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
(STATE BAR NUMBER 014328)
E-MAIL: CADocket@azag.gov

ATTORNEYS FOR RESPONDENTS

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Samuel Villegas Lopez, Petitioner, -vs- Charles L. Ryan, et. al., Respondents.	CIV 98–72–PHX–SMM RESPONSE TO PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT/PETITION FOR HABEAS CORPUS

Respondents hereby respond to Petitioner's Motion for Relief from Judgment/Petition for Writ of Habeas Corpus. Lopez's motion/petition constitutes a second or successive petition, which this Court lacks jurisdiction to consider and should dismiss.

Even if this Court can consider Lopez's Rule 60 motion, he has failed to establish the extraordinary circumstances necessary to reopen the prior habeas proceeding.

Should this Court reconsider the judgment denying his first habeas petition, Lopez has not established cause to overcome procedural default of claim 1C because Lopez's allegation of ineffective assistance of PCR counsel and the underlying claim of ineffective assistance of resentencing counsel are meritless.

For the reasons set forth in the following Memorandum of Points and Authorities, Respondents respectfully request that the motion/petition be denied.

DATED this 20th day of April, 2012.

RESPECTFULLY SUBMITTED,

THOMAS C. HORNE
ATTORNEY GENERAL

/S/
SUSANNE BARTLETT BLOMO
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR RESPONDENTS

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND.

Lopez is a death-row inmate who murdered Estefana Holmes in 1986, and has had over 25 years to advance his claims in state and federal court, including: (1) trial and sentencing proceedings; (2) direct appeal; (3) resentencing proceedings; (4) direct appeal from resentencing; (5) state post-conviction (PCR) proceedings; (6) habeas proceedings in federal district court; and (7) appeal to the Ninth Circuit. His petition for certiorari from the denial of federal habeas relief was denied by the Supreme Court. *Lopez v. Ryan*, No. 11–6117. The Ninth Circuit issued its mandate on November 17, 2011. *Lopez v. Schriro*, No. 08–99021. Thus, he has had one full round of federal habeas proceedings. On March 20, 2012, the Arizona Supreme Court issued a warrant for execution. Lopez is scheduled to be executed on May 16, 2012.

In his first habeas petition, Lopez claimed that resentencing counsel was constitutionally ineffective by failing to investigate and present mitigation regarding Lopez's background and social history (claim 1C). (Exhibit A, at 22.)[1] Lopez asserted that state PCR counsel had raised the same claim in state court, and the claim was therefore exhausted. (*Id*. at 41–42.) This Court found that Lopez had expanded claim 1C beyond what had been presented in state court and that the expanded portion of the claim was procedurally defaulted. (Exhibit B, at 15.)

The Ninth Circuit agreed that Lopez had not presented the expanded portion of claim 1C in state court.[2] *Lopez v. Ryan* (*Lopez III*), 630 F.3d 1198, 1206 (9th

---

[1] Respondents' references to the record will be cited either as Exhibits A–X (Respondents' Exhibits) or Exhibits 1–32 (Lopez's Exhibits).

[2] But, the parties strongly contested whether Respondents waived procedural default in this Court and whether this Court erred in reaching the issue *sua sponte*. *Id.* at 1205. The Ninth Circuit held: "We need not and do not address this issue, however, because we affirm the dismissal of Lopez's claim on an alternate ground." *Id*. Finding that Lopez had not presented (continued ...)

Cir. 2011). It also addressed the properly exhausted portion of the IAC claim adjudicated on the merits. *Id*. at 1209.

Lopez now asks this Court to grant him relief from its judgment finding the expanded portion of the claim procedurally defaulted and to grant him review of the merits of the expanded portion of the claim. (Motion for Relief at 1–3 & 7, n. 1.)

II. LOPEZ'S MOTION/PETITION CONSTITUTES A SECOND AND SUCCESSIVE HABEAS PETITION THAT SHOULD BE SUMMARILY DISMISSED.

A. *This Court lacks jurisdiction.*

Lopez's federal habeas proceedings have concluded. Thus, he is essentially seeking to initiate a new proceeding based on a change in the law subsequent to the dismissal of his first habeas petition. Lopez's claim is filed in the wrong court, and should be dismissed on that basis alone. With the enactment of the AEDPA, Congress significantly "restrict[ed] the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler v. Cain*, 533 U.S. 656, 661 (2001); *see* 28 U.S.C § 2244. Before a second or successive petition is filed in the district court, the applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3)(A). Thus, this Court must dismiss Lopez's claim because he has failed to seek authorization from the Ninth Circuit.[3]

(... continued)
any evidence in support of his expanded claim in state court, the Court determined that he was separately barred from seeking relief. *Id*. (citing 28 U.S.C. § 2254(e)(2)).

