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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SAMUEL V. LOPEZ,	)	**CAPITAL CASE**
	)	**EXECUTION DATE: MAY 16**
Petitioner,	)	
	)	CIV-98-0072-PHX-SMM
	)	
vs.	)	REPLY TO RESPONSE TO
	)	MOTION FOR RELIEF FROM
TERRY STEWART, et al.,	)	JUDGMENT PURSUANT TO
	)	FED. R. CIV. P. 60(b) OR IN THE
Respondents.	)	ALTERNATIVE PETITION FOR
	)	WRIT OF HABEAS CORPUS

Respondents admit that this Court's holding that IAC Of PCR counsel cannot constitute cause is now legally wrong. Respondents admit that *Martinez v. Ryan,* 132 S.Ct. 1309 (2012), is new law that for the first time allows a habeas petitioner to overcome procedural default by proving that his PCR counsel was

ineffective. Respondents also admit that prior to March 20, 2012, Petitioner could not have prevailed on an IAC of PCR counsel cause allegation. Yet, Respondents somehow blame Petitioner for not prevailing in this Court on the basis of law that did not yet exist. This contention is absurd, perverse and inequitable.

I. RESPONDENTS MISUNDERSTAND *GONZALEZ V. CROSBY* AND ITS APPLICATION HERE[1]

Petitioner's 60(b) Motion seeks relief from this Court's procedural ruling which *Martinez* clearly shows is error. This is exactly the type of case that the Court in *Gonzalez* held was proper for a 60(b) motion. In *Gonzalez*, the Supreme Court held:

> [A] Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. A motion that, like petitioner's, challenges only the District Court's failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to § 2244(b)(3).

Gonzalez v. Crosby, 545 U.S. 524, 538 (U.S. 2005).

[1] Petitioner alleged alternatively that his motion under Rule 60(b) be treated as an initial habeas application under *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), *Slack v. McDaniel,* 529 U.S. 473 (2000), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). Respondents failed to address these legal arguments. As such they are waived. Even if this Court were to find that Petitioner cannot proceed under either Rule 60(b)(6) or 60(b)(5), for all of the reasons stated in his previous filing, this Court should allow Petitioner to proceed on his claims as an initial petition.

Here, Petitioner is challenging this Court's "failure to reach the merits" of IAC of Sentencing Counsel claim.

Respondents ignore that this very issue was decided adversely to their position by this district court in *Moorman v. Schriro*, 2012 U.S.Dist. LEXIS 24426 (Feb. 27, 2012), which presented a similar claim, though pursuant to *Maples v. Thomas*, 132 S.Ct. 912 (2012).

> In *Gonzalez*, the Court explained that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim on the merits." *Id*. at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id*. at n. 4. The Court further explained that a Rule 60(b) motion does not constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id*.
>
> Such is the case here. This Court found procedurally barred Petitioner's claim alleging ineffectiveness from the failure to retain experts at sentencing; it did not rule "on the merits" of the claim. Thus, pursuant to *Gonzalez*, this Court has jurisdiction to consider Petitioner's Rule 60(b) motion, free of the constraints imposed by 28 U.S.C. § 2244(b) upon successive petitions. See *Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007) (finding § 2244(b) inapplicable where Rule 60(b) motion sought to reopen judgment on procedurally barred claim).

Moormann v. Schriro, 2012 U.S. Dist. LEXIS 24426, 5-6 (D. Ariz. Feb. 27, 2012).

Similarly, another district court faced with this exact argument has found that such 60(b) motions are not second or successive petitions.

> In this case, the petitioner is seeking relief from the application of a procedural bar that prevented this court from reviewing his ineffective assistance of trial counsel and appellate counsel claims on the merits. In *Gonzalez*, the Court specifically exempted challenges to the application of a procedural default from the types of Rule 60(b) challenges that would be considered a successive habeas petition. 545 U.S. 524, 532 n.4. Therefore, the Rule 60(b) motion in this case is not a successive petition.

Greene v. Humphrey, No. 1:01-CV-2893-CAP, Docket Entry No. 170 (N.D. GA April 19, 2012); *See also Adams v. Thaler*, No. 5:07-cv-180, Docket Entry No. 45 (E.D. Texas April 23, 2012)(granting Stay of Execution to consider 60(b) motion based on *Martinez*).

> A motion that seeks to add a new ground for relief, as in *Harris, supra*, will of course qualify [as a second or successive petition]. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.

Gonzalez v. Crosby, 545 U.S. 524, 532 (U.S. 2005) (emphasis in original).

