Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
Isabel Osuna
Filing ID 1207528
3/9/2012 4:24:30 PM

THOMAS C. HORNE
ATTORNEY GENERAL
(FIRM STATE BAR NO. 14000)

SUSANNE BARTLETT BLOMO
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION SECTION
1275 W. WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686
CADOCKET@AZAG.GOV
(STATE BAR NUMBER 014328)

ATTORNEYS FOR PLAINTIFF/RESPONDENT

ARIZONA SUPERIOR COURT

COUNTY OF MARICOPA

STATE OF ARIZONA, PLAINTIFF/RESPONDENT, -VS- SAMUEL VILLEGAS LOPEZ, DEFENDANT/PETITIONER.	NO. CR0000–163419 RESPONSE TO PETITION FOR POST-CONVICTION RELIEF (HON. WARREN J. GRANVILLE PRESIDING)

The State of Arizona, hereby responds to Petitioner Samuel Villegas Lopez's Petition for Post-Conviction Relief. Lopez's petition is a successive petition alleging that resentencing counsel was constitutionally ineffective for failing to present mitigation regarding Lopez's family background and social history. This claim is precluded because Lopez failed to raise the claim in his prior PCR petition. *See* Ariz. R. Crim. P. 32.2(a)(3). Lopez's claim does not fall within an exception because there has not been a significant change in the law that is applicable to his case nor has he presented newly discovered material facts that

probably would have changed the sentence. *See* Ariz. R. Crim. P. 32.1(g) and (e); 32.2(b). Therefore, Lopez's claim is precluded, and his petition should be summarily dismissed. *See* Ariz. R. Crim. P. 32.2(a). This Response is supported by the attached Memorandum of Points and Authorities.

Respectfully Submitted this 9th day of March, 2012.

THOMAS C. HORNE
ATTORNEY GENERAL

KENT E. CATTANI
DIVISION CHIEF COUNSEL

/S/
SUSANNE BARTLETT BLOMO
ASSISTANT ATTORNEY GENERAL

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. *The crime.*

Lopez murdered Estefana "Essie" Holmes more than 25 years ago. He was convicted by a jury and sentenced to death by a judge. *State v. Lopez* (*Lopez I*), 163 Ariz. 108, 786 P.2d 959 (1990). After an appeal to the Arizona Supreme Court, Lopez was granted another sentencing proceeding. He was again sentenced to death. *State v. Lopez*, (*Lopez II*), 175 Ariz. 407, 857 P.2d 1261 (1993). After two decades of post-conviction litigation, the State of Arizona requested, on December 29, 2011, that the Arizona Supreme Court issue a Warrant of Execution. More than a month after this request, Lopez filed this successive PCR petition.

The victim in this case was a 59-year-old widow who lived alone. Lopez entered her apartment, where he raped and murdered her, stabbing her 23 times and slitting her throat. Her apartment revealed evidence of a "terrible and prolonged struggle." *Lopez II*, 175 Ariz. at 409, 857 P.2d at 1263.

> A window had been broken from the inside out, scattering glass for seven to eight feet. A screen door bore a concave impression matching the shape of a body. A bookcase was knocked over, and broken pieces of ceramic were found on the bed, the floor, and in the victim's hair. Blood was splattered on the walls in the kitchen, bedroom, and bathroom. Blood was smeared on the screen door, and, in the kitchen, police found bloody footprints, blood on the refrigerator, blood on the stove, and diluted blood around the kitchen.

Id.

Despite her small size—5'2" tall and 124 pounds—Mrs. Holmes clearly tried to defend herself. She had defensive wounds on her right arm, and the medical examiner determined that she was still standing after having been stabbed. *Id.* at 409–410, 1263–64. Lopez blindfolded her with her pajama bottoms and gagged her with a scarf. He stabbed her in the head, face, breast, and upper chest. Semen was found in her vagina and anus. *Id.* On October 29, 1986 when Mrs. Holmes did not show up for work, police went to her apartment on a "check welfare" call and found her body. *Id.*

"[Lopez] had been seen in the neighborhood the night of the crime. He was also seen in the early morning after the murder walking down the street, soaking wet, as if he had recently washed himself." *Lopez I*, 163 Ariz. at 111, 786 P.2d at 962.