[3] A three judge circuit court panel must find that the applicant has made a prima facie showing that "application satisfies the requirements" of 28 U.S.C. § 2244(b). 28 U.S.C. § 2244(b)(3)(C). The decision of the panel is not subject to further litigation. 28 U.S.C. § 2244(b)(3)(E). The decision to accept or deny a successive petition must be made "not later than 30 days after the filing of the motion." 28 U.S.C. § 2244(3)(D).

B. *The motion/petition is barred as a second and successive petition*.

Furthermore, the successive petition would fail even if it had been properly presented to, and authorized by, the Ninth Circuit. Where a Rule 60 motion for relief constitutes a "habeas corpus application," it is governed by 28 U.S.C. § 2244(b). *Gonzalez v. Crosby*, 545 U.S. 524, 530. (2005). A habeas corpus "application" is a filing that seeks "an adjudication on the merits of the petitioner's claim[s]." *Id*. Lopez's Rule 60 motion clearly seeks review of the merits of his claim 1C that resentencing counsel was constitutionally ineffective.[4] (Motion for Relief at 1–3; 6; 7, n. 1.)

Any claim that was presented in a prior habeas application "*shall be dismissed*." 28 U.S.C. § 2244(b)(1); *Gonzalez*, 545 U.S. at 529–30. The Supreme Court has clarified that a motion—even if it is presented as a Rule 60 motion—that advances a claim that "was also 'presented in a prior application'" must be dismissed without further analysis. *Gonzalez*, 545 U.S. at 530 (quoting 28 U.S.C. § 2244(b)).

Moreover, in *Gonzalez*, the Supreme Court specifically noted that a successive petition should not be filed under the guise of a Rule 60 motion contending—as Lopez asserts—that a subsequent change in the law justifies relief. The Supreme Court has stated that such a pleading, "although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Gonzalez*, 545 U.S. at 531. A successive habeas petition that raises a previously presented claim must be dismissed, and even a new, retroactive rule of *constitutional law* does not create an exception. *See* 28 U.S.C. § 2244(b)(1);

---

[4] Claim 1C has proved to be a moving target, evolving as Lopez's attorneys continually shape and reshape it. The unexhausted portion of the claim was identified in Lopez's memorandum regarding claim 1C as resentencing counsel's failure to "conduct the comprehensive investigation of Petitioner's background and social history required of competent counsel in a capital case." (Exhibit A, at 22.)

Gonzalez, 545 U.S. at 530; *Cf.* 28 U.S.C. § 2244(b)(2)(A) (providing exception to rule of dismissal for successive petition raising *new claims*). *A fortiori*, there can be no exception for a new rule regarding cause. Thus, even assuming *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), could be construed to be retroactively applicable, it does not create a basis for this Court to consider the merits of Lopez's previously presented claim.

Lopez argues that his motion for relief alleges a defect in this Court's ruling involving the resolution of a procedural issue, rather than a merits ruling. (Motion for Relief at 8–9.) Thus, he implies that his motion does not 'bring a claim' and is therefore not subject to § 2244(b)'s limitations. *See Gonzalez*, 545 U.S. at 532. While the *Gonzalez* court made a distinction between Rule 60 motions that attack procedural defects and those that attack merits resolutions, the distinction makes no difference here. Lopez does not "merely assert[] that a previous ruling which precluded a merits determination was in error," *Gonzalez*, 545 U.S. 532, n. 4, he asks this Court to grant him "review of the *merits* of his claim raised in his first habeas petition." (Motion for Relief at 3 & 7, n. 1 (emphasis added).) This is in contrast to *Gonzalez*, where the petitioner merely asked the district court to correct a time-bar ruling. *Gonzalez*, 545 U.S. at 527.

Because Lopez's motion seeks review of the merits of a habeas claim previously presented, it constitutes a successive habeas application that does not fall within a statutory exception and should be dismissed. *See* 28 U.S.C. § 2244(b); *Gonzalez*, 545 U.S. at 530. Lopez admits that the same federal constitutional issue he asks this Court to review on the merits was presented in his first habeas petition. (Motion for Relief at 3 & 7, n. 1.) Thus, this claim falls squarely into the category of claims discussed in *Gonzalez* that constitute a second or successive petition. *See Gonzalez* 545 U.S. at 530. Accordingly, this Court should dismiss it.

