of Transcript, 4/21/87, pages 79 - 88.
11. See Exhibit 3, attached.
12. Record of Transcript, 7/13/90.
13. See Exhibit 4 - 28, attached.
14. See Exhibits 5, 6, 7, 8, 9, 15, 16, 17, 18, 23 and 26.
15. See Exhibit 8.
16. See Exhibits 5 and 6.
17. See Exhibits 4, 11, 15, 18, 20 and 28.
18. See Exhibit 17.
19. See Exhibits 7 and 23.
20. See Exhibit 7.
21. See Exhibits 5 and 27.
22. See Exhibit 15.
23. See Exhibit 24.
24. See Exhibit 28.
25. See Exhibit 8.

26. See Exhibits 4, 9, 23, 25 and 28.

27. See Exhibits 5, 7, 10 and 24.

28. See Exhibits 6, 12, 15, 16, 18, 19, 27 and 28.

29. See Exhibits 6, 8, 9 and 18.

30. See Exhibits 15 and 16.

31. See *Speaking for the Dead at Death Sentencing.*, Phalen and McClellan, Arizona Attorney, November 1994.

32. See Exhibits 5, 6, 7, 8, 9, 15, 16, 17, 18, 23 and 26.

33. See Exhibit 16.

34. See Exhibits 5, 6, 7, 8, 9, 15, 16, 17, 18, 23 and 26.

35. See Exhibits 6, 12, 15, 16, 18, 19, 24, 27 and 28.

36. See Exhibits 6, 8, 9, 15, 16 and 18.

37. Record of Transcript, June 25, 1987.

38. Record of Transcript, June 25, 1987.

39. This item is present with the rest of the trial exhibits as preserved by the Clerk of the Court. Petitioner requests that the court take judicial notice of the contents of the Clerk's exhibit boxes.

40. See Exhibit 29, attached.

Copies of the foregoing
delivered on this 14th day
of December, 1994 to:

The Hon. Judge Peter T. D'Angelo
Judge of the Superior Court
201 W. Jefferson
Phoenix, AZ 85003

Ms. Dawn Northup
Assistant Attorney General
1275 W. Washington
Phoenix, AZ 85007

Mr. Samuel V. Lopez
#43833
ASPC-Florence-CB6
P.O. Box 8600
Florence, AZ 85233

By Robert W. Doyle
ROBERT W. DOYLE
Attorney for Petitioner

VIII. EXHIBITS

1. Presentence Report of 1986.
2. Presentence Report of 1990
3. Affidavit from Dr. Otto Bendheim, M.D.
4. Letter marked Instrument 48L
5. Letter marked Instrument 48N.
6. Letter marked Instrument 48O.
7. Letter marked Instrument 48Q.
8. Letter marked Instrument 49B.
9. Letter marked Instrument 49C.
10. Letter marked Instrument 49D.
11. Letter marked Instrument 49F.
12. Letter marked Instrument 49G.
13 Letter marked Instrument 49H.
14. Letter marked Instrument 49I.
15. Letter marked Instrument 49J.
16. Letter marked Instrument 49K.
17. Letter marked Instrument 49M.
18. Letter marked Instrument 49N.
19. Letter marked Instrument 49P.
20. Letter marked Instrument 49Q.
21. Letter marked Instrument 49R.
22. Letter marked Instrument 49S.
23. Letter marked Instrument 49T.
24. Letter marked Instrument 49V.
25. Letter marked Instrument 49X.

26. Letter marked Instrument 49Y.

27. Letter marked Instrument 49Z.

28. Letter marked Instrument 49C[1].

29. Letter from Mr. Paul Ahler, Deputy County Attorney.

30. Pretrial Interview of Pauline Rodriguez,
Defendant's Exhibit 11, 7/13/90.

31. Pretrial Interview of Yodilia Sabori,
Defendant's Exhibit 10, 7/13/90.