The Fifth Circuit has likewise rejected a similar argument. In *Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. Tex. 2007), the Fifth Circuit wrote, “Significantly, the [*Gonzalez*] Court then explained that there is no new habeas claim ‘when [a petitioner] merely asserts that a previous ruling which precluded a merits determination was in error -- for example, a denial for such reasons as

failure to exhaust, procedural default, or statute-of-limitations bar.'" 504 F.3d at 526, quoting, *Gonzalez* at 545 at 532 n.4. In *Ruiz*, the habeas petitioner initially raised an unexhausted IAC claim which was defaulted because it had not been presented in state court. *Ruiz* continued through his first round of habeas and was denied all relief and certiorari. *Ruiz* went back to state court and exhausted his IAC claim for the first time. After the State court denied that claim on the merits, *Ruiz* returned to federal court and filed a Rule 60(b) motion arguing that the basis for the previous procedural default ruling had been removed. The Fifth circuit agreed. It held:

> The federal district court's previous denial of Ruiz's claim was not "on the merits." That is, the district court did not rule that there were no grounds entitling Ruiz to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d), but rather denied relief based on procedural default and failure to exhaust, two rulings specifically identified by the Court as rulings precluding a merits determination. So the district court had jurisdiction to consider Ruiz's Rule 60(b) motion, free of the jurisdictional constraints of AEDPA upon successive petitions. In short, Ruiz is pursuing his first federal petition with its claim that his trial counsel was ineffective in failing to investigate and otherwise develop a mitigation case, a "Wiggins" claim.

Ruiz v. Quarterman, 504 F.3d 523, 526 (5th Cir. 2007).

Of course, the granting of a Rule 60(b)(6) petition will lead to the consideration of the merits of Petitioner's claim, but that is not the basis of the motion. The basis of the motion is that the Court's decision on procedure is wrong – which is not debated here. This is a proper vehicle for 60(b)(6) motion.

II. IAC OF PCR COUNSEL IS NOT WAIVED; *MARTINEZ* IS AN EXTRAORDINARY CIRCUMSTANCE.

Contrary to Respondents insinuation, *Gonzalez* did NOT hold that a change in the law could never create extraordinary circumstances justifying relief under Rule 60(b)(6).[2] While it is true that the defendant in *Gonzalez* was not able to establish extraordinary circumstances under the facts and the law in his case, the circumstances here are far different from those present in *Gonzalez*.

The change in procedural law announced by *Martinez* is extraordinary. *Martinez* changed longstanding and well-entrenched habeas procedural law that was grounded in a previous opinion from the United States Supreme Court. "Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas." *Coleman v. Thompson*, 501 U.S. 722, 757 (U.S. 1991). That was the procedural law in habeas from 1991 to 2012. *Martinez* is a major departure from *Coleman* and represents a paradigm shift.

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[2] *See Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987)(Warden obtained 60(b)(6) relief for change in the law which undermined decision granting habeas relief.

Respondents' allegation that undersigned counsel[3] has not been diligent and abandoned the IAC of PC counsel defense to procedural default brazenly ignores the litigation history of this case and Respondents' role in sandbagging its procedural defense for years, waiting until its last pleading to raise its failure to exhaust argument.

In its order appointing counsel, this Court also set forth the procedures Petitioner and Respondent must follow: After Petitioner filed his "finalized petition" Respondents were ordered to file an Answer Re: Procedural Status of Claims. The Court directed the Answer to address the procedural status of all claims raised in the petition and to specifically identify which claims Respondents alleged were procedurally barred. The Court explained the importance of its established procedure:

> The Court intends this briefing on the procedural status of the claims **to be the sole briefing on all issues of exhaustion and procedural default** necessary for the Court to determine which claims will be reviewed on the merits.

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[3] Respondents seem to suggest that Petitioner is represented by the same office as counsel for Roger Scott. Response at p. 9, citing a March 31, 2000 Order. Even if that were true, the significance of such is not apparent. But it is not true. Mr. Scott was represented in this Court from 1997-2005 by Carla Ryan and Robert Hirsch. *Scott v. Schriro*, Case No. 97-1554, Docket Entry Nos. 2, 8. The FPD was appointed on appeal. *Id*. Docket Entry No. 170. Denise Young has been in private practice since 1999. Kelley Henry works for the Federal Public Defender for the Middle District of Tennessee. As this Court knows, each Federal Public Defender's Office is independent of the other. Ms. Henry has not worked for the Federal Public Defender in Arizona since March of 2000. The procedural posture of Petitioner's IAC at Sentencing Claim was not challenged until 2008.

Order, p. 4 (Ariz.D.Ct. Jan. 22, 1998)(emphasis added). In Its March 11, 1999, Answer Respondents plainly stated that the IAC of sentencing counsel claims "have been properly exhausted." Answer Re: Procedural Status of Claims, Docket Entry No. 37, p. 12. Thus, there was no procedural briefing ordered on the issue of IAC Sentencing Counsel because of Respondents' actions.

Eight years later, Respondents changed their mind. Despite the previous explicit waiver of exhaustion, this Court denied Lopez relief, holding that the claim presented in habeas was different from the claim presented in state court. Docket Entry No. 200, pp. 13-15. The Court also held, without allowing for further briefing, that the allegations should have been presented by PCR counsel, but citing *Coleman v. Thompson*¸ because Petitioner had no right to counsel in post-conviction, IAC of PCR counsel "cannot serve as cause." *Id*.[4]

Respondents' argument that Petitioner should now be prevented from raising his IAC of PCR counsel against this record and the entrenched state of the law from 1991-2012 is refuted by *Panetti v. Quarterman*, 551 U.S. 930 (2007). "Instructing prisoners to file premature claims, particularly when many of these

[4] Although the Court of Appeals agreed that Respondents "conceded that Lopez's ineffective assistance of counsel claim was 'properly exhausted," the Court decided it "need not" decide whether the State waived exhaustion because Lopez "failed to present any of the evidence in support of his expanded claim in state court," and now is "separately barred from relief…." *Lopez v. Ryan*, 630 F.3d 1198, 1201, citing 28 U.S.C. §2254(e)(2).

claims will not be colorable even at a later date, does not conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'" *Panetti v. Quarterman*, 551 U.S. 930, 946 (U.S. 2007) quoting *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (per curiam) (internal quotation marks omitted)).

