

AFFIDAVIT OF STATIA PEAKHEART

1. My name is Statia Peakheart. I am a Deputy Federal Public Defender with the Office of the Federal Public Defender for the Central District of California. Before my current employment, I was a staff attorney at the Arizona Capital Representation Project (ACRP) in Tempe, Arizona.

2. The ACRP was a nonprofit law office funded in large part by a grant from the Administrative Office of the United States Courts. The purpose of the ACRP was to provide assistance and resources for counsel appointed to represent indigent defendants whom the State of Arizona charged with or convicted of capital crimes. I worked with the ACRP from 1992 to 1995, when the ACRP lost its federal funding.

3. As a staff attorney for ACRP, I, along with attorney Michael O'Connor, was responsible for monitoring the state capital case of Samuel V. Lopez. Our role as resource counsel in the Lopez case was to assist his counsel with investigation, research, and drafting pleadings. Mr. Lopez had already been sentenced to death, and his direct appeal was concluded, so his case was at the state post-conviction level, awaiting his filing of a Rule 32 petition.

4. With the approval of Robert Doyle, Mr. Lopez's post-conviction attorney, I began meeting with Sam Lopez in the winter of 1994-1995. I explained

to Mr. Lopez the role of the ACRP and that we would offer our services, including some investigation and record gathering to Mr. Doyle. Mr. Lopez and Mr. Doyle accepted the Project's offer of assistance.

5. I met with Mr. Lopez often, both to develop his trust and to obtain information that would help Mr. Doyle in litigating his case. In every meeting, I found Mr. Lopez to be cooperative and helpful. Mr. Lopez did not understand the legal process and seemed to be totally dependent on his lawyer. Mr. Lopez seemed to be naïve in his dealing with his lawyer. He did not know what questions he should ask or even what direction to give his lawyer. For example, initially, Mr. Lopez did not understand the relationship between his crimes and death sentence and what I later learned was his horrific childhood. He did not know that information about his childhood or the period before the crimes was relevant to judge's sentencing decision. It appeared to me that I was the first lawyer to explain clearly to Mr. Lopez what a life history or a mitigation investigation is and how it related to the sentencing process in a death penalty case. I am not sure that I was ever able to get Mr. Lopez to understand completely, but he did sign authorizations for release of information forms so that ACRP could get life history and other records and he allowed ACRP to investigate his childhood and life history. At no time, did Mr. Lopez say "don't do

this” or “stay away from that”; so long as I kept him informed about what we were doing and why, Mr. Lopez agreed to the life history investigation.

6. Because I was able to develop his trust and confidence that ACRP was helping his attorney, Mr. Lopez was very open with me about the physical and mental abuse his whole family suffered at the hands of his violent, alcoholic father. He was also open about his family’s poverty. He talked about when he started using drugs and alcohol and paint sniffing, and I think he came to realize it was to escape his life.

7. One thing I remember about Mr. Lopez is how betrayed he felt by his mother. It was clear to me that Mr. Lopez loved his family very much, yet none of his family visited him at the prison. Mr. Lopez felt like his mother and brothers had abandoned him. (I learned that his father had died; Mr. Lopez had not seen his father for many years, after he abandoned Mr. Lopez and his family and I was the one who told him about his father’s death.) Another thing I remember about Mr. Lopez is that he comes from a family of eight brothers; the oldest was doing well in his life – in terms of stability, family life, and work history – the next brother was doing less well, until ultimately the youngest four, including Mr. Lopez, were in prison for very serious offenses. The picture was beginning to develop that the brothers’ eventual circumstances evinced their family’s situation

when they were children, including Mr. Lopez's – as the father became more violent, alcoholic and abusive, the family's poverty and turmoil increased. Even then, as capital defense attorneys, we knew that there would be a wealth of mitigation evidence available to any lawyer who merely bothered to look for it, and there was.

8. Once assigned to the case and with Mr. Doyle's knowledge and approval, I immediately began the time-consuming process of gathering records and interviewing the Lopez family. During just three months, we had gathered over 1500 pages of social history records in the case. It appears no attorney before ACRP had ever gathered those records, including trial counsel. We turned those records over to Mr. Doyle for his use in Mr. Lopez's Rule 32 petition. See Exhibit A, Receipt of Documents. That batch of documents was just the start, I knew that there was much more to be done.

9. When my requests failed, my associate, Michael O'Connor, tried to convince Mr. Doyle to seek more time and funding from the judge to complete the investigation and to identify appropriate witnesses and expert assistance to support relief. We even drafted motions for Doyle to file that included requests for a continuance, request for funds for an investigator, and request for the appointment of experts. These motions said what had been done so far, where the investigation

was headed, and how relevant the information was to the request for relief. I attach those motions to this affidavit as Attachments B-D.

10. Mr. Doyle refused to file these motions because, he said, he did not want to anger the judge. I remember this explanation clearly, even to this day. While this was a problem we encountered with the contract PCR counsel at the time – they were afraid that if they made the judge angry, the judge would not appoint them to any more cases – we told them their duty was to the client, not the judge, but this was often to no avail.

11. Michael O'Connor and I decided to ask another lawyer in our office, Oliver Loewy, to appeal to Mr. Doyle and convince him that the additional time and resources needed to be requested to present the information and experts to the state court, thus preserving the issue for federal review. I attach a memorandum regarding that meeting and its lack of success as Attachment E.

12. 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 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 Mr. Lopez. Also, I have no idea where he got this information from since Mr.

Doyle had no contact with the family – ACRP did all the investigation and interviews for him. I know from my conversations with this family that I was the first person whoever interviewed them about their background and history as it related to Mr. Lopez’s capital case (my memory is that not even Mr. Lopez’ trial attorney had met with them). 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, and we needed time and funding to complete the effort.