III. ASSUMING THAT LOPEZ'S MOTION/PETITION CAN BE CONSIDERED AS A RULE 60 MOTION RATHER THAN A SUCCESSIVE HABEAS PETITION, *MARTINEZ* DOES NOT CREATE THE EXTRAORDINARY CIRCUMSTANCES REQUIRED TO REOPEN THE JUDGMENT DENYING LOPEZ'S FIRST HABEAS PETITION.

In order to reopen a final judgment, Lopez must establish one of the grounds specified in Rule 60(b). Lopez contends that the Supreme Court's decision in *Martinez* constitutes an extraordinary circumstance under Rule 60(b)(6). More specifically, Lopez asserts that *Martinez* showed the error of this Court's procedural default ruling in his first habeas petition. In *Gonzalez*, however, the Supreme Court found that a change in the law did not create extraordinary circumstances justifying relief under Rule 60(b)(6). *Gonzalez*, 545 U.S. at 536–39. Similarly, the change in the law created by *Martinez* does not create extraordinary circumstances here.

First, this Court's language reflecting that ineffectiveness of PCR counsel could not serve as cause was correct under then-existing law. (Exhibit B, at 15, n. 8.) *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Custer v. Hill*, 378 F.3d 968, 974–75 (9th Cir. 2004). "It is hardly extraordinary that subsequently, after [this] case was no longer pending, [the Supreme Court] arrived at a different interpretation." *Gonzalez*, 545 U.S. at 537.

Moreover, the change in the law presented in *Martinez* "is all the less extraordinary" in Lopez's case because of his lack of diligence in pursuing a claim that ineffective assistance of PCR counsel was cause to overcome procedural default. *See Gonzalez*, 545 U.S. at 537. At the time *Martinez* was decided, Lopez had never argued that there was cause to overcome procedural default, and he, therefore, abandoned such an argument. *See id.*

In his original habeas proceeding, *Lopez did not assert any cause* to overcome his procedural default of the claim he now seeks to resurrect. Instead, Lopez insisted that his PCR counsel *raised* the entirety of claim 1C in state post-

conviction proceedings, and, thus, the claim was not procedurally defaulted. (Exhibit A, at 41.) As this Court properly found, Lopez "did not allege cause and prejudice or a miscarriage of justice to overcome [procedural] default." (Exhibit B, at 15.)

The record is contrary to Lopez's assertion that this Court "applied and relied upon" pre-*Martinez* procedural law when it denied Lopez's claim. (Motion for Relief at 8.) This Court did not rely upon the then-existing procedural law that ineffective assistance of PCR counsel did not constitute cause to overcome procedural default. This Court's footnote that ineffectiveness of PCR counsel—"*even if alleged*"—could not serve as cause was *dicta* because Lopez *did not allege* ineffectiveness of PCR counsel or any other cause to overcome procedural default. (Exhibit B, at 15, n. 8.)

In addition to Lopez's failure to assert the ineffectiveness of PCR counsel as cause to overcome procedural default in this Court, Lopez also failed to assert it on appeal or in his petition for rehearing and suggestions for rehearing en banc in the Ninth Circuit.

Instead, Lopez consistently and repeatedly asserted—in direct contradiction of his current position—that PCR counsel raised claim 1C in state PCR proceedings. *See Lopez III*, 630 F.3d at 1205, n. 6. Only after this assertion was rejected by this Court and the Ninth Circuit, after the Ninth Circuit denied his request for rehearing, after the Supreme Court denied his petition for certiorari, after the Ninth Circuit issued the mandate, and after the State requested a warrant for execution from the Arizona Supreme Court, did Lopez argue that the unexhausted portion of claim 1C should be heard on the merits because PCR counsel was constitutionally ineffective by failing to raise it. Lopez clearly abandoned any claim that cause existed to overcome procedural default. *See Gonzalez*, 545 U.S. at 537. "[The petitioner's] lack of diligence confirms that [a

new case] is not an extraordinary circumstance justifying relief from the judgment in [his] case." *Id*.; *See also Ackermann v. United States*, 340 U.S. 193, 197–98 (1950) (petitioner cannot be relieved of his choice not to pursue a claim because hindsight seems to indicate that his decision was probably wrong).