The Ninth Circuit opinion in this case was decided on January 20, 2011. *Lopez v. Ryan*, 630 F.3d 1198 (9th Cir. 2011). Petitioner filed a Petition for Rehearing and Suggestions for Rehearing *En Banc* on February 10, 2011, which was denied on March 30, 2011. *Lopez v. Ryan*, No. 08-99021, Order. Exhibit 35. The United States Supreme Court did not grant certiorari in *Martinez v. Ryan* until June 6, 2011. *See Martinez v. Ryan*, Supreme Court Docket No. 10-1001. Petitioner then included a citation to *Martinez* in his Petition for Writ of Certiorari. See Exhibit 36, Petition for Writ of Certiorari.[5]

Petitioner cannot be faulted for failing to divine the significant change in the law brought about by the *Martinez* decision. The Ninth Circuit held as much in *Moormann*, who alleged attorney abandonment under *Maples v. Thomas, supra*, in a 60(b) motion. There the Court held that counsel could not have brought the claim earlier. "Moormann contends that he could not previously have argued

[5] The Petitioner in *Gonzalez* did not rely on the pending decision in *Artuz v. Bennett* in his Petition for Writ of Certiorari.

"abandonment," because the Supreme Court only recently recognized it as establishing cause for default, and **in this he is correct**." *Moormann v. Schriro*, 672 F.3d 644, 647 (9th Cir. 2012)(emphasis added).[6]

In *Planned Parenthood Cincinnati Region v. Taft* (hereafter *Taft*), the Sixth Circuit considered a similar situation of late arising law.

On May 23, 2005, the Supreme Court granted certiorari in *Ayotte v. Planned Parenthood of Northern New England* (hereafter *Ayotte*). (See Supreme Court Docket # No. 04-1144). Over one month after the *Ayotte* certiorari grant, the Planned Parenthood parties filed their final briefs with the Sixth Circuit. (See Sixth Circuit Court of Appeals Docket # 04-4371).

On December 7, 2005, the Sixth Circuit heard argument in *Taft*. (See Sixth Circuit Court of Appeals Docket # 04-4371). Over one month later, the Supreme Court decided *Ayotte*. See *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320 (2006). When the Appellants in the *Taft* case sought to take advantage of law *Ayotte* established, Appellees argued that the *Taft* appellants waived their argument by not raising it earlier. The Sixth Circuit rejected that argument and considered the late-arising *Ayotte* argument, reasoning that:

> (Appellants) can hardly be faulted for failing to raise an argument before there was legitimate legal support for such an argument. Regarding an argument as waived under such circumstances would be

[6] The Court went on to find that *Moormann* had not established that his attorney had abandoned him. *Id*., p. 647.

> both inequitable and counterproductive. *Hormel v. Helvering*, 312 U.S. 552, 557–59, 61 S.Ct. 719, 85 L.Ed. 1037 (1941) (noting an efficiency rationale for addressing waived issues where intervening case authority might change the result). Parties would be forced to either litter their pleadings with every argument which might conceivably be adopted during the pendency of a proceeding or forgo the benefit of any new relevant case law.

Planned Parenthood of Cincinnati Region v. Taft, 444 F.3d 502, 516 (6th Cir. 2006); *see also Sherwood v. Prelsnik*, 579 F.3d 581, 588-89 (6th Cir. 2009).

The circumstances in this case are more compelling than those present in *Taft*. Unlike the change of law at issue in *Taft*, *Martinez* not only establishes relevant law, it overturns twenty years of consistent practice in every circuit, including this one, rejecting the argument *Martinez* now legitimizes.

As the Supreme Court recognized in *Hormel*

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Hormel v. Helvering, 312 U.S. 552, 557 (1941). In fact, “Federal appellate courts often forgive a litigant's failure to raise an issue seasonably **when at that time it would have been futile to do so**, but a substantial change in or clarification of the law occurs in the litigant's favor after final judgment in the trial court.” *United States v. Byers*, 740 F.2d 1104, 1132 (D.C. Cir. 1984) (emphasis added). In this

case procedure should give way to fairness and equity, and this Court should decline Respondents' invitation to consider Petitioner's Martinez argument waived.

Rule 60(b) exists to do equity. "Rule 60(b) gives the court a grand reservoir of equitable power to do justice in a particular case." *Manzanares v. City of Albuquerque*, 628 F.3d 1237, 1241 (10th Cir. 2010); *Phelps v. Alameida*, 569 F.3d 1120, 1135 (Rule 60(b)(6) gives courts the powers to vacate judgments to accomplish justice.) Respondents do not deny that the equitable concerns of *Martinez* are present in this case where **no court has ever ruled on the merits** of Petitioner's IAC of sentencing counsel claim due to a now erroneous procedural ruling. *Martinez v. Ryan*, 132 S. Ct. 1309 (U.S. 2012) ("And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.") An erroneous procedural ruling stands between life and death. The reliability of Petitioner's capital sentence is ultimately at issue. There can be no more extraordinary circumstance.[7]

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[7] Rule 60(b)(5) may also provide grounds to reopen the Court's judgment.