13. In the summer of 1995, the ACRP lost its federal funding and began the process of shutting down. I took a position with the Capital Habeas Unit of the Federal Public Defender’s Office in Los Angeles and had no further contact with the case.

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14. In the seventeen years since I left Arizona, Mr. Lopez's case has continued to bother me. Mr. Doyle's representation stands out as one of the worst cases of ineffective lawyering I have ever seen – particularly since we had already done so much of the issue-spotting, mitigation/life history investigation and record-gathering for him.

Further affiant sayeth not.

Dated this 14th day of February 2012.

Stacia Peakheart

Stacia Peakheart

Subscribed and sworn to before me on this _____ day of February 2012 in Los Angeles, Los Angeles County, California.

See Attached

Notary Public

CALIFORNIA JURAT WITH AFFIANT STATEMENT

- See Attached Document (Notary to cross out lines 1-6 below)
- See Statement Below (Lines 1-5 to be completed only by document signer[s], *not* Notary)

Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

State of California

County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this

14th day of February, 2012, by

(1) Stacia Peakheart
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me (.) (.)

(and

(2) _____
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

Signature [Handwritten Signature]
Signature of Notary Public



Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: Affidavit

Document Date: 02/14/2012 Number of Pages: 7

Signer(s) Other Than Named Above: None

RIGHT THUMBPRINT OF SIGNER #1

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RIGHT THUMBPRINT OF SIGNER #2

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ATTACHMENT A

MEMORANDUM

Privileged and Confidential
Attorney Work Product

TO: *Lopez file*

FROM: Statia

RE: Transmittal of file documents

DATE: May 1, 1995

On May 2, 1995, I, *Richard W. Dahl* received the following files from the Arizona Capital Representation Project:

1. Documents pertaining to Samuel Lopez;
2. Documents pertaining to Samuel Lopez's trial;
3. Documents pertaining to Concha Villegas Lopez;
4. Documents pertaining to Arcadio Lopez, Jr.;
5. Documents pertaining to Eddie Lopez;
6. Documents pertaining to Frank Lopez;
7. Documents pertaining to Steve Lopez;
8. Documents pertaining to José Lopez;
9. Documents pertaining to George Lopez; and,
10. Documents pertaining to Gloria Lopez.

ATTACHMENT B

1 Robert Doyle
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3 (602) 253-1010
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4

5

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

7	STATE OF ARIZONA,	)	NO. CR-163419
8	Respondent,))
9	vs.	)	MOTION FOR EXTENSION OF TIME
10	SAMUEL VILLEGAS LOPEZ,	)	PURSUANT TO ARIZONA RULE OF
11	Petitioner,	)	CRIMINAL PROCEDURE 32.4(C)
12	_____	)	Assigned to:
13		)	Hon. Peter T. D'Angelo

14 Petitioner moves that this Court grant him a thirty-day
15 extension of time, until May 3, 1995, in which to file his
16 petition for post-conviction relief, pursuant to ARIZONA RULE OF
17 CRIMINAL PROCEDURE 32.4(c), the Fifth, Sixth, Eighth and
18 Fourteenth Amendments, to the UNITED STATES CONSTITUTIONS and
19 related provisions of the ARIZONA CONSTITUTION and laws. The
20 most factually compelling reason to provide additional time is
21 that counsel and his staff have uncovered approximately 1,500
22 pages of documents to be examined and considered before filing.

23

24 MEMORANDUM OF POINTS AND AUTHORITIES

25

26 BACKGROUND

27 Undersigned counsel was appointed by this Court to represent
28 Petitioner in his post-conviction proceedings. ARIZ. R. CRIM. P.

1 32.4(c). A preliminary petition for post-conviction relief was
2 timely filed.

3 Subsequently, the parties agreed to file a stipulated
4 request to permit Petitioner to file a supplemental petition by
5 April 3, 1995, and to extend the State's deadline for filing its
6 response to forty-five days after April 3, 1995. While the
7 parties did file a stipulated request, that request contained a
8 typographical error. Thus, while the parties did agree in the
9 stipulated request that Petitioner should have until April 3,
10 1995, to file a supplemental petition, the parties also and
11 mistakenly asked that the State be granted until April 3, 1995,
12 to file its response.

13 On February 8, 1995, this Court entered an order granting
14 the requested extensions in time. Unfortunately, the order
15 reflects the filed stipulation's typographical error, for it
16 grants Petitioner no additional time in which to file a
17 supplemental petition but does grant the State until April 3,
18 1995, to file its response.

19 Having believed that he had been granted until April 3,
20 1995, to file a supplemental petition, undersigned counsel and
21 staff have been diligently conducting further investigation. A
22 substantial amount of evidence relevant to Petitioner's post-
23 conviction proceedings has been uncovered, but the investigation
24 is not complete. For this reason, and for the additional reasons
25 set out below, Petitioner respectfully requests that this Court
26 grant him leave to file a supplemental post-conviction petition
27 by or on May 3, 1995.

1 I. GOOD CAUSE EXISTS TO GRANT PETITIONER AN ADDITIONAL
2 THIRTY DAYS IN WHICH TO FILE A SUPPLEMENTAL PETITION
3 FOR POST-CONVICTION RELIEF.

