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Attorney for Petitioner Samuel Villegas Lopez

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

STATE OF ARIZONA)
)
 Respondent,)
 v.)
)
 SAMUEL VILLEGAS LOPEZ)
)
 Petitioner.)
_____)

No. CR 163419

PETITION FOR
POSTCONVICTION RELIEF

Defendant Samuel Villegas Lopez, No. 43833, is a prisoner in state custody under sentence of death in Arizona for the murder and sexual assault of Estefana Holmes. He is presently incarcerated in the Arizona State Prison's Eyman Complex in Florence, Special Management Unit II, at P.O. Box 3400, Florence, AZ 85132. As explained below, Mr. Lopez requests this Court grant him relief based on newly discovered evidence establishing that he received ineffective assistance of counsel at his capital sentencing in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This claim is not subject to preclusion because of United States Supreme Court's recent decision, *Maples v. Thomas*, 2012 U.S. LEXIS 905 (2012), which holds

that a “client cannot be charged with the acts or omissions of an attorney who has abandoned him.” *Maples*, slip op. at 14. The *Maples* Court defines abandonment as:

‘[E]videnced by counsel's near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years.’ If true, Justice Alito explained, ‘petitioner's allegations would suffice to establish extraordinary circumstances beyond his control[.] Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.

Maples, quoting *Holland v. Florida*, 130 S.Ct. 2549, slip op. at 6 (2010)(internal citations omitted). Thus post-conviction counsel’s unprofessional conduct is an extraordinary circumstance which severs the agency relationship and the defendant cannot be held liable for his lawyer’s unprofessional errors where he has no reason to believe that his lawyer is no longer acting as his agent.

I. THE SUPREME COURT DECISION IN MAPLES V. THOMAS IS A SIGNIFICANT CHANGE IN THE LAW WHICH FOR THE FIRST TIME PROVIDES A MEANS FOR MR. LOPEZ TO PRESENT HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON NEWLY DISCOVERED EVIDENCE

The United States Supreme Court recently decided *Maples v. Thomas*, 2012 U.S. LEXIS 905, which significantly changed the law with respect to the implications of post conviction counsel’s breach of the duties owed to a client under agency law. The Court held that where extraordinary circumstances exist, for example, where counsel abandons the client by failing to serve as the agent of the client, the attorney’s actions sever the agent principle relationship, and thus the client is no longer responsible for the conduct of the attorney. *Maples*, slip op. at 14 (citing *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010)).

Mr. Maples was convicted of capital murder and sentenced to death in Alabama. In post conviction, Maples was represented *pro bono* by two lawyers from a large New York based law firm, and an Alabama lawyer who served only as local counsel. All parties understood that local counsel's role would be limited to allowing the New York attorneys to appear *pro hac vice*. In 2001, Maples, through counsel, filed a petition for post conviction relief. Some months later the two New York lawyers left the firm, and their new employment rendered them unable to continue representing Maples. Neither, however, moved to withdraw as counsel, and no other lawyers from the firm enrolled in their stead.

In 2003, the trial court entered an order denying Maples post conviction relief. Alabama law required Maples to appeal the ruling within 42 days, if he was to appeal. The clerk of court sent notice of the ruling to the two New York lawyers and to local counsel. The notice sent to New York, however, was returned to the clerk, with notations indicating that neither lawyer was employed by the firm. The clerk did nothing further with the notice of the ruling. The 42 days within which Maples had to appeal had passed without any filing by Maples.

About a month after the deadline to appeal had expired, the Alabama Assistant Attorney General sent a letter directly to Maples in which he informed Maples that the time of appeal had run, and that Maples had four weeks left to file a petition for writ of habeas corpus. Upon receipt of the letter, Maples immediately called his mother, who then called the New York law firm. The firm unsuccessfully attempted to appeal in state

court, notwithstanding the expired period of time in which to appeal, and ultimately initiated federal habeas proceedings on behalf of Maples.

The District Court found Maples had defaulted his claims and was unable to show “cause” sufficient to overcome the procedural default. The Eleventh Circuit affirmed. The United States Supreme Court granted certiorari to decide whether Maples had demonstrated cause to excuse his default.

The High Court held that the lawyers representing Maples abandoned him without giving Maples notice, thus severing the principal-agent relationship. Because Maples’ attorneys breached their duty as his agent, they no longer acted as Maples’ representative. *Maples*, slip op at 12. In its analysis, the Court adopted the test articulated in *Holland v. Florida*, to determine whether a habeas petitioner warrants equitable tolling: “If true, petitioner’s allegations would suffice to establish extraordinary circumstances beyond his control. *Id.* at 14 (quoting *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010)). “In this case, the ‘extraordinary circumstances’ at issue involve an attorney’s failure to satisfy professional standards of care.” *Holland, supra*, at 2562.

The Court found Maples had shown cause sufficient to excuse his procedural default, because, through no fault of his own, he lacked the assistance of an attorney to appeal from the denial of post conviction relief. *Id.*, at 21.

“Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word. . . . a client cannot be charged with the acts or omissions of an attorney who has abandoned him”

Id. at 14 (quoting *Holland v. Florida, supra*, at 2568).

Much like *Maples*, as detailed below and supported by affidavits,¹ Mr. Lopez's post conviction lawyer did not serve as an agent to Lopez, and thus severed their principal-agent relationship. Lopez is entitled to benefit from the recent development in the law. Because of post conviction counsel's breach of duty to Lopez, no court has ever reviewed the powerful mitigation in his case. *Maples* dictates that Lopez should finally have that opportunity. The relief Lopez requests is a new post-conviction hearing where he will be allowed to present his newly discovered evidence establishing his claim of constitutionally ineffective assistance of sentencing counsel free from preclusion due to the extraordinary circumstances established by his post-conviction counsel's professional failures.

II. PROCEDURAL HISTORY

In 1986, Sam Lopez was homeless, destitute, hungry, and often intoxicated. He lived in the park in a neighborhood park, R.T. 4-21-87, pp. 108, and slept in a friend's nearby car where he stored the few clothes he had. R.T. 4-22-87, p. 31-32. He bathed in the park's water fountain, but was often unclean. Just as often, he was hungry. When he could find it, he drank alcohol, smoked marijuana and sniffed toxic fumes from paint cans. R.T. 4-16-87, pp. 16, 18, 28-30; 4-21-87, 13, 124; Presentence Report dated Sept. 1, 1981.

On the morning of October 29, 1986, police found the body of Estafana Holmes in her apartment. R.T. 4-20-87, pp. 31, 34. She had been sexually assaulted and stabbed with knives from the apartment's kitchen, *Id.*, pp. 30, 80-81. The front door was

¹ See, Exhibits 25-39.

unlocked and nothing revealed a forced entry. R.T. 4-20-87, p. 43. The apartment was in utter disarray, but nothing was taken. Ms. Holmes' untouched purse lay inside the bathroom. R.T. p. 45; 4-21-87, p.30.

Nearly a week after the murder of Ms. Holmes, the police arrested Lopez for allegedly sexually assaulting Cecilia Rodriguez, a woman Lopez knew and with whom he had a consensual sexual liaison a few weeks earlier. R.T. 4-21-87, pp. 9-10. Rodriguez admitted she and Lopez had previous consensual sexual relations, they had been drinking heavily that day at a friend's home, and left together to go to a liquor store to buy more alcohol.² *Id.* Rodriguez claimed that Lopez raped her on route to the store, but physicians found no physical evidence to support her allegations. Exhibit 1, PPD DR: Sex Assault Allegation. The State concluded Rodriguez was not credible, and did not charge Lopez. *Id.* But the State hid these key facts from Lopez. As a result, the allegations the State knew to be untrue were later introduced against Lopez at his capital trial, capital sentencing, and capital re-sentencing proceedings. They also considered by the presentence report writers in their sentencing recommendation to the judge. Exhibit 2, Presentence Report.

When police interrogated Lopez about the Rodriguez incident, they knew he was intoxicated, and noted that his eyes were 'glassy, dilated.' R.T. 4/21/87, pp. 39-40. Lopez himself also reported that he had been drinking. *Id.*, p. 39. Detective Dan Ray first interrogated Lopez about the alleged assault of Rodriguez, with lead homicide

² Rodriguez told one officer she had consumed "about a six pack," and another she had drunk about "8 cans of [] beer." Exhibit 1.

detective Billy Butler present. *Id.*, pp. 10, 14, 15.³ Although these two different policemen interrogated Lopez, neither recorded their interrogations. *Id.*, p. 38.

During the interrogation, Lopez inquired about the woman who lived in the neighborhood where he was staying who “was stabbed, and her throat cut.” *Id.* Butler soon returned alone to continue the unrecorded interrogation of the intoxicated Lopez. Butler concluded Lopez’s statement incriminated him in the Holmes murder because the police had not publicly disclosed that the victim’s throat had been cut. *Id.*, pp. 16-17. From that point on, the unrecorded interrogation focused solely on the Holmes murder and Lopez’s whereabouts that night. *Id.*, pp. 17-18.⁴

Lopez denied murdering Holmes, and told police that on the night of the crime he played basketball and later slept in a car.⁵ *Id.* at 18-19. When interrogated about how he learned the victim’s throat was cut, Lopez said he heard it “from some friends and rumors in the neighborhood.” *Id.*, p. 19.

The police, and later the State at trial, seized on this rumor as the centerpiece of its case against Lopez, and argued that this fact was known only to the killer. The State called a police “media relation sergeant” who testified he went to the homicide scene, and spoke to reporters who had learned of the murder from listening to police scanners. R.T.

³ The police department called Butler at home because they knew he “needed to talk to” Lopez. *Id.*, pp. 9-10.

⁴ Despite knowing Lopez was intoxicated, the police began interviewing him about his alleged assault of Rodriguez at 10:47 p.m. Just before midnight, at about 11:53 p.m., Butler began interviewing him about the Holmes murder. R.T. 4-21-87, p. 17.