Lopez's palm print was found on the wall of the kitchen area of the victim's apartment, his fingerprint was found on the window frame, and another one of his fingerprints was found on a glass fragment that fit the broken window in the victim's apartment. (R.T. 4/22/87, a.m., at 15–19, 21.) This last fingerprint was on the inside of the window glass. (*Id.* at 23.) Although DNA testing was not being performed at the time of Lopez's trial, analysis of seminal stains from the victim and blood in the apartment—excluded as coming from the victim—strongly

connected Lopez to the rape and murder. (R.T. 4/22/87, at 42, 44, 73–74.) Lopez expressly rejected post-conviction DNA testing. (Exhibit A.)

Despite this evidence, Lopez persists in attacking the accuracy and sufficiency of the evidence presented against him at trial. (PCR Petition at 7–9). While suggesting that the State's case against him was weakly supported, Lopez seems to concede that he could have raped and murdered Essie Holmes, but he has never had any memory of that night. (Exhibit 37, at 3–4.) Lopez's current claim that he lacks any memory of the night of the murder conflicts with his 1986 statement to police that he was playing basketball that night from 7:00 or 8:00 p.m. to approximately 10:00 or 11:00 p.m. and his 1990 statement to a presentence report writer that he was in the park watching people play basketball on the night of the murder. (Exhibit B; Exhibit C, at 2.) His current claim that his memory loss is due to his heavy substance abuse around the time of the murder conflicts with his statements to the 1987 and 1990 presentence report writers and his mental health expert. In 1987, he reported that he did not suffer from substance abuse and was not a regular user of drugs or toxic vapors. (Exhibit C, at 1 (supplement).) He also told his mental health expert that his paint sniffing was in the past. (Exhibit 34, at 4.) In 1990, he reported that he was not intoxicated on the night of the murder, required no help for substance abuse, and that his use of toxic vapors had been sporadic and had not resulted in any long lasting effects. (Exhibit D, at 2, 6.)

B. *1987 Sentencing.*

At the time of Lopez's first sentencing, his counsel, Joel Brown, retained a mental health expert, Dr. Otto Bendheim. (Exhibit 34.) Dr. Bendheim found no evidence of psychosis, depression, hallucinations, delusions, or other mental illness. (*Id.* at 3, 5.) Dr. Bendheim's conclusion that Lopez did not suffer from psychological impairment corroborated testing conducted in the Department of Corrections in 1981 and 1985. (Exhibit C, at 7.) Dr. Bendheim "found no evidence that [Lopez] would have been unaware of the wrongfulness of his conduct or that he would have been unable to conform his conduct to the requirements of the law unless he was suffering from 'pathological intoxication.'" (Exhibit 34, at 5.)

Pathological intoxication is a very rare condition causing extreme reactions to very small amounts of alcohol. Dr. Bendheim opined that pathological intoxication could not be determined, but could not be entirely ruled out. (*Id.*) Lopez's own statements, however, undermined a diagnosis of pathological intoxication. Lopez told Dr. Bendheim "again and again" that he had not been drinking at the time of the crime, experienced no unpleasant reactions to alcohol, and did not consider himself to have problems with alcohol. (*Id.* at 4.) He admitted using marijuana but denied having problems with substances except for some "problems with 'paint sniffing' in the past." (*Id.*)

Dr. Bendheim also reported that Lopez was of normal intelligence in the low-average range with "fairly good" memory attention and concentration. (*Id.* at 3.) He performed well on counting and calculation tests. (*Id.*) The 1987 presentence report indicated that testing conducted in the Department of Corrections revealed that Lopez had an I.Q. of 108. (Exhibit C at 7.)