> Federal Rule of Civil Procedure 60(b)(5) permits a party to obtain relief from a judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable." Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests, but the Rule provides a means by

The Fifth Circuit in *Ruiz*, explained the equities thusly:

> The "main application" of Rule 60(b) "is to those cases in which the true merits of a case might never be considered." Thus, although we rarely reverse a district court's exercise of discretion to deny a Rule 60(b) motion, we have reversed "where denial of relief precludes examination of the full merits of the cause," explaining that in such instances "even a slight abuse may justify reversal." This lesser standard of review has been applied most liberally to motions to re-open default judgments, but has also been extended where a judgment on the merits was pretermitted by strict time limits in a bankruptcy court's local rules. And as we have explained, no federal court has considered the merits of Ruiz's constitutional claims. We say only that **a procedural hurdle was erroneously placed in Ruiz's path, that courts universally favor judgment on the merits, and that the underlying case here is sufficiently "significant [and] potentially meritorious" that it should not be cut off at its knees.** Equity

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> which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest."

Horne v. Flores, 557 U.S. 433 (U.S. 2009)(citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). Courts have applied Rule 60(b)(5) to habeas cases.

> The Court likewise finds that relief from judgment is warranted under Rule 60(b)(5). Prospectively, it would be inequitable to deny Petitioner's request for relief from judgment when his habeas petition under case number 07-12724 was dismissed only because this matter remained pending at the time. To deny relief would compromise Petitioner's opportunity to challenge the legality of his conviction on the merits.

Williams v. Wolfenbarger, 2008 WL 108864 (E.D.Mich.,2008). See also *Harvest v. Castro*, 531 F.3d 737 (9th Cir. 2008)(applying 60(b)(5) to order granting habeas relief).

would not deny Ruiz a hearing on the merits.

Ruiz, 504 at 531-532 (emphasis added).

Other courts have similarly held that extraordinary circumstances exist pursuant to Rule 60(b)(6) and *Gonzalez* where a subsequent change in procedural law removed the procedural bar that had previously been found in the case. For example, in *Abdur'Rahman v. Bell*, Sixth Circuit Case Nos. 02-6547/6548, the Court held that a subsequent rule change in Tennessee law which relieved a petitioner of the burden of appealing a claim from the intermediate appellate court to the Tennessee Supreme Court in order to exhaust the claim for review and making the rule retroactive, qualified as an appropriate motion under Rule 60(b)(6). Exhibit 36, Court of Appeals Order. The case was remanded to the District Court who ruled that the change in the law was in fact an extraordinary circumstance and reopened the case for reconsideration of the previously barred prosecutorial misconduct claim. Exhibit 37, District Court Order.

III. RESPONDENTS MISUNDERSTAND THE OBLIGATIONS OF POSTCONVICTION AND SENTENCING COUNSEL.

A. Standard for Determining IAC of PCR counsel

Respondents fundamentally misread *Martinez* and the standard this Court applies in evaluating PCR counsel's performance. The opinion is clear. The court is to use the same familiar test in *Strickland v. Washington*:

> where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U. S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez v. Ryan, 132 S.Ct. 1309, 1318-1319 (U.S. 2012).

So, this Court must first decide did the PCR lawyer fail to raise the claim. The answer to that is not in dispute. He did. As a result, this claim has never been adjudicated on the merits by any court. The court must then ask, whether the failure to raise the claim fell below prevailing professional norms and if so was petitioner prejudiced. The prejudice inquiry is whether the underlying claim has "some merit." For that inquiry, the Court uses the COA standard as explained in *Miller-El*, reasonably debatable among jurists of reason.

Petitioner has provided this Court with sworn affidavits from Russell Stetler, Statia Peakheart, Robert Doyle, and Joel Brown, and supporting documents which establish that PCR counsel's performance did fall below prevailing professional norms where he failed to conduct his own mitigation investigation and eschewed the assistance of experts in the field who provided him with valuable mitigation information and where he misled the Court on the cooperativeness of the client's family, making it appear to the Court that further investigation would be futile.

Moreover, Petitioner has provided this Court with sworn statements and supporting documents that support a substantial claim for ineffective assistance of sentencing counsel. Indeed, first sentencing counsel Joel Brown, and PCR counsel Robert Doyle, have sworn that this evidence is evidence that they would have presented in sentencing and PCR if they had known of it.[8] Importantly, Respondents do not dispute the contents of the reports. The facts as pled by Petitioner should be treated as true for purposes of these proceedings.