⁵ As discussed above, because Lopez was homeless, Cipriano Chayrez’s car was where he slept and stored his few possessions.

4/21/87, pp. 63-64. The sergeant testified he made “a very general generic statement to the press,” that during the night “an intruder or intruders killed the victim” and “she had been stabbed,” but never provided the number or location of stab wounds. *Id.* R.T.

4/21/87, pp. 59, 61-63. The sergeant also “called in basically the same story” to “the UPI and AP wire services.” *Id.*, p. 63.

But police conducted no investigation to determine what information was known by the community in the neighborhood where Holmes and Lopez lived. Police failed to uncover what the community was told about the crime by police officers, emergency medical personnel and others at the scene, and when they learned that information. Both trial testimony and evidence supported exactly what Lopez told Butler: he heard from friends and neighborhood rumors how the victim had been killed.

Pauline Rodriguez, who lived in the neighborhood where the crime occurred, testified that the victim’s next-door neighbor told her the victim “was slit in her throat and stabbed around seven times.” *Id.*, pp. 86-87. The “crowd of people” surrounding the victim’s apartment “were all saying different things.” *Id.*, p. 87. Later that night, Rodriguez saw Lopez when he walked by her house. *Id.*, p. 85. She asked him for a cigarette, and asked if he heard “what had happened” to the woman across the street. Lopez said “yeah,” and kept walking. *Id.*; Exhibit 12: R.T. 7/13/90 (p.m.).

Butler’s own police report describing his interview of Lopez’s friend, Cipriano Chayrez, provides further evidence that it was widely known that Holmes’ throat was cut. Exhibit 4, *Interview with Cipriano Chayrez*. On the day the victim’s body was found,

Lopez and Chayrez were together. They went to Chayrez's sister's house, and a friend also visiting was talking about "that old woman" who "had gotten her throat slit." *Id.*

Even as police knew that many people knew about the circumstances of Holmes's death, Lopez was arrested for murder. His case was assigned to Maricopa County Judge Peter D'Angelo, and Joel Brown, of the Maricopa County Public Defender's office was appointed to represent him. Exhibit 5, Sentencing Memorandum.

In 1985, Lopez's brothers Jose and George were indicted for first-degree murder. The Maricopa County Public Defender's Office represented Jose Lopez, and private counsel represented George Lopez. Judge D'Angelo presided over both capital cases. Jose plead guilty, and pursuant to the plea, was sentenced to life in prison. *State v. (Jose Villegas) Lopez*, 153 Ariz. 285, 736 P.2d 369 (1987). George went to trial and was sentenced to death. *State v. George Villegas Lopez*, 158 Ariz. 258, 762 P.2d 545, 547 (1988).

When Brown began Sam Lopez's representation, his office also represented Jose. The Maricopa County Public Defender's Office thus knew Sam, Jose and George Lopez were brothers. They also knew Judge D'Angelo reviewed and considered Jose's presentence report, which stated:

[Ms. Rita Castellanos] also says that many of [the community], especially older people, commented on how worthless the Lopez brothers were.

Exhibit 7, Presentence Investigation: Jose Lopez. These same attorneys also knew Judge D'Angelo sentenced George to death only seven months earlier. Exhibit 8, Sentencing Transcript: George Lopez. Yet, the Defender's office continued to represent Jose, in his

appeal after sentencing, and Lopez himself, who had since been arraigned on murder charges. Lopez requested his counsel secure another judge given his brothers' recent murder proceedings before Judge D'Angelo, but Brown failed to do so. Exhibit 9, Petition for Postconviction Relief, pp. 4-5; Exhibit 10, Supplemental Petition for Post-Conviction Relief, pp. 4-5.

A. The Trial

Lopez's capital trial comprised a mere two and a half days. State witnesses described Lopez as "shy," "mild and meek," "quiet," and "real nice" while not under the influence of intoxicants. Exhibits 13, 6 and 11. Witnesses who were with Lopez shortly before the crime testified he had been drinking, but then left the area where they had been talking for four or five minutes to get "high." When Lopez returned a few minutes later, "major changes" had taken place in him from the way he was only a few moments before. He was "shaking," "acted like he was mad, like everything bothered him," he "couldn't stand still," was "staggering," "he had to hold himself on the wall, just stand on the pole," and was "falling down." Exhibit 10, pp. 72-78. Others described Lopez as "not himself," "different," "loaded on something," and "angry." *Id.*, pp. 83-84, 87.

Brown was wholly unprepared for the trial. He failed to meet or interview any of Lopez's family, friends or others who knew him. He did not gather or review any social history records. He did not investigate or challenge the Maricopa County presentence report, which the judge relied upon, and contained harmful allegations, now known to be false: that Lopez sexually assaulted Cecilia Rodriguez days after the Holmes homicide. Exhibits 1-2; R.T. 6-25-87. Brown had consulted with Dr. Bendheim, a psychiatrist,

about Lopez's use of alcohol as a mitigating circumstance, but inexplicably, never called Dr. Bendheim to testify. At trial, Brown presented no evidence and called no witnesses. Brown's efforts at trial were so meager Judge D'Angelo later recorded his concern:

At the time of trial the court was concerned over the lack of any evidence presented on behalf of defendant. I believe I so expressed to counsel, either formally or informally.