Overall, Dr. Bendheim's findings were not helpful to Lopez, and Brown chose not to present them. Based on the testimony of two trial witnesses, Brown argued that Lopez's intoxication on the night of the crime was a statutory mitigating circumstance. *Lopez I*, 163 Ariz. at 115, 786 P.2d at 966.

Although Brown had previously obtained a continuance to present the testimony of Lopez's mother and brother, Frank, both of them failed to appear at the sentencing hearing despite being advised of the time and location. (R.T. 6/25/87, at 4.) Lopez had expressly opposed Brown subpoenaing his mother and brother or any family members for the sentencing hearing. (*Id.*) Similarly, the author of the 1987 presentence report stated, regarding information from family members, "[Lopez] did not want [the presentence report writer] to contact anyone in particular." (Exhibit C, at 4.) Despite the presentence report writer's efforts to obtain information, Lopez's family did not offer any opinion regarding his sentence. (*Id.*) Lopez and his mother did not appear to have a particularly close relationship. When Lopez was paroled from prison several years before the

murder of Essie Holmes, Lopez and his mother experienced difficulties, and she did not want Lopez to live with her. (*Id.* at 6–7.) When Frank Lopez testified at the sentencing hearing of another brother, George, he described the family as "not that close." (Exhibit 8, at 27.)

Although Lopez has now provided sympathetic declarations from family members describing a dysfunctional childhood, such was not the case at the time of Lopez's sentencing. In addition to the fact that Lopez's family failed to come forward with any evidence of a dysfunctional upbringing at his 1987 sentencing—and later, his 1990 resentencing—Lopez himself did not indicate that his childhood was dysfunctional. The author of the 1987 presentence report noted that "[i]n other presentence reports [Lopez] did not mention any traumatic or serious events while he was growing up. [Lopez] stated that the biggest problem within the family was financial." (Exhibit C, at 7.)

In 1987, the sentencing judge found the existence of two aggravating circumstances: (1) a prior conviction for a felony involving the use or threat of violence on another person, and; (2) the murder was committed in an especially heinous, cruel, or depraved manner. *Lopez I*, 163 Ariz. at 111, 786 P.2d at 962. Although Lopez proffered intoxication as a statutory mitigating circumstance, the judge found that Lopez had failed to prove it by a preponderance of the evidence.

Id. at 115, 966. Finding no other mitigation, the judge sentenced Lopez to death. *Id.*

Lopez received a new sentencing after the Arizona Supreme Court reversed his original death sentence. On appeal, Lopez's counsel, George Sterling, successfully argued that Lopez's prior conviction for resisting arrest did not qualify as an aggravating circumstance because it did not necessarily involve the use or threat of violence. *Id.* at 114, 965. Sterling then took over Lopez's representation for his 1990 resentencing.

C. *1990 Resentencing.*

Because Dr. Bendheim's report gave some support to mitigation of pathological intoxication, Sterling pursued a different strategy than Brown and submitted the report at Lopez's resentencing proceeding in 1990. (R.T. 7/13/90, p.m., at 72.) Sterling also presented the videotaped testimony of Dr. Bendheim in which Dr. Bendheim tentatively opined that Lopez suffered from pathological intoxication. (*Id.* at 70–71; Exhibit 26, at 30.) Sterling attempted to strengthen the evidence of intoxication that Joel Brown had presented in 1987. Although Sterling could not locate witnesses Pauline Rodriguez and Yodilia Sabori, he submitted their pretrial statements in which both women described Lopez as drunk or "on something" in the hours before the murder. (R.T. 7/13/90, p.m., at 73; Exhibit 3 at 4; Exhibit E, at 5.) Sterling argued that the ingestion of even a small amount of

alcohol could change Lopez from shy and retiring to aggressive and physically abusive. (R.T. 8/3/90, at 19.) This condition, Sterling argued, prevented Lopez from appreciating the wrongfulness of his actions. (*Id.*)

Sterling further argued that Lopez had evolved into a model prisoner while incarcerated and thus, should be given leniency. (R.T. 8/3/90, at 22.) In support of this mitigation, Sterling presented the testimony of a detention officer. (R.T. 7/13/90, p.m., at 122.)