4 RULE 32.4(c) of the ARIZONA RULES OF CRIMINAL PROCEDURE
5 provides that post-conviction petitions may be amended upon a
6 showing of good cause. ARIZ. R. CRIM. P. 32.4(c). In this case,
7 good cause exists for additional time to complete the
8 investigation necessary to fully presenting the claims of relief
9 contained in his post-conviction petition and necessary to fully
10 identifying and raising additional claims for post-conviction
11 relief. Undersigned counsel has never before represented a
12 capital defendant in post-conviction proceedings. Since filing
13 the preliminary petition in this case, counsel has learned that
14 much work remains to be done to adequately present Petitioner's
15 case. While this necessary investigation is ongoing, much
16 remains to be done. This postconviction case seeking relief from
17 Petitioner's capital convictions and sentences is factually and
18 legally extremely complex, and there are numerous potential guilt
19 and penalty phase witnesses, and other technical issues.

20 A significant part of what might appear to be delay in this
21 case can be attributed to inaccurate information received early
22 in the investigation. In fact, then, undersigned counsel has not
23 engaged in delay, and filed the preliminary petition in the
24 initial time allotted. Before filing the preliminary petition,
25 undersigned counsel interviewed two previous attorneys for
26 Petitioner who said that their investigations found little or no
27 documents concerning Petitioner. In just 60 days, current

1 counsel's investigatory staff has found an immense amount of
2 material. This material must be reviewed and carefully
3 considered before filing a supplemental petition.

4 Although a substantial amount of investigation has been
5 accomplished since this Court's February 2 order, the
6 investigation necessary to effectively representing Petitioner in
7 these capital proceedings is far from complete. For example,
8 while many records critical to Petitioner's post-conviction
9 petition have been obtained and reviewed, additional records have
10 been requested but not yet received. It often takes several
11 weeks or months to get responses on record requests. In
12 addition, Petitioner comes from a very large family; while
13 diligent efforts have been made and are ongoing, to date only a
14 few family members have been contacted --though the vast majority
15 have been located. Many others are out-of-state. Interviewing
16 and obtaining affidavits from Petitioner's family is an essential
17 part of presenting potential guilt and penalty phase claims for
18 post-conviction relief, including the issue of Petitioner's
19 pathological intoxication. As the Court is aware, Petitioner's
20 family did not significantly participate at either the first or
21 second sentencing.

22 Significant progress has been made in the past 60 days.
23 Records that previous lawyers for Petitioner did not locate have
24 been found. These documents include over 1,500 pages, which
25 counsel needs to review in greater detail. Undersigned counsel
26 continues to receive additional relevant documents. Family
27 members have been located and are being interviewed. Much work

1 that previous counsel failed to do is now being accomplished.

2 Finally, counsel has time-consuming responsibilities in
3 numerous other cases in which he is counsel of record. These
4 include two cases in which undersigned counsel was recently
5 appointed, one a capital case on direct appeal, and the other a
6 capital case in post-conviction proceedings.

7

8 II. THE FEDERAL AND STATE CONSTITUTIONS AS WELL AS THE VERY
9 PURPOSE OF ARIZONA'S RULE 32 POST-CONVICTION
10 PROCEEDINGS REQUIRE COUNSEL TO CONDUCT AN OUTSIDE-THE-
RECORD INVESTIGATION INTO POTENTIAL GUILT AND
SENTENCING PHASE CLAIMS FOR POST-CONVICTION RELIEF.

11 There are at least two reasons why undersigned counsel
12 should be permitted additional time to complete his thorough
13 investigation and amend his petition in this case. First, since
14 Petitioner is entitled to effective assistance of post-conviction
15 counsel as a matter of state and federal law, he is entitled to
16 undersigned counsel's conducting a thorough investigation.
17 Second, since Arizona's Rule 32 post-conviction proceedings are
18 designed to permit petitioners to litigate, among other things,
19 claims that they were denied effective assistance of counsel at
20 trial, denying additional time to complete the investigation and
21 amend the petition would be contrary to the very purpose of these
22 proceedings.

23

24

25 A. Petitioner Is Entitled To Effective Assistance Of
26 Post-conviction Counsel As A Matter Of State And
27 Federal Law And, Therefore, Post-conviction
Counsel Must Conduct A Thorough Investigation Into
Guilt And Penalty Phase Issues.

28

1 Arizona law guarantees effective assistance of counsel to
2 post-conviction petitioners. The Arizona Court of Appeals holds
3 that, "for the right to counsel [under Arizona law] to be
4 meaningful, it must encompass effective assistance of counsel" in
5 state post-conviction proceedings. State v. Krum, 184 Ariz. Adv.
6 Rep. 3 (Div. One, Feb. 14, 1995) (citing Strickland v.
7 Washington, 466 U.S. 668, 685-86 (1984)). See also, ARIZ. R.
8 CRIM. P. 32.2 (amended) (comment) (postconviction petitioner's
9 failure to raise issue may be challenged as constituting
10 ineffective assistance). Furthermore, ARIZ. R. CRIM. PRO., RULE
11 32 plainly contemplates investigation of issues outside the
12 record. See, e.g., State v. Wood, 180 Ariz. 53, 61, 881 P.2d
13 1158, 1166 (1994) (declining to address on direct appeal
14 ineffective assistance of counsel claims because they are fact
15 intensive and, therefore, trial courts are far better situated to
16 address them). Thus, effective representation of Petitioner
17 requires that investigation outside the record be completed. Cf.
18 Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (counsel's
19 duty to make reasonable investigations or to make reasonable
20 decision not to make particular investigations); Evans v. Lewis,
21 855 F.2d 631, 637 (9th Cir. 1988) (counsel's failure to
22 investigate mental condition cannot be construed as trial
23 tactic); Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir.
24 1991) (defense counsel is obligated to conduct mitigation
25 investigation even where defendant instructs counsel not to
26 present mitigation evidence); Liebman, J. FEDERAL HABEAS CORPUS

1 PRACTICE AND PROCEDURE, 7.1, p. 66 (1988) (proper
2 representation on post-conviction requires a thorough factual
3 investigation of all aspects of the trial and appeal).