B. Prevailing Professional Norms

Petitioner provided this Court with a detailed affidavit from a nationally recognized mitigation specialist with thirty years of experience and who has been hired by the Administrative Office of the U.S. Courts to train lawyers and their investigators in the area of mitigation investigation, who provides this court with the baseline for determining the prevailing professional norms for post-conviction counsel in 1994-1997. Respondents' only response is to tell the court to ignore the affidavit by citing to a case that does not support their position. Response at 14, n. 5. Respondents tell this Court that *Earp v. Cullen*, 623 F.3d 1065 (9th Cir. 2010), stands for the proposition that expert testimony on the prevailing professional norms is irrelevant. *Earp* does not say that. The IAC expert in *Earp* was allowed

[8] George Sterling's testimony was lost when PCR counsel failed to raise the claim and Mr. Sterling has since passed away. But the fact that Doyle has sworn that he would have presented this evidence and testimony in the PCR if he had known of it suggests that it was not in Sterling's files.

to testify "regarding what competent trial counsel in a death penalty case should have done in 1991." 623 F.3d at 1075. The only limitation in *Earp* was as to the expert's testimony on the ultimate issue. Even then, the opinion does not say that such opinion testimony is irrelevant, it merely finds that it was not an abuse of discretion to limit the opinion testimony.

Mr. Stetler has been repeatedly admitted as an expert witness in the area of mitigation and where there is a claim that rests on determining professional norms, who better than to provide that information than an expert who has worked on literally hundreds of capital cases, most of which did not result in a death verdict. Mr. Stetler is not offered as a legal expert, nor did he say that a lawyer was required to hire a mitigation investigator. But, the lawyer is and was required to either do the investigation himself or hire someone who is qualified to do it.

Respondents similarly ignore the affidavit of Statia Peakheart who worked on Mr. Lopez's case on a volunteer basis in her role as an attorney with the Arizona Capital Representation Project ("ACRP"). Since its inception in 1989, ACRP has been educating Arizona practitioner's on the prevailing professional norms in capital representation.

> The sole mission of the Arizona Capital Representation Project ("Project") is to improve the quality of representation afforded to capital defendants in Arizona. The Project is the only legal aid organization in Arizona assisting capital defendants at all legal stages (from pretrial through clemency), as well as providing direct, often

> pro bono, legal representation to Arizona death row inmates in their state and federal appeals.
>
> Since 1989, the Project has provided assistance in some form to most inmates on Arizona's death row and has directly represented dozens of death-sentenced prisoners. The Project provides free consulting (including client relations, issue identification, legal research, drafting pleadings, developing and distributing general legal materials, hosting moot courts in preparation for oral arguments, and referring appropriate expert assistance) to capital defendants and their lawyers. In addition, **the Project hosts free legal training seminars, which provide capital defense lawyers with the education and tools necessary for competent representation**. The Project also provides community education about Arizona's death penalty.

http://azcapitalproject.org/about/ (last visited April 22, 2012) (emphasis added).

Ms. Peakheart, who Mr. Doyle only allowed to work on the case for three months, understood the professional norms for competent post-conviction litigation and was trying to educate Mr. Doyle.[9] Ms. Peakheart's affidavit clearly outlines the tremendous amount of work that she was able to accomplish in those three short months. Ms. Peakheart "found Mr. Lopez to be cooperative and helpful." Docket Entry No. 238, Exhibit 4, p. 2. She also found Mr. Lopez to be naïve in his dealings with his lawyers and to not possess the understanding necessary to know how to assist his lawyers. "It appeared to me that I was the first lawyer to explain clearly to Mr. Lopez what a life history or a mitigation investigation is and how it

[9] Respondents do not deny that Mr. Lopez instructed Mr. Doyle to accept the assistance of the ACRP. Likewise, they do not deny that Mr. Lopez instructed Mr. Doyle to request more time so that the investigation could be competently conducted.

relates to the sentencing process in a death penalty case." *Id.* Mr. Lopez put no restrictions on Ms. Peakheart and was cooperative. *Id.* Similarly, Ms. Peakheart found the family members to be cooperative and willing to help. *Id.,* p. 5.

Respondents do not dispute that Robert Doyle never attempted to interview the Lopez family. Indeed he swore under oath that he never did. Docket Entry 237, Exhibit 3. Yet, the state continues to argue that the family was unwilling to sign affidavits in post-conviction when the undisputed sworn testimony before this Court proves the exact opposite:

> 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.

Docket Entry No. 238, Exhibit 4, p. 5.

Ms. Peakheart explains that with all of her experience as a capital practitioner, "Mr. Doyle's representation stands out as one of the worst cases of ineffective lawyering I have ever seen – particularly since we had already done so much of the issue-spotting, mitigation/life history investigation and record-gathering for him." *Id.*, p.7.

Respondents defend Doyle's severing of his relationship with ACRP as if that absolved him of his professional duty to investigate the case. The responsibility was Doyle's. He admits that the evidence presented in this Court is the sort of evidence that he would have provided in post-conviction. Docket Entry

No. 237, Exhibit 3, p. 2. Doyle was instructed by Mr. Lopez to accept the help of ACRP and to seek additional time. He rebuked those instructions, yet conducted no investigation of his own.