In addition to pursuing mitigation of intoxication, pathological intoxication, and good prisoner behavior, Sterling sought out a more favorable psychiatric opinion than the one offered by Dr. Bendheim. Based upon questions posed by the prosecutor to Dr. Bendheim at Dr. Bendheim's July 11, 1990 deposition, it appears that Sterling retained Dr. Brad Bayless to administer tests to Lopez. (Exhibit 26, at 16.) The fact that Sterling elected not to present Dr. Bayless's psychiatric findings indicates that, like Dr. Bendheim's findings, they were not helpful to Lopez.

Sterling also focused on undermining the validity of the single remaining aggravating factor.[1]

---

[1] Sterling submitted a sentencing memorandum challenging A.R.S. § 13–703(F)(6), Arizona's especially cruel, heinous, or depraved aggravator, as unconstitutionally vague and overbroad. (R.T. 7/13/90, at 80–81.) Eight days *after* Sterling filed his memorandum and approximately two weeks *before* the resentencing hearing, however, the United States Supreme Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990), was handed down in which the Court held that Arizona's especially heinous, cruel, or depraved aggravator, as defined by the Arizona Supreme Court, was constitutional. *Id.* at 655.
(continued ...)

At Lopez's 1990 resentencing hearing, Sterling expressed dismay at the lack of mitigation presented in 1987, but stated that on remand, he had presented as much mitigation to the court as he could find. (R.T. 8/3/90, at 18.) The record reflects that Sterling had a court appointed investigator, conducted an investigation, sought out mitigating evidence, issued subpoenas for school, DES, CPS, mental health, and other records, retained experts, and presented what was available. (*Id*; R.T. 7/13/90, at 72–73; Exhibit I.) It is clear that the opinions of Lopez's experts—Dr. Bendheim and, presumably, Dr. Bayless—were that Lopez did not suffer from psychological problems, mental illness, or low IQ. Testing conducted in the Department of Corrections, information in the 1987 and 1990 presentence reports, and Lopez's own statements in both 1987 and 1990 also do not support Lopez's current allegations regarding those conditions. Although Dr. Bendheim believed that Lopez possibly abused marijuana and paint, Lopez denied that he was dependent on such substances or that his sporadic use of them created long lasting effects. (Exhibit 34, at 5; Exhibit C, at 6.)

(... continued)

Despite the decision in *Walton*, Sterling attempted to rebut the State's evidence that the murder was especially heinous, cruel, or depraved. Sterling presented the testimony of Dr. Keen and, based on that testimony, argued in his post-hearing sentencing memorandum that that aggravator had not been proven. (Exhibit F, at 1–8.) In his memorandum, Sterling cited numerous Arizona cases in support of this contention. (*Id.*) Ultimately, Sterling was unsuccessful in his efforts. Had he been successful, however, Lopez would have been ineligible for the death penalty.

The 1987 and 1990 presentence reports indicated that Lopez's father abandoned the family when Lopez was 8-years-old, that the family suffered great economic hardship as a result, and that Lopez was living in a friend's car at the time of the murder. (Exhibit C, at 7; Exhibit D, at 5–6.) Thus, to the extent that Sterling failed to present this evidence, the sentencing judge was aware of it and considered it before he resentenced Lopez to death.