4 The Sixth Amendment to the UNITED STATES CONSTITUTION also
5 guarantees effective assistance of counsel to post-conviction
6 petitioners in the same procedural posture as Petitioner.
7 Specifically, where state post-conviction review serves as the
8 only appeal on certain issues, those state post-conviction
9 procedures must meet the same constitutional standards as must be
10 met by the procedures for the first direct appeal of right. See
11 Coleman v. Thompson, 111 S. Ct. 2546 (1991).

12 In Evitts v. Lucey, 469 U.S. 387 (1985), the United States
13 Supreme Court held that Fourteenth Amendment's equal protection
14 guarantee requires that the constitutional right to counsel on
15 the first direct appeal of right in state court encompasses the
16 right to effective assistance of counsel on that appeal. The
17 Court went on to hold that "where the merits of the one and only
18 appeal an indigent has as of right are decided without benefit of
19 counsel, we think an unconstitutional line has been drawn between
20 rich and poor." Id. at 357 (emphasis in original).

21 In Arizona, criminal defendants are entitled to appeal from
22 their convictions and sentences. However, Arizona provides that
23 the first place criminal defendants may raise certain claims is
24 in Rule 32 post-conviction proceedings, most notably ineffective
25 assistance of trial counsel claims. State v. Wood, 180 Ariz. 53,
26 61, 881 P.2d 1158, 1166 (1994). In Arizona, then, the Rule 32
27 post-conviction proceeding is the one and only appeal of those

1 claims which criminal defendants have in Arizona. Under Evitts,
2 then, if the merits of these claims by post-conviction
3 petitioners in Arizona "are decided without benefit of counsel,
4 ... an unconstitutional line has been drawn between rich and
5 poor." Id. at 357. For these reasons, post-petitioners in
6 Arizona are entitled as a matter of federal law to the effective
7 assistance of counsel, at least with regard to those claims which
8 can be raised for the first time only in post-conviction
9 proceedings such as ineffective assistance of trial counsel.

10 Petitioner, then, is entitled to effective assistance of
11 post-conviction counsel as a matter of state and federal law.
12 Since trial counsel "must at a minimum, conduct a reasonable
13 investigation enabling him to make informed decisions about how
14 best to represent his client," Sanders v. Ratelle, 21 F.2d 1446,
15 1456 (9th Cir. 1994), post-conviction counsel must determine
16 whether trial counsel conducted a reasonable investigation.
17 Similarly, under Arizona state law, "effective counsel must
18 carefully investigate all available defenses[.]" State v. Ring,
19 131 Ariz. 374, 641 P.2d 862 (1982) (citing to State v. Lopez, 3
20 Ariz. App. 200, 412 P.2d 882 (1966)). In the instant case, then,
21 undersigned counsel must make an informed decision whether trial
22 counsel rendered effective assistance by, among other things,
23 conducting a reasonable investigation.

24

25 B. Independent Of Petitioner's Right To Effective
26 Assistance Of Post-conviction Counsel, State And
27 Federal Due Process And Equal Protection
28 Guarantees --As Well As Common Sense-- Requires
That A Thorough Investigation Be Conducted In

28

1 motion for an extension of time in which to complete the
2 investigation and file a supplemental petition for post-
3 conviction relief. Petitioner respectfully requests that the
4 Court grant a thirty-day extension of time provided for in ARIZ.
5 R. CRIM. PRO. 32.4(c), setting the due date for the petition at
6 May 3, 1995.

7

8 Respectfully submitted this _____ day of April, 1995.

9

10

11

By _____

12

Robert Doyle
Counsel for Petitioner

13

14

Copies of the foregoing mailed
this _____ day of January 1995,
to:

15

16

Hon. Peter T. D'Angelo
Judge, Maricopa County Superior Court

17

18

Dawn Northrup
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85003

19

20

by: _____

21

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23

24

25

26

27

28

ATTACHMENT C

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5 ** FILED UNDER SEAL **
6

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA
9

10	STATE OF ARIZONA,	)	No. CR-163419
)	
11	Respondent,)	
		)	MOTION FOR LEAVE TO FILE
12	vs.	)	UNDER SEAL AND FOR <u>EX PARTE</u>
		)	CONSIDERATION OF MOTION FOR
13	SAMUEL VILLEGAS LOPEZ,	)	FUNDS FOR EXPERT WITNESSES
		)	AND FOR AN INVESTIGATOR
14	Petitioner.)	
		)	ASSIGNED TO:
15	_____) HON. PETER		
16	T. D'ANGELO		

17 Petitioner, pursuant to Article I, Sections 4 and 24 of the
18 ARIZONA CONSTITUTION, RULE 32.4.c. of the ARIZONA RULES OF
19 CRIMINAL PROCEDURE, ARIZ. REV. STAT. 13-4013 and the Sixth,
20 Eighth and Fourteenth Amendments to the UNITED STATES
21 CONSTITUTION, makes this ex parte request (1) for leave to file
22 under seal a motion requesting funds for expert witnesses; and,
23 (2) that this Court conduct all further proceedings regarding
24 that sealed motion ex parte. In support of this motion, Mr.
25 Lopez states as follows.

26 There are numerous and compelling reasons why this Court
27 should grant the instant motion. Denying it will compel Mr.
28

1 Lopez to disclose his defense and strategy and to incriminate
2 himself, and will invade his right to counsel, his rights to due
3 process and equal protection and force disclosure of attorney-
4 client privileged and work-product materials. Further, denying
5 Mr. Lopez's requests will force him to choose between
6 constitutional rights guaranteed by both the federal and Arizona
7 constitutions. Finally, any legitimate interest the state might
8 have in guarding the public finances can be protected by this
9 Court's exercise of its discretion.