Respondents claim that Doyle had spoken with Petitioner's previous lawyers. Response, p. 10. Respondents ignore that Mr. Doyle does not remember ever speaking to George Sterling about the case, but does remember speaking to Joel Brown. Exhibit 3, p. 1. Joel Brown has sworn "I do not remember ever speaking to [Doyle] about Mr. Lopez's case." Docket Entry No. 239, Exhibit 14.

C. The Prejudice

Respondents' argument, Response, p. 20, that George Sterling was not ineffective because he a) allegedly knew that the family was uncooperative; b) tried to subpoena some records; and c) challenged the single aggravator, ignores (and misrepresents) the facts and the numerous Supreme Court cases which reject similar arguments.

First, the Supreme Court has never held that if a trial lawyer presents at least some mitigation he is absolved from his obligation to conduct a full investigation.

> **We have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented[.]** True, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker, *Strickland, supra,* at 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674. **But we also have found deficiency and prejudice in other cases in which counsel presented**

> **what could be described as a superficially reasonable mitigation theory during the penalty phase**. *E.g., Williams, supra*, at 398, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (remorse and cooperation with police); *Rompilla v. Beard,* 545 U.S. 374, 378 (2005) (residual doubt). We did so most recently in *Porter v. McCollum*, 558 U.S. ___, ___, 130 S. Ct. 447, 449 (2009) (*per curiam*), where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief, *id*., at 453-54, 130 S. Ct. 447, 175 L. Ed. 2d 398. Not only did we find prejudice in *Porter,* but-bound by deference owed under 28 U.S.C. § 2254(d)(1) --we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed Porter's claim. *Porter, supra*, at ___, 130 S. Ct. at 454-55.

Sears v. Upton, 130 S. Ct. 3259, 3266 (2010) (internal record citations and parallel citations omitted) (emphasis added).

Second, Sterling's investigation was clearly well below professional norms. The State seeks to blame Petitioner and his family for counsel's failure to investigate. Even if the family was uncooperative, which is in dispute, the blame is misplaced. Close-knit families with two supportive and functional parents rarely have children who end up charged with capital murder. The fact that the family wasn't knocking on counsel's door is a "red flag" that there are family matters that need to be investigated. The Lopez family is extremely limited, impaired and disenfranchised. They have no understanding of the law or how a capital murder trial or post-conviction works. It is the lawyer's professional obligation and duty to make those contacts and to conduct that sensitive investigation. These

interviews tread on areas of trauma and shame that are very difficult for these families to reveal to total strangers. That is why lawyers often employ mitigation experts to help them with this necessary investigation. It is the rare family member who will tell a lawyer or investigator about her multiple rapes by her husband, how he threatened her life and the lives of her children, how he poured boiling water over his own son, how he would break into the house like a character out of a Stephen King novel, or how he would drink bleach in front of his children—all acts that happened in the Lopez family home. It belittles the mitigation here to describe this family as dysfunctional, and it is unfair to blame them for not knowing how to traverse the system to obtain the help they so desperately needed. Had Sterling investigated, as he was obligated to do, he would have discovered the facts Lopez presented here supporting key mitigating evidence and a sentence less than death. Contrary to Respondents' allegation that only "little evidence of mitigation was available," Response, p. 21, the facts demonstrate powerful mitigating evidence was available had Sterling knocked on Lopez's family's door, and met his neighbors, friends and others who knew Lopez and his family.

Similarly, the presentence report describing the family as poor is hardly a sufficient substitute for the life-threatening, abusive and neglectful conditions in which the Lopez family lived. The presentence report writer is not the defense investigator. "In *Wiggins v. Smith*, 539 U.S. 510, 524, 525 (2003), we held counsel

‘fell short of . . . professional standards’ **for not expanding their investigation beyond the presentence investigation report** and one set of records they obtained, particularly "in light of what counsel actually discovered" in the records.” *Porter v. McCollum*, 130 S. Ct. 447, 453 (U.S. 2009)(emphasis added).

There is no evidence that any lawyer found the family to be uncooperative. Joel Brown made one phone call to one brother. Brown admits he had no concept, much less an understanding of mitigation. According to Statia Peakheart’s sworn statement, she was the first lawyer to have any meaningful contact with the family. Her affidavit is supported by the families’ declarations. All of the lawyers’ affidavits describe Mr. Lopez as cooperative, helpful, and likeable. No lawyer has ever said that Mr. Lopez placed any restrictions on their investigation.

Moreover, use of such an excuse for failing to conduct the thorough investigation needed, and required, was explicitly rejected in *Rompilla*.

> Rompilla's own contributions to any mitigation case were minimal. Counsel found him uninterested in helping, as on their visit to his prison to go over a proposed mitigation strategy, when Rompilla told them he was "bored being here listening" and returned to his cell. To questions about childhood and schooling, his answers indicated they had been normal, save for quitting school in the ninth grade. There were times when Rompilla was even actively obstructive by sending counsel off on false leads.

Rompilla v. Beard, 545 at 381 (record citations omitted).

Respondents try to draw some negative inference by the date of the family declarations, as if that proves they could not have been obtained earlier.