R.T. 6-25-87, p. 2. *Lopez was Brown's first death penalty client and he had never been trained on how to conduct a penalty phase investigation. Exhibit 39, Affidavit of Joel Brown. Today, Mr. Brown candidly admits that he conducted no social history investigation whatsoever. "I did not have an investigator assigned to the case. I was by myself. I had no concept of aggravation or mitigation." Id. "I did not even know I had done anything wrong until Judge D'Angelo started to make a record about the fact that I had not called any witnesses." It is clear from Mr. Brown's affidavit and a review of the record that Mr. Brown did not attempt the sort of investigation that was called for in a capital case.*

Mitigation Specialist, Mr. Russell Stetler, has reviewed the state court record in this case, and concludes that Mr. Brown's work in this case was deficient. Here Mr. Stetler describes Brown's deficient performance:

To summarize a few key points, at the time of Mr. Lopez'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 Mr. Lopez's family. He had some contact with Mr. Lopez'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 25, Stetler Affidavit, p. 27, ¶ 42 .

Lopez was convicted of first-degree murder. Judge D'Angelo found the existence of two aggravators: Lopez had "been previously convicted of a felony" involving the use or threat of violence on another person, A.R.S. §13-703(F)(2); and the "offenses" were "committed...in a cruel," and "especially heinous or depraved manner," A.R.S. § 13-703(F)(6). D'Angelo found no mitigating circumstances, and sentenced Lopez to death. R.T. 6-25-87, pp. 6-7, 13-16.

B. The First Capital Appeal

George Sterling represented Lopez in his appeal to the Arizona Supreme Court. The Court affirmed Lopez's convictions, but vacated his death sentence, finding Judge D'Angelo erred when he relied on Lopez's earlier conviction for resisting arrest to establish Arizona's (F)(2) aggravating circumstance. The court found Lopez's prior conviction did not qualify as a felony prior conviction involving the use or threat of violence on another person. *State v. Lopez*, 163 Ariz. 108, 114 (1990). It also held that D'Angelo did not err in rejecting Lopez's "alleged intoxication at the time of the murder" as a mitigating circumstance. *Id.* 163 Ariz. at 115. The court vacated Lopez's death sentence, and remanded for a new sentencing hearing. *Id.*, 163 Ariz. at 116.

C. The Second Capital Sentencing.

Sterling also represented Lopez at his re-sentencing hearing. Sterling knew that Judge D'Angelo had already sentenced both Lopez and his brother, George, to death,⁶ but like Brown, Sterling failed to request another judge. Like Brown, Sterling never investigated Lopez's life or family history to discover what mitigating evidence existed. He failed to gather key social history records on Lopez and his family. Had he only looked, Sterling would have discovered abundant, valuable evidence supporting a sentence less than death. The need to investigate a defendant's background, especially a defendant like Lopez where the State sought a death sentence, was well known at the time of Sterling's representation, as well as at the time of trial counsel Brown's representation.

As National Mitigation Coordinator for the federal death penalty projects since 2005, and before that appointment, Director of Investigation and Mitigation at the New York Capital Defender Office, Russell Stetler knows well not only the investigation that capital counsel must undertake to effectively represent their client in the life-or-death proceedings, but also the consequences that result when counsel fails in his or her duty to conduct that seminal investigation. Exhibit 25, pp. 1-4, pp. 7-18. As Stetler explains:

Effective capital defense through the post-Furman era has required counsel to conduct a thorough investigation of the client's life. This investigation generally involves a multigenerational inquiry into the biological, psychological and social influences on development and adult functioning of the accused. Mitigation investigation involved parallel tracks of collection and analyzing life-history records, and conducting multiple, in-person, face-to-face interviews. The purpose of this investigation is to develop evidence that will humanize the defendant, help jurors and judges

⁶ George's conviction and death sentence were set aside. Before a different judge, he was again convicted of murder, but received a sentence less than death.

to understand why he may have committed the capital offense, and to evoke compassion and empathy by identifying the client's individual frailties that at once establish human kinship and expose vulnerabilities and disadvantage.

Id., p. 2. The need to conduct a thorough investigation was "well-established by the time of Mr. Lopez's state petition for postconviction relief in 1995. It was readily apparent in the 1990's that postconviction counsel needed to conduct such an investigation to assess the effectiveness of defense counsel's performance at trial under the familiar two-prong test of *Strickland v. Washington*, 466 U.S. 669 (1984), requiring both deficient performance as measured against prevailing professional norms and resultant prejudice."

Id., pp. 2-3.