The sentencing judge found that the murder was especially heinous, cruel, or depraved. (Exhibit G, at 3–4.) He found that the proffered mitigating circumstances had not been proven by a preponderance of the evidence. (*Id.* at 6–8.) He therefore found no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at 8–9.) In weighing the aggravation and mitigation, the sentencing judge found that the aggravation was particularly strong because the brutality of the murder caused it to "stand[] out above the norm of first degree murders." (*Id.* at 7.) He stated:

> I've been practicing law since 1957. I've prosecuted first degree murder cases. I defended first degree murder cases. In the last eight years or so I've been on the criminal bench approximately 5 years. Of that time I've presided over numerous first degree murder cases. I have never seen one as bad as this one.

(R.T. 8/3/90, at 33–34.) The Arizona Supreme Court independently reviewed Lopez's death sentence and affirmed "in similarly forceful terms." *Lopez v. Ryan*

(*Lopez III*), 630 F.3d 1198, 1209 (2011); *Lopez II*, 175 Ariz. at 410–17, 857 P.2d at 1264–71.

D. *PCR Proceedings.*

Between 1994 and 1997, Robert Doyle represented Lopez in state PCR proceedings. (Exhibit 27.) Doyle filed a PCR petition alleging a number of claims including two claims of sentencing IAC. (Exhibit 9.) Specifically, Doyle argued that resentencing counsel was constitutionally ineffective because he failed to provide Dr. Bendheim with the pretrial statements and trial testimony of two witnesses who saw Lopez on the night of the murder. *See Lopez III*, 630 F.3d at 1208. Doyle submitted an affidavit from Dr. Bendheim in which he stated that if he had been provided with those materials, he could have made a more certain diagnosis of pathological intoxication. *Id.* Doyle also argued that advances in DNA testing were newly discovered evidence and requested that the physical evidence be made available and funds be allocated for testing, but, as noted above, Lopez later rejected post-conviction DNA testing. (Exhibit 9, at 17–20; Exhibit A.)

On May 3, 1995, Doyle filed a supplemental PCR petition alleging an additional IAC claim and elaborating upon one he previously raised. (Exhibit 10.) Doyle also filed a PCR reply on August 8, 1995. (Exhibit 11.)

At the time of the PCR proceedings, Doyle had spoken with Joel Brown and one of Lopez's other previous attorneys about the case, and Doyle knew that Lopez

and his family had been uncooperative with counsel. (Exhibit 27; Exhibit J, at 3; Exhibit 30, at 2 (Doyle noting that "over the years, attempts to contact and learn more from family members has been met with resistance" and that family members contacted by volunteers were, as yet, unwilling to commit to signing affidavits).

Doyle initially accepted the help of the Arizona Capital Representation Project (ACRP). (Exhibit 27.) Doyle found, however, that the ACRP volunteers were not helpful. (*Id.*) They wanted him to request more time and more money, and he did not believe such requests would be granted by the PCR judge. (*Id.*) In fact, Doyle had previously requested additional time in which to file a supplemental PCR petition. Although Doyle's motion was granted and the PCR court gave him until May 3, 1995 to file the supplemental petition, the court clearly indicated, "There will be no further extensions." (Exhibit K.) When Doyle determined that the ACRP volunteers were undermining his relationship with Lopez, he stopped working with them. (*Id.*)

The trial, sentencing, and resentencing judge presided over the PCR proceedings. He found that: (1) counsel's performance did not fall below prevailing professional norms, and; (2) there was no reasonable probability of a different trial or sentencing outcome because of alleged ineffective assistance. (Exhibit 35.) *See Lopez III,* 630 F.3d at 1208. The PCR judge also rejected Lopez's other claims.

After the PCR judge dismissed Lopez's petition, Doyle filed a Petition for Review in the Arizona Supreme Court. (Exhibit G.)

II. ARGUMENT.

Claims in not raised in a previous PCR petition are waived. Ariz. R. Crim. P. 32.2(a)(3). Unless a claim in a successive PCR petition falls within an exception, it is precluded under Rule 32.2(a) of the Arizona Rules of Criminal Procedure. Rule 32.2(b) provides an exception to preclusion when:

> There has been a *significant change* in the law that if determined to *apply* to defendant's case *would probably overturn the defendant's conviction or sentence*[.]