10 Under Arizona law, this Court may grant Mr. Lopez's
11 requests. His requests for funds are pursuant in part to ARIZ.
12 REV. STAT. 13-4013, which nowhere suggests that the state must
13 be involved in a courts ruling on such requests.¹ While the
14 Arizona Supreme Court holds that there is no constitutional
15 requirement that hearings on requests for funds pursuant to
16 Section 13-4013 be conducted ex parte, State v. Apelt, 176 Ariz.
17 349, 364-65, 861 P.2d 634, 649-50 (1993), this state's appellate
18 courts have never held that ex parte consideration of such
19 requests are prohibited.

20

21 _____
21 ARIZ. REV. STAT. 13-4013(b) provides:

22 When a person is charged with a capital offense the
23 court may on its own initiative and shall upon
24 application of the defendant and a showing that the
25 defendant is financially unable to pay for such
26 services, appoint such investigators and expert
27 witnesses as are reasonably necessary adequately to
28 present his defense at trial and at any subsequent
proceeding. Compensation for such investigators and
expert witnesses shall be such amount as the court in
its discretion deems reasonable and shall be paid by
the county.

1 Moreover, Apelt is wrongly decided. Requests for funds
2 pursuant to Section 13-4013 should always be under seal and
3 considered ex parte for at least three reasons. If Apelt is
4 correctly decided, this Court should exercise its discretion and
5 grant this motion for these same three reasons.

6 First, if Section 13-4013 requests are not made under seal
7 and considered ex parte, defendants' constitutional rights will
8 be violated. Under Section 13-4013, a defendant must disclose
9 "what [is] to be investigated and why it [is] believed to be
10 material ... in order for the court to determine that the
11 expenditure sought [is] reasonably necessary to enable defendant
12 to present an adequate defense." State v. Greenawalt, 128 Ariz.
13 150, 156, 624 P.2d 828, 834 (1981). Therefore, the Supreme Court
14 held, a trial court did not abuse its discretion when it denied
15 funds to a defendant who had failed to make a showing of the
16 subject matter to be investigated and its materiality to the
17 case.

18 The showing required for entitlement to Section 13-4013
19 funds will always turn on a defendant's disclosing his defense
20 and strategy and will often require a defendant to incriminate
21 himself in violation of federal and state law, invade his right
22 to counsel in violation of federal and state law and violate his
23 rights to due process and equal protection as guaranteed by
24 federal and state law. Further, it will often turn on the
25 defendant's disclosure of attorney-client privileged information
26 and work-product information.

27 A second reason that Section 13-4013 funds requests should
28

1 be made under seal and considered ex parte is that proceeding
2 otherwise would compel defendants to choose between
3 constitutionally guaranteed rights. The right to counsel
4 guaranteed by the Sixth Amendment and the Due Process guaranteed
5 by the Fourteenth Amendment to the UNITED STATES CONSTITUTION and
6 by Article 2, Sections 4 and 24 of the ARIZONA CONSTITUTION
7 entitles criminal defendants to "the raw materials integral to
8 the building of an effective defense." Ake v. Oklahoma, 470 U.S.
9 68 (1985). Thus, requiring defendants to disclose to the State
10 the bases for their request for Section 13-4013 funds would mean
11 that defendants would have to choose between their constitutional
12 rights. Specifically, they would have to choose between the
13 state and federal due process rights to the "raw materials
14 integral to the building of an effective defense" and the panoply
15 of rights set out above. The UNITED STATES CONSTITUTION forbids
16 requiring defendants to choose between their federal
17 constitutional rights. Simmons v. United States, 390 U.S. 377
18 (1968). In addition to the federal constitutional safeguards,
19 Arizona defendants should not be forced to choose between their
20 state constitutional rights.

21 Third, Apelt's holding is contrary to ARIZ. REV. STAT. 1-
22 211, providing rules of statutory construction. The Arizona
23 Supreme Court has repeatedly held that a statute adopted from
24 another state should be construed consistently with cases decided
25 by the courts of that state. See, e.g., Gammons v. Berlat, 144
26 Ariz. 148, 696 P.2d 700 (1985), and State v. Tramble, 133 Ariz.
27 48, 695 P.2d 737 (1985).

28

1 Section 13-4013 was adopted from CALIFORNIA PENAL CODE
2 987. See Historical Note to ARIZ. REV. STAT. 13-4013. The
3 California statute prescribes that "[t]he fact that an
4 application has been made [for funds "reasonably necessary for
5 the preparation or presentation of the defense"] shall be
6 confidential and the contents of the application shall be
7 confidential." Moreover, the court's ruling on the request
8 "shall be made at an in-camera hearing." CAL. PENAL CODE 987.9
9 (1985 & Supp. 1990); Corenevsky v. Superior Court, 36 Cal.3rd
10 307, 321, 682 P.2d 360, 204 Cal.Rptr. 165 (1984).

11 The Apelt decision is inconsistent with the California
12 courts's interpretation of Section 987 and, therefore, violates
13 ARIZ. REV. STAT. 1-211.2

14 Finally, this Court should grant Mr. Lopez's requests
15 because doing so will provide him the same basic rights available
16 to a monied defendant. McGregor v. State, 733 P.2d 416 (Okla.
17 Ct. Cr. App. 1987) ("To allow participation, or even presence by
18 the State would thwart the Supreme Court's attempt" in Ake to
19 treat indigent and non-indigent defendants equally). That is, if

20 Apelt is also wrongly decided to the extent that it turns
21 on RULE 15.2, ARIZ. R. CRIM. PRO. Requiring defendants to
22 disclose all witnesses and defenses violates their rights under
23 STATES CONSTITUTION, including but not limited to their rights
24 not to incriminate themselves, to counsel, to punishment which is
25 neither cruel nor unusual, and to due process. Even if such
26 requirements were constitutionally permissible, compelling
27 defendants to disclose that they are exploring defenses and
28 claims is constitutionally impermissible. It is just such
29 compulsion that is at issue when defendants seek Section 13-4013
30 funds, so all proceedings on requests for Section 13-4013 funds
31 should be sealed and ex parte.