To the extent that Lopez argues he was previously unable to assert that ineffective assistance of PCR counsel constituted cause to overcome procedural default because *Martinez* had not yet been decided, he is also incorrect. It is unimportant whether Lopez was *aware* he could make the assertion as long as he *could* make it. *See Gonzalez*, 545 U.S. at 537–38, n. 10. Moreover, prior to *Martinez*, many habeas petitioners, including the *Martinez* petitioner, had contended that ineffective assistance of PCR counsel constituted cause to overcome procedural default. Some of these petitioners were represented by the Federal Public Defender's Office, which also represents Lopez. (*See* Exhibit C, at 11–12.) Undoubtedly, Lopez's counsel could have asserted ineffectiveness of PCR counsel as cause to overcome procedural default. They obviously chose not to make that assertion, and thus, Lopez abandoned the argument.

Accordingly, the change in the law created by *Martinez* does not create extraordinary circumstances. There are no grounds under which Lopez can reopen the judgment denying his habeas petition. *See* Rule 60(b), Federal Rules of Civil Procedure.

IV. EVEN IF THIS COURT REOPENS THE JUDGMENT DENYING HIS HABEAS PETITION, LOPEZ HAS NOT ESTABLISHED CAUSE TO OVERCOME PROCEDURAL DEFAULT ENTITLING HIM TO REVIEW OF THE MERITS OF HIS CLAIM.

Martinez recognizes a narrow exception that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S.Ct. at 1315. In other words, a federal habeas court may consider a prisoner's otherwise

procedurally defaulted IAC-trial claim if the prisoner establishes: (1) his state PCR counsel was constitutionally ineffective in failing to raise the claim in state court, and; (2) the underlying IAC-trial claim is "a substantial one." *Id.* at 1318. Lopez cannot establish cause to overcome the procedural default of claim 1C because he has not established either of the two *Martinez* prongs. Thus, Lopez is not entitled to review of the merits of his procedurally defaulted claim.

A. *State PCR counsel did not render ineffective assistance*.

Contrary to Lopez's assertions, this Court has not already found that PCR counsel was "at fault" or in "error" when he did not raise the entirety of claim 1C in state court. This Court merely found that a portion of the claim was not fairly presented in state court because PCR counsel did not raise it, not that the lack of presentment constituted an error, deficient performance, or constitutionally ineffective representation. The record also shows that PCR counsel, Robert Doyle, did not render ineffective assistance of counsel.

1. <u>Doyle did not render deficient performance</u>.

Between 1994 and 1997, Doyle represented Lopez in state PCR proceedings. (Exhibit 3.) Doyle filed a PCR petition alleging a number of claims including two claims of sentencing IAC. (Exhibit 1.) 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*.

At the time of the PCR proceedings, Doyle had spoken with Lopez's previous attorneys, and Doyle knew that Lopez and his family had been uncooperative with counsel. (Exhibit D, at 2; Exhibit 3; Exhibit 2, 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).

Approximately 2 months after Doyle filed the PCR petition, the Arizona Capital Representation Project (ACRP) offered Doyle its volunteer assistance, and Doyle accepted. (Exhibit 3.) Doyle found, however, that the ACRP volunteers were not helpful. (*Id*.) In April 1995, ACRP pressured Doyle to request more time and more money from the court, but Doyle reasonably believed such requests would be denied by the PCR judge. (*Id*.) In fact, Doyle had previously requested additional time in which to file a supplemental PCR petition, and, 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 E; Exhibit F.) When Doyle determined that the ACRP volunteers were undermining his relationship with Lopez, he stopped working with them. (Exhibit 3.)

On May 3, 1995—the deadline set by the court—Doyle filed the supplemental PCR petition the court had given him additional time to file. (Exhibit 10.) In the supplemental petition, Doyle alleged an additional IAC claim and elaborated upon one he previously raised. (*Id*.)

At that time, Doyle also filed a motion for additional time to file another supplemental petition "should circumstances warrant," in which he expressly noted Lopez's family's unwillingness to provide statements to counsel. (Exhibit 2.) Also, Doyle contemporaneously filed a motion for discovery, which was granted, and thus continued to investigate possible additional PCR claims. (Exhibit D.)

As of May 3, 1995, Doyle possessed the records ACRP had gathered. (Exhibit D, at 2; Exhibit E, at 3; Exhibit 2, at 2.) These records were "grammar school records, high school records, medical records, family member's records,

and records of [Lopez's] previous employment." (Exhibit D, at 2.) As discussed further below, these are the same type of records resentencing counsel subpoenaed in 1990. Thus, ACRP's record gathering did nothing to substantially further Lopez's IAC claims. More specifically, the records did not create a basis for an IAC claim that resentencing counsel failed to investigate social history records since resentencing counsel *had* investigated social history records.