Respondents ignore the sworn statements that Peakheart had only worked on the case for three months before Doyle broke ties with ACRP. Respondents also ignore Doyle's inexplicable inaction after he terminated ties with Peakheart and the Project, apparently deciding instead to conduct his own investigation. But Doyle NEVER spoke to the family. It was only after federal counsel were appointed that the key investigation the law requires, and Doyle failed to undertake, picked up from where Peakheart (not Doyle) had left off. And, it was the course of the federal litigation, together with the constant interference of ADC in allowing access to the client, that alone determined the speed in which the declarations were obtained. Nothing about the date of the declarations is relevant to the ability of PCR or sentencing counsel to investigate and obtain the facts and social history information supporting a sentence less than death.

Moreover, the investigative "efforts" put forth by Sterling were meager at best, and ineffective. As an initial matter, Respondents suggest that Sterling did conduct an investigation and tries to insinuate that it was the same investigation as the ACRP conducted. A comparison of Respondents' Exhibit R and Petitioner's Exhibits 4, 5, 6, 8, 9, and 15-30 belie this statement.

Petitioner's Exhibits show records obtained on all members of Sammy's family which were valuable to developing the mitigation themes and leading to an accurate diagnosis of Post-Traumatic Stress Disorder, as well as accompanying

dissociative episodes, and neurocognitive damage. No neuropsychological evaluation was performed prior to federal habeas.

Respondents' Exhibit R indicates that Sterling only sought a limited number of records on Sam Lopez, and some subpoenas were sent to places that would clearly not have records on Mr. Lopez. As an example, two of the twelve subpoenas requested records from Peoria Schools. Petitioner did not attend Peoria Schools. Petitioner attended the Murphy School District in Phoenix where he was tested in the 7th grade as reading at the 3rd grade level. Exhibit 33. Such a report is a "red flag" that should be followed up on by competent counsel. While it appears that Sterling knew he should get medical records, he failed to subpoena the hospital Petitioner actually went to, Memorial. Had he done so, he would have discovered that Petitioner was seen in the ER with breath that smelled of model airplane glue and at another time he was seen in the ER disoriented. Exhibit 34. These reports are also red flags that should have been followed up on by counsel. Petitioner freely admitted to sniffing glue and huffing paint--substances that are known to cause brain damage, yet Sterling did not follow up that important information. Furthermore, there is no evidence that any of the subpoenas were actually complied with. And, Sterling subpoenaed documents relating only to Sammy Lopez, not to his father, mother, or siblings. It was well established at the time of trial that a competent mitigation investigation takes into account the

records of the entire family. Exhibit 9; Gary Goodpaster, *the Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 232-324 (1983). Thus the evidence of Sterling's "investigation" shows only that he knew he had an obligation to do so, but his efforts were both meager and incomplete. And the result was that the sentencer heard testimony about some theoretical pathological intoxication, when there was readily available compelling mitigation.

Respondents' argument that the presentation of the unsupported, speculative opinion of Dr. Bendheim satisfied counsel's duty to Petitioner and was a stronger argument for mitigation than the evidence presented here is erroneous, to say the least. Response, pp. 21-22. *Rompilla* also refutes that contention. In discussing the false picture of Rompilla that his lawyers presented because they failed to conduct an adequate investigation, the Court found prejudice, writing:

> The jury never heard any of this and neither did the mental health experts who examined Rompilla before trial. While they found "nothing helpful to [Rompilla's] case," *Rompilla*, 554 Pa., at 385, 721 A. 2d, at 790, their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw**, found plenty of "'red flags'"** pointing up a need to test further. 355 F.3d at 279 (Sloviter, J., dissenting). When they tested, they found that Rompilla "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions." *Ibid*. They also said that "Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially

> impaired at the time of the offense." *Id*., at 280 (Sloviter, J., dissenting).
>
> These findings in turn would probably have prompted a look at school and juvenile records, all of them easy to get, showing, for example, that when Rompilla was 16 his mother "was missing from home frequently for a period of one or several weeks at a time." Lodging 44. The same report noted that his mother "has been reported . . . frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times." *Ibid*. School records showed Rompilla's IQ was in the mentally retarded range. *Id*., at 11, 13, 15.
>
> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins v. Smith*, 539 U.S., at 538, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S., at 398, 146 L. Ed. 2d 389, 120 S. Ct. 1495), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U.S., at 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052.

Rompilla v. Beard, 545 U.S. 374, 392-393 (U.S. 2005).

Petitioner has also shown the flaw in Respondents' next contention: that "little evidence of mitigation was available." Response, p. 21. As discussed above and in Petitioner's Motion, substantial evidence was available had Sterling only knocked on the door of the family home, and interviewed his family, neighbors, and others who knew him and his family. Respondents' contention that Sterling pursued "extensive social history records" is mistaken. *Id*., p. 22. Had Sterling

pursued available records, he too, like Rompilla's later counsel, would have discovered multiple "red flags." *Rompilla*, *supra*. But as Petitioner addressed in his petition and above, Sterling was obligated to do more than collect some records: he was obligated to thoroughly investigate Lopez's background and interview persons who knew Lopez, including neighbors, teachers, physicians, his immediate and extended family, and others. "Effective capital defense since throughout the post-*Furman* era has required counsel to conduct a thorough investigations of the client's life. This investigation generally involves a multigenerational inquiry into the biological, psychological, and social influences on the development and adult functioning of the accused." Exhibit 9, p. 2.