But rather than investigate Lopez's background and identify and interview his family, friends and others who knew him, Sterling contacted Dr. Bendheim and duplicating Brown's limited efforts, asked Bendheim to visit Lopez again. In preparation for the first sentencing in 1987, Brown provided Bendheim with police reports about the crime and a police interview of Raymond Hernandez. But Brown never called Bendheim to testify. At resentencing, Sterling sent Bendheim two additional documents he did not have at the initial trial: the 1985 presentence report discussing Lopez's arrest and conviction for resisting arrest, and the police report on "a sexual assault incident" involving Cecilia Rodriguez. At the 1990 resentencing, Sterling did ask Bendheim to testify in a taped deposition. Exhibit 26.

Bendheim testified Lopez possibly suffered from a substance abuse disorder, known as "pathological intoxication," "an unusual reaction to even minor amounts of

alcohol.” *Id.*, p. 4. Bendheim reported that his diagnosis was tentative because Bendheim was not present when the crime occurred; therefore he could not confirm that Lopez’s character changes when he is impaired. *Id.*, pp., 5-6. But, with the benefit of the two documents Sterling gave him, which Brown did not provide in 1987, Bendheim would have altered his prior conclusions:

I would probably have added ... that there had been other incidents where the defendant displayed criminal behavior out of character for his usual conduct and in a bizarre reaction pattern to intoxicants.

Id., at 10. Upon review of these additional documents, Bendheim “could state pretty firmly that this person is subject to unusual reactions of behavior and conduct, including criminology and including assaultiveness when under the influence” of “alcohol or drugs,” and “this type of intoxication definitely diminishes capacity.” *Id.* He speculated that “this murder would not have occurred” if Lopez had not been intoxicated. *Id.*, at 11-12.

On cross-examination, Bendheim agreed that predisposing factors for pathological intoxication were not present in Lopez, and that Bendheim had “no other source of information” about Lopez’s changed character other than the Hernandez statement and Brown’s “verbal input....” *Id.*, at 17. Sterling’s reliance on a single witness to establish a mitigating factor was further challenged when the prosecutor informed Bendheim:

There were no witnesses who testified under oath or gave statements to the court at any time concerning Lopez’s difficulties or problems with substance abuse.

Id., at 26. Bendheim conceded that “assuming there is no evidence in the record anywhere to substantiate that people have claimed this,” his conclusions were “more

speculative.” *Id.*, at 025. Bendheim’s opinion about Lopez’s mental state transformed from “pretty firm[,],” “probab[le],” based “on fairly good grounds” into a “tentative,” and “to a very large degree speculative” diagnosis. *Id.*, 10, 27.

Sterling had not conducted even a minimally competent investigation and provided little to support Bendheim’s now “tentative” diagnosis of pathological intoxication. He asked Bendheim if there were “witnesses that are saying after two or three beers this guy goes bizarre....” if his opinion might be different. *Id.*, at 35. Bendheim “would entertain the diagnosis very seriously” if he heard testimony to that effect. *Id.*, at 36.

Because Sterling had not investigated Lopez’s background, the only “witnesses” besides Raymond Hernandez Sterling could have been referencing were Sabori and Rodriguez. Sterling had long known the substance of their pretrial statements and trial testimony, but never provided that key evidence to his only mitigation witness.

The consequences of Sterling’s failure to conduct any investigation into Lopez’s life and background, including the key fact the State relied on to support death, did not end there.

Despite conducting no investigation into Lopez’s life, Sterling told the judge:

There’s nothing societally [sic] redeeming in the defendant’s background. I wish we could all argue with [the prosecutor] on that. Probably can’t.

R.T. 8-3-90, p. 27.

Lopez’s re-sentencing hearing was brief. Sterling presented two witnesses. The first, forensic pathologist Phillip Keen, was called to attack the sole aggravator, the

especially heinous, depraved and cruel manner of the victim's death. R.T. 7-13-90, pp. 8-30. Richard Bailey, a county jail classification officer, testified next about Lopez's exemplary behavior while in prison. Exhibit 12, R.T. 7-13-90 (p.m.), pp. 56-58. Sterling also submitted Bendheim's videotaped deposition, Exhibit 26, three documents Bendheim discussed in that deposition, *id.*, and taped statements from Sabori and Rodriguez.

Ultimately, Judge D'Angelo sentenced Lopez to death again. The Arizona Supreme Court affirmed Lopez's death sentence.

D. State Post Conviction Proceedings

In August 1994, post conviction counsel Robert Doyle was appointed for Mr. Lopez. On December 19, 1994, Doyle filed a twenty-page petition for post conviction relief. See Petition for Post Conviction Relief, attached as Exhibit 9. 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; 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 33 and 27. 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 Mr. Lopez's case, free of charge. ACRP proposed assigning some of its lawyers to conduct a full investigation on behalf of Mr.

Lopez. Given that Lopez was the first capital case that Doyle had ever handled, he readily agreed. Exhibit 27.

Beginning in February 1995, ACRP lawyers began work on Mr. Lopez's case, collecting relevant documents, records, and other materials regarding Mr. Lopez 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 28.