Moreover, the records gathered by ACRP did *not* include declarations from family members. The earliest declarations from family members Lopez has provided are dated 1999—long *after* ACRP began pursuing declarations and 4 years *after* the PCR court's deadline for a supplemental petition. (Exhibit F; Exhibits 17–31.) This contradicts Lopez's suggestion that his family members were willing to provide declarations to ACRP at the time his PCR was pending. It is clear from the record that the PCR judge was unwilling to allow Doyle the "hundreds of hours" "at a minimum" Lopez believes Doyle would have needed to "establish rapport" with Lopez's relatives and 'break down their barriers.' (*See* Motion for Relief at 17; Exhibit F.)

Subsequent to receiving the records from ACRP, Doyle would have also been in possession of the materials provided in response to his discovery motion. (Exhibit D.) The fact that he did not file another supplemental petition based on these materials indicates that the circumstances did not warrant it. On August 8, 1995, Doyle filed a PCR reply. (Exhibit G.)

The trial, sentencing, and resentencing judge presided over the PCR proceedings. He found that: (1) trial and resentencing 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 12.) *See Lopez III*, 630 F.3d at 1208. The PCR judge also rejected Lopez's other claims. (Exhibit 12.)

After the PCR judge dismissed Lopez's petition, Doyle moved for reconsideration of the court's dismissal. (Exhibit H.) After that motion was denied, Doyle filed a Petition for Review in the Arizona Supreme Court, thus preserving the PCR claims for federal habeas review. (Exhibit I.)

The result of the PCR proceedings is presumed to be reliable, and Doyle is presumed to have been effective. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000) (addressing appellate IAC claims). Lopez is required to conclusively rebut the presumption of effectiveness. *See id*; *Strickland*, 466 U.S. at 694. PCR counsel need not and should not raise every nonfrivolous claim, but instead should use their professional judgment to winnow the issues, "focusing on one central issue, if possible, or at most on a few key issues." *See Jones v. Barnes*, 463 U.S. 745, 751–54 (1983). In light of *Martinez*, it is now possible to bring an IAC claim based on PCR counsel's failure to raise a particular issue, but it will be very difficult to establish. *See Robbins*, 528 U.S. at 288 (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.")). Omitted claims must be so obvious and significant from the record as to fall below an objective standard of reasonableness. *See Gray*, 800 F.2d at 646–47.

Doyle's performance was reasonable under the prevailing professional norms of PCR counsel in Maricopa County in 1994–1997.[5] *See Strickland*, 466 U.S. at

---

[5] Lopez submitted the affidavit of Russell Stetler in support of his contention that Doyle was constitutionally ineffective. (Exhibit 9.) Stetler's affidavit is an opinion regarding the performance of counsel and the prevailing professional norms of trial, sentencing, and PCR counsel in Maricopa County. It is irrelevant. "Expert testimony is not necessary to determine claims of ineffective assistance of counsel." *Earp v. Cullen*, 623 F.3d 1065, 1075 (9th Cir. 2010).

Moreover, Stetler's opinion that competent counsel should retain "mitigation specialists" is misplaced here. (Exhibit 9, at 12–13.) The assistance of a mitigation specialist is not a requirement for the effective assistance of counsel in a capital case. *See, e.g. Phillips v. Bradshaw*, 607 F.3d 199, 207 (6th Cir. 2010). Indeed, prior to June 2002, the Arizona Rules of

(continued ...)

688. Specifically, he was not constitutionally ineffective by failing to raise an IAC claim based on resentencing counsel's alleged failure to present family background mitigation from Lopez's family members or to investigate Lopez's social history. As demonstrated below, Lopez's family was uncooperative, and resentencing counsel investigated Lopez's social history by subpoenaing and obtaining records. Doyle raised IAC claims, including claims that resentencing counsel was ineffective, and also preserved those claims for federal habeas review. (Exhibits 1, 10, G, H, I.) Lopez has failed to establish that the omitted claim was obvious and significant or that it was clearly stronger than the claims presented. *See Gray*, 800 F.2d 646–47.

Further, this case stands in sharp contrast to *Martinez* on which Lopez relies. Martinez's PCR counsel asserted *no* PCR claims. 132 S.Ct. at 1314.