1 Mr. Lopez were able to provide funds for his own investigation,
2 his counsel would not have to reveal his strategy and
3 preparation except as required by the discovery rules. See ARIZ.
4 R. CIV. PRO. 26(b)(4) (work product privilege).

5 The high courts of various other states have determined that
6 federal and state constitutional law entitle defendants to ex
7 parte hearings on their motions for funds for expert witnesses.
8 For example, in Brooks v. State, 385 S.E.2d 81 (Ga. 1989), the
9 Georgia Supreme Court noted that while "the state may have an
10 interest in examining the defendant concerning his indigency[,]"
11 the defendant has a "legitimate interest" in not revealing his
12 theory of the case to the state. Id. at 83. That court set
13 about to resolve these conflicting interests by creating a
14 procedure to "protect the legitimate interests of the state and
15 the defendant." Id. at 84.

16 To protect the defendant's interest, the Brooks court held
17 that an application for funds should be presented in chambers and
18 heard ex parte. To protect the state's interest, the court held
19 that the state may submit a brief to be considered at the time of
20 the ex parte hearing regarding the defendant's indigency. To
21 further protect the state's interest, the court held that "the
22 state may always be represented when the defendant is examined as
23 to his indigency." Id. at 84. See also North Carolina v.
24 Ballard, 355 N.C. 515, 519, 428 S.E.2d 178, 180 (1993) (requests
25 for state funded psychiatric assistance must be heard ex parte;
26 to hear such requests in the state's presence violates the
27 defendant's right to the assistance of counsel and his privilege
28

1 against self-incrimination, as guaranteed by the Fifth, Sixth and
2 Fourteenth Amendments to the UNITED STATES CONSTITUTION);
3 McGregor v. Oklahoma, 733 P.2d 416 (Okla. Ct. Cr. App. 1987) (Ake
4 requires that hearings on motions for court-appointed
5 psychiatrists be conducted ex parte); State v. Touchet, 642 So.2d
6 1213 (La. 1994) (creating partially ex parte mechanism to
7 consider indigent defendant's funds applications for expert
8 witnesses). For the same reasons relied on in these cases, this
9 Court should grant Mr. Lopez's motion.

10

11 For all these reasons, Petitioner respectfully requests that
12 this Court grant his motion to file his request for funds under
13 seal and conduct all further proceedings regarding that motion ex
14 parte.

15 Dated this _____ day of March, 1995.

16

17 By _____
18 Robert Doyle

19 Copies of the foregoing mailed
20 this _____ day of March, 1995,
21 to:

22 Hon. Peter T. D'Angelo
23 Judge, Superior Court of Maricopa County

24 Dawn Northrup
25 Assistant Attorney General
1275 West Washington
Phoenix, AZ 85003

26 By: _____

27
28

1 Robert Doyle
Attorney-at-Law
2 1010 E. Jefferson
Phoenix, AZ 85034-2222
3 (602) 253-1010
State Bar No. 007380
4

5
6 ** FILED UNDER SEAL **
7

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

10 STATE OF ARIZONA,)
11 Respondent,) NO. CR-163419
12 vs.)
13 SAMUEL VILLEGAS LOPEZ,) EX PARTE MOTION FOR FUNDS
14 Petitioner,) FOR AN INVESTIGATOR
15)
16) ASSIGNED TO:
HON. P. D'ANGELO

17 Petitioner, Samuel Villegas Lopez, moves ex parte that this
18 Court appoint an investigator to assist in the investigation of
19 facts to support his petition for post-conviction relief. This
20 motion is pursuant to his rights to due process and equal
21 protection, to present a defense, to counsel, and to freedom from
22 cruel and unusual punishment, as guaranteed by the Sixth, Eighth,
23 and Fourteenth Amendments to the UNITED STATES CONSTITUTION, by
24 sections Four, Ten, Fifteen, and Twenty-four of Article Two of
25 the ARIZONA CONSTITUTION, and by ARIZ. REV. STAT. 13-4013(B).
26

27 I. Mr. Lopez's Right to Ex Parte Consideration of Requests Made
28 In Furtherance

ATTACHMENT D

1 Robert Doyle
2 Attorney-at-Law
3 1010 E. Jefferson
4 Phoenix, AZ 85034-2222
5 (602) 253-1010
6 State Bar No. 007380

7
8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
9
10 IN AND FOR THE COUNTY OF MARICOPA

11 STATE OF ARIZONA,
12 Respondent,

13 vs.

14 SAMUEL LOPEZ,
15 Petitioner,

16) NO. CR-163419
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

MOTION FOR AN EXTENSION OF TIME
PURSUANT TO ARIZ. R. CRIM.
32.4(c) AND 32.6(d)

Assigned to:
Hon. Peter D'Angelo

15 Petitioner, a capital defendant, through counsel and pursuant to ARIZ. R. CRIM. P. 32.6,
16 ARIZ. CONST., art. II, secs. 4 & 24, and the Fifth, Sixth, Eighth and Fourteenth Amendments
17 to the UNITED STATES CONSTITUTION, and ARIZ.R.CRIM.P. 32.4(c) & 32.6(d), hereby moves
18 this Court for an extension of time within which to file Petitioner's amended petition for post-
19 conviction relief. In support of this motion, Petitioner states as follows:

20 1. Petitioner has exercised due diligence in investigating this case and has uncovered many
21 new issues which must be presented to this Court. The investigation of these issues continues,
22 however, and more time is necessary to properly document these claims and present them to the
23 Court as is required by ARIZ.R.CRIM.P. 32.5.