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 29. 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 30. 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 29. Doyle was reluctant to file the draft motions, fearful that they would not be granted by Judge D'Angelo. Exhibit 27, 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 28. 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 31. Doyle was offended by this letter and severed ties with the ACRP. Doyle Affidavit, Exhibit 27.

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 32. 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.

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 33. 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 Mr. Lopez 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’s family because he had relied entirely on the investigation of the ACPR lawyers.

See Exhibit 28, Doyle 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 Mr. Lopez. 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 Mr. Lopez's capital case.

Exhibit 28, 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 28, Affidavit of Statia Peakhart. This was not unreasonable given the very preliminary nature of the investigation at that point. Exhibit 25, 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 27. 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 relatively successful. *Id.* Despite knowing this, and despite the persistent rumors about the Lopez family, Doyle failed to answer 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 25; *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 27 and 28. Though ACRP were the only members of the defense team who had or were conducting any investigation on behalf of Mr. Lopez, 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 26. The testimony of these witnesses contained important mitigating evidence. These witnesses knew Lopez well, and witnessed the radical shift in his demeanor when he consumed alcohol. 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 35. The Arizona Supreme Court denied review of that decision, without explanation. Exhibit 36.

E. Federal Post Conviction Proceedings

Lopez initiated habeas corpus proceedings in the Arizona District Court in November, 1998. Newly appointed federal habeas counsel for the first time conducted a thorough social history investigation. That investigation uncovered significant and compelling mitigation evidence. Federal habeas counsel were able to obtain sworn statements from Lopez’s family members attesting to the horror of growing up in the

Lopez household where each and every day the family feared they would be killed by their drunken and violent father. The evidence shows that Mr. Lopez was often hungry and went unsupervised for almost the entirety of his childhood. The evidence provided the foundation for neuropsychiatrist Dr. George Woods' evaluation of Mr. Lopez. Dr. Woods provided a detailed and comprehensive sworn statement outlining the significance of Mr. Lopez's background and explaining how that background effected Lopez's mental functioning. The mitigation evidence presented to the federal court in support of the ineffective assistance of counsel claim would have overcome the single aggravating circumstance in this case and easily meets the *Strickland* prejudice prong. Nonetheless, the federal courts found that all of Lopez's mitigation evidence was defaulted because Doyle had failed to present it in the State court. Ultimately, without holding an evidentiary hearing, the district court denied Mr. Lopez's petition, and the Ninth Circuit affirmed the decision of the district court. The United States Supreme Court denied certiorari.

III. NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. LOPEZ RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING AND MR. LOPEZ IS ENTITLED TO RELIEF UNDER RULE 32.1(e) and (g) FREE FROM PRECLUSION UNDER RULE 32.2 (b) BECAUSE LOPEZ'S POST-CONVICTION COUNSEL FAILED IN HIS DUTY TO ACT AS LOPEZ'S AGENT DEPRIVING LOPEZ OF ANY MEANINGFUL JUDICIAL CONSIDERATION OF HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Under Rule 32.1(g), this Court permits a defendant to raise a claim based on "a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." The United States Supreme

Court's recent decision in *Maples v. Thomas* is a significant change in the law, which, when applied to Mr. Lopez's case, would overturn his sentence of death.

Like *Maples*, Lopez was abandoned by post conviction counsel, such that he cannot be held responsible for the conduct of his attorney. Doyle, Lopez's counsel, so failed to "satisfy professional standards of care," that he severed the agent-principle relationship he had with Lopez. *Holland, supra*, at 2562. Because Doyle no longer served as Lopez's agent, Lopez cannot be held responsible for what Doyle did or did not do on his behalf in post conviction. "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Maples, supra*, at 14.

Doyle was appointed to represent Lopez in 1994, never having handled a capital post conviction case previously. Shortly after filing Lopez's petition for post conviction relief, Doyle was approached by lawyers from the Arizona Capital Representation Project (ACRP), who offered to provide assistance to Doyle in representing Mr. Lopez by conducting the extensive mitigation investigation that had never been done pretrial. Doyle readily agreed, and lawyers from ACRP began to work on Lopez's case. While the ACRP lawyers kept Doyle abreast of the progress of their investigation, they worked independently of Doyle. Doyle, for his part, relied entirely on the ACRP investigation, and did not conduct any investigation.

In May of 1995, ACRP lawyers informed Doyle that while they had been able to conduct important necessary investigation into Lopez's background and social history,

the investigation was at that time, not yet complete.⁷ Without any discussion, and certainly without the explicit permission of Lopez, Doyle intentionally abandoned the investigation of Lopez's social history. Exhibits 27 and 37. Though Doyle had never had any contact with Lopez's family, and had relied entirely on the investigation of ACRP, he cut all interactions with them, and abandoned all claims that could have resulted from their work in the case. *Id.* He admits that he did not intentionally or strategically waive any claim and that if he had it at the time, he would have presented the mitigation evidence uncovered in federal court. Exhibit 28, Doyle Affidavit.