These facts and the evidence Lopez presents here demonstrate the prejudice Lopez suffered when Sterling failed to conduct that investigation. Respondents seek to dismiss the "mitigation case," *Rompilla, supra*, at 392-393, that Sterling could have presented had he only looked, contending instead that counsel's failure to conduct the investigation the law required and present the available evidence supporting a life sentence is of no moment because "the sentencing judge was aware that Lopez was brought up in poverty and with an absent father," and "considered this before he resentenced Lopez to death." Response, p. 22. The horrific, terrifying trauma, beatings and abuse that Petitioner witnessed, suffered and endured encompasses far more than the absence of a father and unrelenting

poverty. See Rule 60(b) Motion, pp. 24-34. Nothing in the presentence report described the Petitioner as a young man keeping watch for his father so he could warn the others to run. Nothing in the presentence report described the night terrors that Petitioner suffered as a child and the resulting dissociative episodes. As Lopez explained, beginning in childhood, he suffered abandonment, neglect, addiction, neurological disease, mental illness, cognitive impairments, impulsivity, extreme poverty, traumatic induced stress, and constant dangers that threatened his daily existence. Neither Sterling nor Doyle knew these facts because neither investigated Lopez's background.

Conceding that Lopez need not establish a "causal nexus between mitigation" and the crime before the state court will credit his mitigation, Respondents nonetheless argue that the horrific abuse and terror Lopez suffered throughout his childhood and life "is not entitled to significant weight" in the absence of "evidence" that "explains how Lopez's unstable childhood led to" the crime. Response, p. 23. As a matter of federal constitutional law, Respondents suggestion is error and has been rejected by the Ninth Circuit. *Tennard v. Dretke*, 542 U.S. 274 (2004); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007). As a factual matter, the idea that the evidence presented isn't relevant to the facts of the crime is nonsense. Petitioner was still living with the effect of his PTSD, caused by years of childhood trauma that led to dissociative episodes. And, Petitioner

explained how the abuse he suffered severely impacted and impaired him at the time of the crime. *See e.g.*, Petition, pp. 27-28, 32-36 (Lopez was in "constant danger" throughout his childhood; "developed an "anticipatory stress response," suffered "hyperarousal, hypervigilance, high anxiety, agitation, guardedness, paranoia" unable "to response appropriately to emotional stimuli," suffered "night terrors" "intense fears," "lived in constant terror," "profound neglect and poverty," and "[n]europsychological testing" shows "significant brain damage."). To combat his longstanding trauma, Lopez consumed alcohol, drugs, and sniffed paint, lived in cars, washed in a neighborhood park, and to obtain food, robbed houses in the neighborhood when the occupants where gone. Petition, p. 33.

Contrary to Respondents' contention that Lopez's crime "was so brutal" that there was nothing Sterling could have done that would have "changed the sentencing outcome," Response, p. 23, the facts and circumstances of Petitioner's life demonstrate the exact opposite.[10] Had Sterling conducted the investigation the law required he conduct, there is a reasonable possibility it would "have changed the sentencing outcome." Response, p. 25. *See, e.g.*, *Rompilla*, *supra; Sears, supra, Williams, supra.* Indeed, similar arguments have been rejected by the Supreme Court. Like the Petitioner in *Porter*, Petitioner here was presented in a

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[10] Respondents' contention that Sterling was "diligen[t]" in investigating Lopez's background is unsupported. Response, p. 23.

false light at sentencing. So any comments made by the sentencer who has never heard the real mitigating evidence is simply not relevant. Like *Porter*,

> This is not a case in which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge." *Strickland, supra*, at 700. The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with Williams, his crimes, and almost nothing else. Had Porter's counsel been effective, the judge and jury would have learned of the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins, supra*, at 535. They would have heard about (1) Porter's heroic military service in two of the most critical--and horrific--battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling. See *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable'"). Instead, they heard absolutely none of that evidence, evidence which "might well have influenced the jury's appraisal of [Porter's] moral culpability." *Williams*, 529 U.S., at 398, 120 S. Ct. 1495, 146 L. Ed. 2d 389.

Porter v. McCollum, 130 S. Ct. 447, 454 (2009)(internal parallel citations omitted).

Under *Martinez*, *supra*, 132 S.Ct. at 1315-1316, these facts also demonstrate cause to overcome postconviction counsel's gross ineffectiveness in failing to conduct the central investigation he was obligated to conduct, and the resulting prejudice Lopez suffered when this Court procedurally defaulted Lopez's ineffective counsel claim in his later habeas proceedings. Doyle's multiple failures

to investigate and present the substantial ineffective sentencing counsel claim here warrant relief.

IV. CONCLUSION

The length of this reply and the volumes of evidence and the significant factual disputes all demonstrate that a hearing on this motion is necessary. Petitioner respectfully requests this Court reopen its judgment to allow further proceedings or in the alternative permit Petitioner to move forward on this claim of IAC of Sentencing counsel in accord with *Stewart v. Martinez-Villareal, Slack*, and *Pannetti.*

Respectfully submitted this 23rd of April, 2012.

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