24 2. Issues uncovered by undersigned counsel's investigation and which require further
25 investigation to provide the necessary documentary support for these claims include, but are not
26 limited to the following:

27 a. Juror Mark Wigley said during voir dire that he never served on a jury
28 before. An interview conducted with Juror McCrory revealed that Mr.

1 Wigley informed the jury that he had previously served on a jury and this
2 served as a basis for electing him foreperson of the jury. More time is
3 needed to obtain the affidavits supporting this claim. Moreover, many
4 jurors remain to be interviewed and more time is needed to complete this
5 investigation.

6 b. Juror McCrory also stated during voir dire that she had never served on
7 a jury before. A recent interview with her revealed the fact that she
8 actually had served on a jury prior to sitting on the Lopez case. More
9 time is needed to obtain the affidavits supporting this claim.

10 c. Alfred Welker needs to be interviewed to determine whether he and the
11 victim were involved in a romantic way and whether they had consensual
12 intercourse earlier in the evening before she was killed. Trial counsel's
13 failure to do this investigation was deficient and potentially prejudicial.
14 More investigation needs to be done to determine whether prejudice exists.

15 d. Trial counsel failed to challenge the state's theory concerning time of
16 death. The forensic pathologist testified that he had no way of
17 determining the time of death from his tests. He also said that he
18 presumed the victim died shortly before her body was discovered. There
19 was no cross-examination concerning the onset of rigor mortis or relating
20 to the victim's core body temperature at the time of the autopsy. These
21 issues are critical to understanding when she died. If the victim died
22 shortly before being discovered by the police, Mr. Lopez may be
23 exonerated of this crime. A forensic pathologist must be hired to examine
24 this evidence and the testimony given at trial.

25 e. Trial counsel was ineffective for failing to challenge the forensic serology
26 evidence. Much of this evidence presented by the state was, at least,
27

1 misleading. For example, Cipriano Chayrez (Chapo) can not be excluded
2 as a donor of semen found in the victim. His antigens would be masked
3 by the victim's antigens. The tests done by the state show, at most, that
4 an additional person deposited B antigens, not that Chapo's semen was not
5 present. The conclusion that he may have been present is strengthened by
6 the serologist's testimony concerning the amount of acid phosphatase
7 found in the victim. (Also, acid phosphatase is a presumptive test for
8 seminal fluid; it is not dispositive as it was portrayed. Acid phosphatase
9 can last considerably longer than 13 hours, contrary to the State's
10 testimony.) If Chapo was present we have no way of knowing who killed
11 the victim. Even if Mr. Lopez was involved in a rape of the victim, the
12 court's findings on heinous, cruel or depraved are unreliable since we
13 have no way of knowing who did what to the victim. A forensic
14 serologist must be hired to examine the test results in this case to properly
15 rebut the serology evidence. This evidence is also cognizable as newly
16 discovered evidence under ARIZ.R.CRIM.P. 32.1(e) & 32.2(b).

17 f. Trial counsel was ineffective for failing to investigate and present evidence
18 of Mr. Lopez's deprived childhood, including but not limited to: a)
19 possible malnutrition; b) overcrowded conditions, *i.e.*, the Lopez family
20 living with over fifteen children and three adults in the two-bedroom
21 house of Mr. Lopez's aunt; c) loss of Mr. Lopez's father at an early age
22 and the lack of a strong male role model in the home; d) physical and
23 mental abuse suffered by Mr. Lopez as a child; and e) Mr. Lopez's
24 exposure to pesticides while working as a field worker, along with other
25 members of his family. Significant investigation remains to be done in
26 documenting these factors. Moreover, a cultural expert should be
27

1 appointed to examine the effects of Hispanic culture on the Lopez
2 children.

3 g. Trial counsel was ineffective for failing to present evidence of organic
4 brain dysfunction in Mr. Lopez. Investigation has uncovered evidence of
5 prolonged paint sniffing and alcohol abuse by Mr. Lopez. Interviews with
6 Mr. Lopez's siblings have revealed evidence of *petit mal* seizures that may
7 have resulted from paint sniffing. In addition, Mr. Lopez has been
8 characterized as having a severe alcohol problem in the months prior to
9 the offense for which he was arrested. And, there is testimony at trial
10 that Mr. Lopez was using other drugs. A neuropsychological examination
11 of Mr. Lopez should be done to see if there are any verifiable organic
12 effects of this serious abuse of inhalants and alcohol. Under *State v.*
13 *Christensen*, these facts would have permitted a previously uninvestigated
14 impulsivity defense. More investigation remains to document these facts.

15 h. Trial counsel was ineffective for failing to investigate and present evidence
16 of the rape of Mr. Lopez's mother in the years immediately preceding the
17 offense for which he stands convicted. This offense was reported to the
18 police but the perpetrator was never caught. More time is needed to
19 obtain the affidavits and documents supporting these facts.

20 i. Investigation has revealed that a Michael Carillo was arrested for armed
21 robbery shortly before the trial in this case. Investigation remains to be
22 done so that it may be determined whether this was one of the Michael
23 Carillos who testified at Mr. Lopez's trial. If they are the same person,
24 investigation must be conducted to see what, if any, agreement may have
25 been reached between the prosecution and Mr. Carillo in exchange for his
26 testimony.