Doyle then filed a motion for a continuance, in which he informed the court that "attempts to contact and learn more from family members ha[d] been met with resistance," that "no members of the family came forward to help trial attorney Joel Brown," and as of the date of the motion, "none of them are willing to commit to signing affidavits." Exhibit 33. Doyle submitted this motion to the court despite the fact that Doyle had never had any contact with Lopez's family, but had relied entirely on the investigation of ACRP. Exhibit 27. Doyle knew this to be a false statement, as Peakhart had explicitly told him that the investigation was simply premature, not that family members were unwilling to sign affidavits. Exhibit 28. Lopez also reports that he never instructed his family members not to cooperate with the investigation of his case. Exhibit 37, Affidavit of Sammy Lopez.

⁷ Despite the fact that Lopez's case had already gone to trial and direct appeal, prior counsel had never conducted the necessary, required and thorough mitigation investigation. Exhibit 26, pp. 15-17; 21-46.

When Doyle severed ties with ACRP, he abandoned the mitigation investigation entirely, and in turn abandoned the claims that the results of the investigation would have supported. 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 this despite the fact that he was on notice that there was something amiss with the Lopez family. Mitigation expert Stetler 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 25, pp. 12-13.

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 short. *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 himself, it was commonly known among the lawyers of the Maricopa County courthouse that there were serious problems that affected the Lopez brothers. Exhibit 27. 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 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 immeasurably damaged by the abusive environment in which they were raised.

A. Doyle's Actions Severed the Agent Principle Relationship

Doyle's decision to sever all ties with ACRP, and thus abandon work on the mitigation investigation and the claims that would have been supported by the fruits of the investigation is nothing short of the "extraordinary circumstance" contemplated by the Court in *Maples* and *Holland*. *Holland, supra* at 2562; *Maples, supra* at 14.

In *Maples*, the Court found that Maples' lawyers breached their duty as his agent when they severed the relationship they had with him, and no longer served as his representative. *Maples*, slip op at 12. Where counsel abandons the client by failing to serve as the client's agent, the attorney's actions sever the agent principle relationship, and the client is no longer responsible for the conduct of the attorney. *Maples*, slip op. at 14 (citing *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010)).

In its analysis, the Court adopted the language and reasoning articulated in *Holland v. Florida*, to determine whether a habeas petitioner warrants equitable tolling: "If true, petitioner's allegations would suffice to establish extraordinary circumstances beyond his control." *Id.* at 14 (quoting *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010)). "In this case, the 'extraordinary circumstances' at issue involve an attorney's failure to satisfy professional standards of care." *Holland, supra*, at 2562. Thus, where "counsel's failure to satisfy professional standards of care" amounts to an "extraordinary

circumstance” beyond the control of the petitioner, agency principles dictate that the petitioner “cannot be charged with the acts or omissions of an attorney who has abandoned him.” *Holland, supra*, 2562, 2568; *Maples, supra* at 14.

“Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.’ We agree that, under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him”

Id. at 14 (quoting *Holland v. Florida, supra*, at 2568).

Much like *Maples*, Mr. Lopez’s lawyer in post conviction severed the agent-principle relationship with Lopez, and thus abandoned Lopez. In representing Lopez, Doyle failed to “satisfy professional standards of care” to such a degree that his behavior constituted an “extraordinary circumstance” beyond the control of Lopez, which precluded Doyle from “operating as his agent in any meaningful sense of that word.” *Holland, supra* at 2562. Because “common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent,” Doyle’s failure to conduct the mitigation investigation, and failure to argue Lopez’s powerful claims of ineffective assistance of counsel should not be attributed to Lopez.

B. Doyle Failed to Satisfy Professional Standards of Care

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 off 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.

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

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

Mr. Lopez 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 Mr. Lopez 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, Mr. Lopez' 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.

On June 24, 1987, Mr. Brown filed a Sentencing Memorandum consisting of three pages, plus notifications of service. The Memorandum pointed out – correctly – that Mr. Lopez'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 Mr. Lopez was impaired on the night of the capital offense by virtue of intoxication. Two young women had testified that they had been talking to Mr. Lopez 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.”

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 Mr. Lopez 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 Mr. Lopez, 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. Mr. Lopez, 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 Mr. Lopez about this. I think Mr. Lopez will tell you he's strongly opposed to me subpoenaing those people in, either his mother, his brother, or any other persons. I think Mr. Lopez 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.)

The prosecution then seized the opportunity to invite Mr. Brown to disclose more privileged confidential information in order to eliminate any lingering doubt about Mr. Lopez's guilt. The deputy county attorney noted that the defense had hired its own experts to examine the physical evidence, but chose not to call them as witnesses. The deputy county attorney concluded, "I was not afforded their reports, but it's my assumption that the reports merely would have verified the State's witnesses." No question was pending, but the deputy public defender responded anyway:

MR. BROWN: Your Honor, that's true.