Ariz. R. Crim. P. 32.1(g) (emphasis added).

Arizona law also provides an exception to preclusion when:

> Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence.

Ariz. R. Crim. P. 32.1(e). Newly discovered material facts do not exist if the defendant did not exercise due diligence in securing the newly discovered material facts. Ariz. R. Crim. P. 32.1(e)(2).

A. *Because there has been no substantial change in the law affecting Lopez's case, Lopez's successive PCR petition does not fall within Rule 32.2(b)'s exception to preclusion.*

Lopez contends that *Maples v. Thomas*, 132 S.Ct. 912, 927 (2012), is a significant change in the law that is an exception to the rule of preclusion. *Maples* concerns whether it is appropriate to apply the "cause" prong of the federal "cause

and prejudice" exception to procedural default on federal habeas review. The Court held that when a state PCR attorney *abandons* his client and no longer represents the client without the client's knowledge, then such actions constitute "cause" to overcome procedural default in federal habeas proceedings. *See Maples*, at 927.

In Maples' state PCR proceedings, he was represented by *pro bono* attorneys from an out-of-state law firm. *Maples*, at 916. The attorneys were admitted *pro hac vice*. *Id.* Local counsel had agreed to facilitate their appearance but undertake no substantial involvement in the case. *Id.* Subsequently, Maples' *pro bono* attorneys left their law firm without informing Maples, seeking permission to withdraw, or arranging substitution of counsel. *Id.* at 916–17. When Maples' state PCR petition was denied, notice was mailed to the attorneys but the mail was returned unopened. *Id.* at 917. With no attorney acting on Maples' behalf, his time to appeal the denial of his PCR petition ran out. *Id.* When he filed a federal habeas petition, it was rejected because he had failed to timely appeal the denial of his PCR petition in state court. *Id.*

Lopez's *Maples* claim is unavailing because *Maples* does not create a free-standing right to counsel or to the effective assistance of counsel in state post-conviction proceedings. Instead, it only establishes that abandonment of PCR counsel can be used as cause to overcome a procedural default in a federal habeas

proceeding, which involves a different forum.

Moreover, even if *Maples* applies to state proceedings, Lopez's PCR attorney did not abandon him. Doyle filed a PCR petition raising a number of claims, including two claims of sentencing IAC. He also filed a supplemental petition raising an additional claim, and he filed a reply. He petitioned the Arizona Supreme Court for review of the dismissal of Lopez's PCR petition. Doyle did not abandon Lopez, and Doyle's state court performance preserved issues for review in Lopez's federal habeas proceeding. *See Lopez III*, 630 F.3d at 1208.

Lopez argues that Doyle's failure to make one specific IAC claim constitutes abandonment. He is incorrect. An attorney's omission of a claim—even a colorable constitutional claim—does not constitute abandonment. *See Towery v. Ryan*, 2012 WL 614677, *1, 7 (February 27, 2012).

Thus, to the extent that *Maples* can be applied to state PCR proceedings, *Maples* is not a significant change in the law that is applicable to Lopez's case. To the extent that Lopez argues that his PCR attorney was *ineffective* in failing to raise a specific IAC claim, Lopez was not constitutionally entitled to effective assistance of PCR counsel.[2] *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania*

[2] In footnote 8 of his PCR petition, Lopez requests that this Court hold these proceedings in abeyance pending the resolution of *Martinez v. Schriro* currently pending before the United States Supreme Court. Because *Martinez* has not yet been decided, it does not represent any change in the law and does not support holding these PCR proceedings in abeyance. *See Nunez-*
(continued ...)

v. Finley, 481 U.S. 551, 555–59 (1987).