1 j. Trial counsel was ineffective for failing to determine the identity of the
2 person identified by witnesses as "Angel," and what role, if any, he may
3 have played in this offense.

4 k. Trial counsel was ineffective for failing to investigate, uncover and
5 present the fact that Pauline Rodriguez was the sister of a woman who
6 Mr. Lopez was accused of assaulting immediately prior to his arrest.

7 3. A proper investigation of these issues is necessary at this time so that this Court may
8 be fully apprised of all issues relevant to a fair proceeding. Moreover, a full investigation at
9 this stage is in the interests of judicial economy, finality and preservation of the state's
10 resources.

11 WHEREFORE, petitioner hereby requests that this court grant an additional thirty days
12 within which to complete the necessary investigation and file a supplemental petition.

13 Respectfully submitted this ____ day of May, 1995.

14
15
16 By _____
Robert Doyle
Counsel for Petitioner

17
18 Copies of the foregoing mailed
this ____ day of May 1995,
19 to:
20 Paul McMurdie
Chief Counsel - Criminal Appeals Section
1275 West Washington
21 Phoenix, AZ 85003

22 by: _____
23
24
25
26
27

ATTACHMENT E

MEMORANDUM

TO: LOPEZ FILE
FR: OLIVER
RE: MEETING W/BOB DOYLE
DT: April 25, 1995

LAST FRIDAY, MOC & SAH ASKED THAT I MEET WITH BOB AS HE REVIEWED THE DOCUMENTS WE HAVE COLLECTED IN SAM LOPEZ'S CASE. THEY ALSO ASKED THAT I TALK WITH BOB ABOUT FILING TWO MOTIONS WE PROVIDED HIM PRIOR TO HIS FILING THE LAST MOTION REQUESTING ADDITIONAL TIME TO FILE A SUPPLEMENTAL PETITION. SPECIFICALLY, AT THAT TIME WE PROVIDED A MOTION FOR DISCOVERY AS WELL AS A MOTION FOR LEAVE TO PROCEED EX PARTE IN REQUESTING FUNDS FOR INVESTIGATIVE AND EXPERT ASSISTANCE. (WE LATER PROVIDED HIM A MOTION FOR FUNDS FOR INVESTIGATIVE ASSISTANCE.)

LAST THURSDAY, SAH AND MOC SPOKE WITH BOB RE FILING THE PREVIOUSLY PROVIDED MOTIONS AS WELL AS FILING A MOTION FOR MORE TIME. SAH & MOC INDICATED THAT BOB STATED THAT HE IS RUNNING THE CASE AND REFUSED TO COMMIT TO FILING ANY DISCOVERY MOTION OR THE MOTION TO PROCEED EX PARTE. HE ALSO REFUSED TO COMMIT TO FILING A MOTION REQUESTING ADDITIONAL TIME. IN MY CONVERSATION WITH HIM ON FRIDAY, HE CONFIRMED THAT HE HAD REFUSED TO COMMIT TO FILING THESE MOTIONS. IT SHOULD BE NOTED THAT BEFORE PROVIDING HIM THE DISCOVERY MOTION, BOB TOLD ME HE WOULD REVIEW IT AND FILE IT OR SOME EDITED VERSION OF IT SHORTLY AFTER RECEIVING IT. HE PROMISED, TOO, THAT HE WOULD TALK WITH THE PROJECT ABOUT ANY EDITS TO THAT MOTION. IT SHOULD BE NOTED AS WELL THAT BOB TOLD ME HE WOULD FILE THE MOTION TO PROCEED EX PARTE AND THE DISCOVERY MOTION A FEW DAYS AFTER THE JUDGE RULED ON THE MOTION FOR MORE TIME. AS OF TODAY, BOB FILED ONLY THE MOTION FOR MORE TIME.

WHEN I MET WITH BOB LAST FRIDAY, HE STATED THAT HE WOULD FILE AN EDITED VERSION OF THE DISCOVERY MOTION. HE ALSO STATED THAT HE WOULD FILE A MOTION REQUESTING ADDITIONAL TIME TO FILE A SUPPLEMENT TO THE PETITION. HOWEVER, YESTERDAY HE INDICATED TO MOC THAT HE WOULD NOT REQUEST ADDITIONAL TIME.

I MET WITH BOB FOR ABOUT AN HOUR TODAY AT HIS OFFICE TO EXPLAIN WHY I BELIEVE IT CRITICAL TO MOVE FOR ADDITIONAL TIME. I EXPLAINED THAT I WAS NOT SUGGESTING THAT WE REFUSE TO FILE A SUPPLEMENTAL PETITION NEXT WEEK NO MATTER WHAT. RATHER, I EXPLAINED (REPEATEDLY, FOR BOB KEPT SAYING THINGS WHICH MADE CLEAR THAT HE DID NOT UNDERSTAND WHAT I WAS SAYING) THAT WE SHOULD FILE THE MOTION FOR MORE TIME AND A MOTION FOR EXPEDITED CONSIDERATION OF THE MOTION FOR MORE TIME. I FURTHER EXPLAINED THAT IF EITHER (A) THE COURT DOES NOT RULE ON THE MOTION FOR MORE TIME BY NEXT WEEK OR (B) THE COURT DENIES THE MOTION FOR MORE TIME, THEN WE SHOULD FILE THE SUPPLEMENTAL PETITION.

WE ENDED OUR DISCUSSION WITH HIS PROMISE TO THINK ABOUT MY PROPOSAL AND GET BACK TO ME TOMORROW OR EARLY THURSDAY MORNING. HE ALSO AGREED AT THE END OF THE DISCUSSION THAT IF A SUPPLEMENTAL PETITION IS FILED THAT THE PROJECT WOULD BE INVOLVED WITH DRAFTING/EDITING IT.