Just referring to the post-trial matters, we've retained, that was, our office actually did, an expert in California, at the Institute of Forensic Science in Oakland. The blood samples that were produced into evidence were all analyzed, those pertaining to Mr. Lopez and the victim. The semen samples were analyzed. We retained an expert from Tucson, Mr. Chuck Rolf. He was retained at our office's expense to examine the fingerprints that were introduced into evidence. He did come up and examined the prints prior to trial. (*Id.* at 5-6.)

The trial court at least clarified that the public defender's office had done absolutely nothing else to investigate potential reasons to spare Mr. Lopez'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.

THE COURT: Is the State aware of any mitigating circumstances?
MR. AHLER: Absolutely none. (*Id.* at 8.)

Mr. Brown also volunteered that the psychiatrist evaluating Mr. Lopez for sentencing also found him competent and that Mr. Lopez 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. Mr. Lopez 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 Mr. Lopez to death. *Id.* at 15.

To summarize a few key points, at the time of Mr. Lopez'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 Mr. Lopez's family. He had some contact with Mr. Lopez'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 25, Stetler Affidavit, pp. 24-26.

C. Newly Discovered Evidence Establishes that Lopez Received Constitutionally Ineffective Assistance of Counsel At His Capital Sentencing; No Court Has Ever Adjudicated Lopez's Mitigating Evidence Because of Post-Conviction Counsel's Professional Failures Which Constitute Attorney Abandonment Under *Maples*

Like *Maples*, Mr. Lopez was abandoned by his lawyer in post conviction.

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 Mr. Lopez, 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 we did things back then it seems like we were in the dark ages.

Exhibit 39, 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.

Because no lawyer during Lopez's state trial and postconviction proceedings ever uncovered the actual conditions of Sammy Lopez's tragic life, no court has ever adjudicated this compelling mitigation evidence. Mr. Lopez should be permitted to do so in this Petition free from preclusion because of the extraordinary circumstances of his post-conviction lawyer's professional failings.

If permitted to proceed on his Sixth, Eighth, and Fourteenth Amendment claim of Ineffective Assistance of Sentencing Counsel, Mr. Lopez would be able to show the following based on newly discovered evidence in federal court.

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 Mr. Lopez'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, Mr. Lopez's mother, Conception Lopez (she is known as Concha).

The beatings were so terrible that Mr. Lopez and his brothers often feared their father had killed their mother. Without provocation or justification, Arcadio beat and terrorized Mr. Lopez 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.

Mr. Lopez 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 37, Lopez Affidavit.

Mr. Lopez 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 Mr. Lopez’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. 406, 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 Mr. Lopez 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 Mr. Lopez suffered thus began at the hands of his father who was “violent and unpredictable,” and whose alcoholic rages and mental illness worsened over Mr. Lopez’s childhood. Mr. Lopez 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 37. Dr. Woods explains that because Mr. Lopez 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.*, pp. 506, 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 37, Lopez Affidavit. But in yet another tragedy to

befall this family, Gloria died at ten months old, following an unsuccessful surgery. Mr. Lopez'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. Mr. Lopez'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 threatened 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.* Mr. Lopez 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 37, 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 her 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 38, 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.*

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 Mr. Lopez'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 25, 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 Doyle had he just allowed the investigation to take place. Doyle 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.

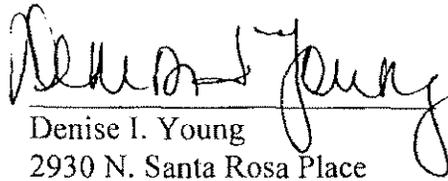
Exhibit 15, p. 93.

Mr. Lopez’s sentencing lawyer failed in his constitutional duty to uncover any of this important mitigating evidence. Had he done so, Mr. Lopez would not have been sentenced to death. 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. Doyle’s actions breached his duties as Lopez’s agent and constitute an extraordinary circumstance which exempts Lopez from preclusion. *See Maples*, 2012 U.S. LEXIS 905 (2012).

IV. CONCLUSION

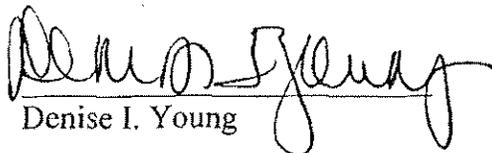
Based on the foregoing facts and law, Mr. Lopez respectfully requests that this Court grant him a new post conviction proceeding represented by competent counsel where he can present his ineffective assistance of sentencing counsel. Lopez also respectfully requests an evidentiary hearing, where he can present available evidence and witnesses supporting sentencing relief, and any other relief that this Court finds just and proper.⁸

Respectfully submitted this 15th day of February, 2012.


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mailed this 15th day of
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⁸ Alternatively, Mr. Lopez requests this Court hold these proceedings in abeyance pending the resolution of *Martinez v. Schriro*, U.S.S.Ct. No. 10-1001 (2011), currently pending before the United States Supreme Court. *Martinez* will determine whether the Sixth Amendment right to the effective assistance of competent counsel extends to state post conviction proceedings.