2. <u>Even assuming Doyle rendered deficient performance, there was no prejudice.</u>

In order to demonstrate prejudice, Lopez must show a reasonable probability that, but for Doyle's unreasonable, obvious, and significant failure to raise the expanded portion of claim 1C, he would have prevailed in his PCR proceeding. *See Robbins*, 528 U.S. at 287. For the reasons discussed below, there is no reasonable probability that the PCR judge would have concluded that resentencing counsel rendered ineffective assistance by not presenting family background information from Lopez's relatives. *See Moorman v. Schriro*, 628 F.3d 1102, 1114 (9th Cir. 2010) (assessing ineffective assistance of appellate counsel for failing to

---

(... continued)

Criminal Procedure did not provide for the appointment of a mitigation specialist. *See* Rule 15.9, Ariz. R. Crim. P. At the time of Lopez's resentencing *in 1990*, the prevailing professional norm in Maricopa County was to retain an *investigator* to help gather mitigation. Resentencing counsel obtained the appointment of an investigator to assist him with mitigation. (Exhibit J.) Furthermore, Stetler, who is not an attorney, is not qualified to render opinions regarding the performance or obligations of counsel. Respectfully, this Court should disregard Stetler's affidavit.

raise IAC-trial claim). Therefore, the fact that Doyle did not raise this claim in PCR proceedings did not prejudice Lopez. *See id*.

B. *The underlying claim Lopez argues PCR counsel should have raised is not "a substantial one."*

Lopez was first sentenced to death in 1987 after a sentencing hearing at which he was represented by Joel Brown. Subsequently, Lopez's appellate 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. *State v. Lopez* (*Lopez I*), 163 Ariz. 108, 114, 786 P.2d 959 965 (1990). Thus, the Arizona Supreme Court reversed Lopez's original death sentence and remanded for a new sentencing proceeding. Brown's performance is therefore irrelevant, except to the extent that it informed or shaped the performance of Lopez's resentencing counsel. Lopez's resentencing counsel was Sterling, the attorney who had successfully represented him on appeal.

In complete disregard of these circumstances, Lopez spends over 4 pages of his motion/petition to argue that Brown was constitutionally ineffective at sentencing, but addresses in one paragraph Sterling's performance at resentencing, which is the relevant underlying issue.[6] The record reflects that Sterling's performance was reasonable under the prevailing professional norms of sentencing counsel in Maricopa County in 1990. *See Strickland*, 466 U.S. at 688.

1. <u>Sterling did not render deficient performance</u>.

a. Factual Background.

Mental health expert, Dr. Otto Bendheim.

At the time of the first sentencing, Brown retained a mental health expert, Dr. Otto Bendheim. (Exhibit K.) Dr. Bendheim found no evidence of psychosis,

---

[6] Sterling is now deceased and cannot provide information regarding his investigation or strategy.

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 L, 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 K, 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 L, 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, however, 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.

Because Dr. Bendheim's report gave some support to a mitigation theory of pathological intoxication, Sterling pursued a different strategy than Brown and

submitted the report at Lopez's resentencing proceeding in 1990. (Exhibit M, at 72.) Sterling also presented the videotaped testimony of Dr. Bendheim, in which he tentatively opined that Lopez suffered from pathological intoxication. (*Id*. at 70–71; Exhibit 11, at 30.) Sterling attempted to strengthen the evidence of intoxication that 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. (Exhibit M, at 73; Exhibit 3, at 4; Exhibit N, 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. (Exhibit O, at 19.) This condition, Sterling argued, prevented Lopez from appreciating the wrongfulness of his actions. (*Id*.)

Mental health expert, Dr. M.B. Bayless.

In addition to presenting a strengthened pathological intoxication opinion from Dr. Bendheim, Sterling sought out a more favorable psychiatric opinion than the one Dr. Bendheim offered. Sterling retained Dr. M.B. Bayless to administer tests to Lopez. (Exhibit P; Exhibit 11, at 16.) The fact that Sterling elected not to present Dr. Bayless's psychiatric findings suggests that, like Dr. Bendheim's findings, they were not helpful to Lopez.

Investigation of social history mitigation.

During the first sentencing proceedings, Brown obtained a continuance to present the testimony of Lopez's mother and brother, Frank, but both of them failed to appear at the sentencing hearing despite being advised of the time and location. (Exhibit Q, at 4.) Lopez had expressly opposed Brown subpoenaing his mother and brother or any family members for the sentencing hearing. (*Id*.) Immediately prior to the 1987 sentencing proceeding, Brown addressed the court:

> MR. BROWN: Both people were fully aware of the time [and] 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 objected 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.