B. *Because there are no newly discovered material facts, Lopez's successive PCR petition does not fall within Rule 32.2(b)'s exception to preclusion.*

Lopez argues that resentencing counsel was constitutionally ineffective by failing to present material regarding his family background and social history. In describing his childhood, Lopez relies on a 2006 report by Dr. George Woods, Lopez's own affidavit, and a 2004 declaration from Domitila Servin. (PCR petition at 35–47). Dr. Woods report relies largely upon declarations—mostly from Lopez's family members—authored between 1999 and 2009. (Exhibit 15). Lopez claims that this material is newly discovered but fails to explain how it falls within the definition of newly discovered material facts.

None of Lopez's material in support of his claim constitutes newly discovered material facts under the rule because Lopez did not exercise diligence in gathering the material. *See* Ariz. R. Crim. P. 32.1(e) (newly discovered material facts exist if they could not have been discovered with due diligence before trial); *State v. Jeffers*, 135 Ariz. 404, 427, 661 P.2d 1105, 1128 (1983) (evidence is not newly discovered where defendant knew of existence and identity of witnesses but

(... continued)
Reyes v. Holder, 646 F.3d 684, 692 (9th Cir. 2011) (*en banc*) (bound to follow a controlling Supreme Court precedent until it is expressly overruled by that Court); *United States v. Sanchez-Ledezma*, 630 F.3d 447, 448 n.1 (5th Cir. 2011) (bound to follow existing precedent even when the Supreme Court grants certiorari on an issue); *Queen Creek Summit, LLC v. Davis*, 219 Ariz. 576, ¶ 18, 201 P.3d 537 (App. 2008) (bound to follow supreme court precedent).

made no effort to obtain witnesses' statements); *State v. Saenz*, 197 Ariz. 487, 490–91, ¶ 13, 4 P.3d 1030, 1033–34 (App. 2000) (evidence known to defendant during trial is not newly discovered, even if it is not known to his counsel).

Certainly, Lopez was aware of the conditions of his own childhood and could have provided this information to sentencing, resentencing, and PCR counsel. The record does not reflect that Lopez lacked access to information from his family members. Rather, the reasonable inference to be drawn from the record is that Lopez did not want to involve his family members in the criminal proceedings. (R.T. 6/25/87, at 4.) Under these circumstances, Lopez was not diligent in gathering material regarding his childhood, and the material does not constitute newly discovered material facts. *See* Ariz. R. Crim. P. 32.1(e)(2); *Jeffers*, 135 Ariz. at 427, 661 P.2d at 1128; *see also Lopez III*, 630 F.3d at 1206 (Lopez does not contend that he lacked access to the information from his family members regarding family history; he could presumably obtain it without court order and with minimal expense).

Moreover, the material Lopez now presents does not constitute newly discovered material facts because it would not have "probably" changed the sentence. *See* Ariz. R. Crim. P. 32.1(e)(3). The aggravation was extremely weighty. (R.T. 8/3/90, at 33–34; Exhibit G.) The sentencing judge was aware that Lopez was brought up in poverty and with an absent father. (Exhibit C, at 7;

Exhibit D, at 5–6.) The additional information about his childhood would not have changed the sentence.

III. CONCLUSION.

For the foregoing reasons, Respondent respectfully requests that Lopez's successive PCR petition be summarily dismissed.

RESPECTFULLY SUBMITTED this 9th day of March, 2012.

THOMAS C. HORNE
ATTORNEY GENERAL

KENT E. CATTANI
DIVISION CHIEF COUNSEL

/S/
SUSANNE BARTLETT BLOMO
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION SECTION

ATTORNEYS FOR PLAINTIFF/
RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2012, I electronically filed the foregoing with the Clerk of the Court for the Maricopa County Superior Court.

I have also on this date provided a copy of the foregoing document by mail or electronic means to:

Denise I. Young
Attorney at Law
2930 N. Santa Rosa Place
Tucson, AZ 85712

Attorney for Defendant/Petitioner

/s/_____
E. LEYVA

2604508