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 L, at 4.) Despite the presentence report writer's efforts to obtain information, Lopez's family did not offer any opinion regarding his sentence. (*Id*.)

Because Sterling represented Lopez in his first appeal, he was very familiar with the record. Sterling would have known that, despite requests, Lopez's family had previously failed to offer any information related to Lopez's sentencing, and Lopez had expressly opposed them being subpoenaed to testify on his behalf. (Exhibit Q, at 4; Exhibit L.)

Nonetheless, Sterling investigated social history mitigation with the assistance of a court-appointed investigator. Sterling sought out social history mitigation by issuing subpoenas for, or otherwise requesting, school, DES, CPS, mental health, and other records. (Exhibits J, R.)

Model prisoner mitigation.

Sterling further argued that Lopez had evolved into a model prisoner while incarcerated and thus, should be given leniency. (Exhibit O, at 22.) In support of this mitigation, Sterling presented the testimony of a detention officer. (Exhibit M, at 122.)

Undermining the remaining aggravating factor with expert testimony.

Sterling also focused on undermining the validity of the single remaining aggravating factor. Sterling submitted a sentencing memorandum challenging A.R.S. § 13–703(F)(6), Arizona's especially heinous, cruel, or depraved aggravator, as unconstitutionally vague and overbroad. (Exhibit S.) Eight days *after* Sterling filed his memorandum and approximately 2 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.

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 expert testimony of a medical examiner, Dr. Phillip Keen, and, based on that testimony, argued in his post-hearing sentencing memorandum that the aggravator had not been proven. (Exhibit T, at 1–8; Exhibit U, at 8–38.) 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 sentencing judge's findings.

The sentencing judge found that the murder was especially heinous, cruel, or depraved. (Exhibit V, 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.

(Exhibit O, at 33–34.) The Arizona Supreme Court independently reviewed Lopez's death sentence and affirmed "in similarly forceful terms." *Lopez III*, 630 F.3d at 1209 (citing *State v. Lopez* (*Lopez II*), 175 Ariz. 407, 410–12, 857 P.2d 1261, 1264–66 (1993)).

b. *Argument.*

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. (Exhibit O, at 18.)

Sterling certainly would have been aware that Lopez and his family were uncooperative regarding presenting family background mitigation. The difficulty in obtaining statements from family members is further demonstrated by the fact that declarations from family members were not obtained until 9 to 16 years *after* Sterling represented Lopez. (Exhibits 17–31.) In fact, Lopez and his mother did not appear to have a particularly close relationship at the time of his resentencing. 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 him to live with her. (Exhibit L, at 6.) When Frank Lopez testified at the sentencing hearing of another brother, George, he described the family as "not that close." (Exhibit W, at 27.)

The declarations from family members describing a dysfunctional childhood that now exist were simply not available at the time of Lopez's resentencing. 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 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 L, at 7.) This information from Lopez himself is something Sterling would have been aware of when he prepared for Lopez's resentencing.

Nonetheless, Sterling obtained the appointment of an investigator to help him conduct a mitigation investigation. (Exhibit J.) Sterling subpoenaed or otherwise obtained school, medical, social service, mental health, police, and correctional records. (Exhibit R.)

Sterling also retained two mental health experts. 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. It was reasonable for Sterling to rely on the opinions of these experts. *See Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 2008). Moreover, 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 psychological problems, mental illness, or low IQ. 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 K, at 5; Exhibit L, at 6.)

Although little evidence of mitigation was available, Sterling presented: (1) Dr. Bendheim's opinion regarding the tentative diagnosis of pathological

intoxication; (2) pre-trial statements of witnesses to support evidence that Lopez was intoxicated on the night of the murder; (3) the testimony of a detention officer to support mitigation of good prisoner behavior, and; (4) the testimony of a medical examiner to support arguments that the single aggravating factor had not been proven. Sterling also pursued: (1) a psychiatric opinion from Dr. Bayless, and; (2) extensive social history records.

Sterling presented what was available. He did not have all the years habeas counsel later had to persuade Lopez's relatives to provide declarations about Lopez's family history. Sterling's performance was reasonable under the prevailing professional norms of sentencing counsel in Maricopa County in 1990. *See Strickland*, 466 U.S. at 688.

2. <u>Even assuming Sterling rendered deficient performance, there was no prejudice.</u>

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 L, at 7; Exhibit X, at 5–6.) Thus, to the extent that Sterling failed to present this evidence, the sentencing judge was aware that Lopez was brought up in poverty and with an absent father, and the judge considered this before he resentenced Lopez to death.

Moreover, although a defendant is not required to establish a causal nexus between mitigation and the murder, "the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence." *State v. Newell*, 212 Ariz. 389, 405, ¶ 82, 132 P.3d 833, 849 (2006). Thus, a dysfunctional family history "is usually given significant weight as a mitigating factor only when the abuse affected the defendant's behavior at the time of the crime." *State v. Mann*, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997).

Additionally, the mitigating weight of a dysfunctional family history lessens the farther removed a defendant is from the dysfunctional family environment. *See State v. Prince*, 226 Ariz. 516, 541–42, ¶¶ 109–112, 250 P.3d 1145, 1170–71 (2011) (impact of childhood marked by alcoholic and abusive father, living on the run from law enforcement, "really, really severe poverty," and repeated sexual abuse was attenuated where defendant was *26-years-old* at the time of the murder). Here, no evidence explains how Lopez's unstable childhood led to the rape and murder of Essie Holmes, and Lopez was 24-years-old at the time of the crime. *See id; Newell*, 212 Ariz. at 406, ¶ 87, 132 P.3d at 850. Thus, the additional family history information Lopez now proffers is not entitled to significant weight. *See State v. Pandeli*, 215 Ariz. 514, 532, ¶ 72, 161 P.3d 557, 575 (2007).

In addition, Sterling could not change the facts of the murder. This murder was so brutal that the sentencing judge remarked that in all his professional experience, he had never seen a case "as bad as this one." (Exhibit O, at 33–34.) Considering the facts and circumstances of the crime, it is unsurprising that, despite Sterling's diligence, the sentencing judge resentenced Lopez to death. Based on the extremely weighty aggravation, the mitigation Sterling presented, and the mitigation otherwise presented to the sentencing judge, there is no reasonable probability that the additional information about Lopez's childhood would have changed the sentencing outcome. *See Strickland*, 466 U.S. at 694.

V. CONCLUSION.

Lopez's motion/petition is simply a successive habeas petition raising a claim previously presented. As such, it should be dismissed.

To any extent it can be considered a Rule 60 motion, Lopez has failed to demonstrate extraordinary circumstances to warrant reopening the judgment denying his first habeas petition. *Martinez* does not create extraordinary circumstances.

If this Court allows Lopez to reopen the judgment, it should find that Lopez has failed to establish cause to overcome procedural default permitting merits review of his claim. Lopez has failed to establish that his PCR counsel was ineffective for omitting a single PCR claim or that the underlying claim, that resentencing counsel was constitutionally ineffective, is substantial.

RESPECTFULLY SUBMITTED this 20th day of April, 2012.

THOMAS C. HORNE
ATTORNEY GENERAL

/S/
SUSANNE BARTLETT BLOMO
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION SECTION
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2012, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

Kelly J. Henry
Office of the Federal Public Defender
Capital Habeas Unit
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805

Denise I. Young
Attorney at Law
2930 North Santa Rosa Place
Tucson, Arizona 85712

Attorneys for Petitioner

s/
E. Leyva

2661461

LIST OF EXHIBITS

Exhibit A. Memorandum

Exhibit B. Memorandum of Decision and Order

Exhibit C. U.S. District Court Order filed 3/31/00

Exhibit D. Motion for Discovery

Exhibit E. Motion for Extension of Time

Exhibit F. Maricopa County Superior Court Minute Entry filed 4/5/95

Exhibit G. Reply to Response to Petition and Supplemental Petition for PCR

Exhibit H. Motion for Rehearing

Exhibit I. Petition for Review

Exhibit J. Maricopa County Superior Court Minute Entry filed 4/2/90

Exhibit K. Dr. Bendheim Report

Exhibit L. Pre-Sentence Report (1987)

Exhibit M. Reporter's Transcript dated 7/13/90

Exhibit N. PCR exhibit E

Exhibit O. Reporter's Transcript dated 8/3/90

Exhibit P. Maricopa County Superior Court Order filed 6/20/90

Exhibit Q. Reporter's Transcript dated 6/25/87

Exhibit R. Subpoenas

Exhibit S. Defendant's Pre-Sentence Memorandum

Exhibit T. Defendant's Post-Hearing Memorandum

Exhibit U. Reporter's Transcript dated 7/13/90

Exhibit V. Special Verdict

Exhibit W. Reporter's Transcript dated 4/25/86

Exhibit X. Pre-Sentence Report (1990)