CAPITAL CASE: EXECUTION SET MAY 16, 2012 at 10:00 A.M

No. 12-99001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL VILLEGAS LOPEZ

Appellant-Petitioner

v.

CHARLES RYAN, ET. AL

Appellee-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

OPENING BRIEF OF SAMUEL VILLEGAS LOPEZ

(ORAL ARGUMENT GRANTED)

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INTRODUCTION

This is a case about equity. In *Martinez v. Ryan*, 566 U.S. ___, 132 S.Ct. 1309 (2012), the United States Supreme Court articulated a rule of law *founded completely on equitable principles*, which provides that the errors of post-conviction counsel are *not* attributable to a federal habeas petitioner who raises a claim of ineffective-assistance-of-trial-counsel. This Court previously barred Lopez's claim that counsel was ineffective at sentencing, concluding that the equitable considerations contained in federal habeas law required it to attribute post-conviction counsel's unquestioned lack of diligence to Lopez himself. *Lopez v. Ryan*, 630 F.3d 1198, 1201 (9th Cir. 2011). *Martinez* now makes clear that this Court improperly and inequitably blamed Lopez for post-conviction counsel's failures.

Because *Martinez* has **completely reversed** the habeas corpus equities which previously prevented this Court from considering his ineffectiveness claim, Lopez is now entitled to equitable relief under Fed.R.Civ.P. 60(b)(6), the "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). Indeed, in federal habeas corpus proceedings, it is precisely when an intervening development so flips the equities – as *Martinez* has done -- that 60(b)(6) relief is warranted. *See e.g.*, *Abdur'Rahman v. Bell*, 392 F.3d 174 (6th Cir. 2004)(en banc), *vacated* 545 U.S.

1151 (2005), *Rule 60(b) relief again granted on remand*, 2008 U.S.Dist.Lexis 37863 (M.D.Tenn. 2008).

In denying equitable relief, the District Court clearly erred in its consideration of all the equities in this case under *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). The court did correctly conclude that Lopez acted diligently and with dispatch in seeking 60(b) relief following *Martinez*. However, the court failed to grasp the equitable nature of the *Martinez* rule and its dramatic effect upon the equities in this case. The court failed to recognize that this Court's prior finding of post-conviction counsel's lack of diligence practically establishes Lopez's entitlement to relief. And the court also erroneously relied on a perceived state interest in executing this unquestionably inequitable federal judgment – directly contrary to the Supreme Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005) which holds that a state's interest in the finality of a judgment are *de minimis* in a 60(b) proceeding.

Because no court has ever heard Lopez's compelling claim that his sentencing counsel was constitutionally ineffective, the district court's erroneous judgment cannot stand. This Court should: a) grant a stay of execution and b) after careful, unhurried consideration, reverse the district court and remand this case with instructions to reopen Mr. Lopez's habeas petition to allow review for the first time of his IAC at sentencing claim that was previously barred for failure to

exhaust. Alternatively, this Court should remand the case with instructions that Mr. Lopez be allowed to pursue his IAC at sentencing claim as a first-in-time habeas petition.

STATEMENT OF JURISDICTION

The district court's order denying Mr. Lopez relief from judgment is a final, appealable order. Order Denying Motion For Relief from Judgment (Apr. 30, 2012). ER 3.[1] This Court has jurisdiction under Article III of the United States Constitution. 28 U.S.C. §§ 1291 and 2253.

This appeal is timely. The district court denied Lopez's motion for relief from judgment on April 30, 2012. Lopez filed his notice of appeal that same day. ER1. *See* Fed. R. App. P. 4(a)(1)(A). "To the extent a certificate of appealability is needed" for this appeal from the district court's Order, the district court found "that reasonable jurists could debate its resolution of Petitioner's Rule 60(b)(6) motion, and "grant[ed] a certificate of appealability on this issue." ER 21, citing 28 U.S.C. §2253(c), *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)." *Id.*

[1] Because of the expedited nature of this appeal, Lopez has created an excerpt of record which contains the relevant orders and pleadings in the district court. Additionally, Lopez has included certain key exhibits most critical for determining the question of post-conviction counsel's ineffectiveness. Lopez does not mean to suggest that the other exhibits, all of which are contained in Lopez's excerpt of record in appeal No. 08-99021, are not relevant to the merits of the procedural defense, but all such exhibits are available to this court both in the previously filed ER and on the court's website: http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000593

ISSUES PRESENTED FOR REVIEW

1. Does the change in habeas procedural law announced in *Martinez v. Ryan*, 566 U.S. ___ (2012) which is based on equity and the Article III powers of the federal courts, together with all the equities in this case, establish extraordinary circumstances warranting relief from judgment under Fed. R. Civ. P. 60(b)(6)?

2. a. Is Lopez's previously procedurally barred IAC at sentencing claim a proper subject of a first-in-time habeas petition because, like the claims in *Martinez-Villareal*, 523 U.S. 637 (1998), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), it was not previously ripe for consideration?

b. Now that the procedural impediment has been cleared, should Lopez be allowed to proceed with his claim in the normal course?

STATEMENT OF THE FACTS RELEVANT TO DECISION

Lopez presented his claim of ineffective assistance of counsel in his amended petition, Amd.Pet.Writ of Habeas Corpus (Nov. 18, 1998), 08-99021 ER 354-357,[2] and supported his claim with substantial evidence. 08-99021 ER 534-852. The District Court found that his claim had not been presented to the Arizona state court, and therefore was procedurally defaulted and procedurally barred, holding specifically that ineffective assistance of post-conviction counsel could not provide cause under *Coleman v. Thompson*, 501 U.S. 722 (1991). 08-99021 ER 867-869.

On appeal, this Court issued an opinion on January 20, 2011 concluding that post-conviction counsel was to blame for failing to exhaust Lopez's claim and that Lopez was barred from relief. *Lopez v. Ryan*, 630 F.3d 1198 (9th Cir. 2011). Lopez 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. Over two months later, the United States Supreme Court granted certiorari in *Martinez v. Ryan*. *See Martinez v. Ryan*, Supreme Court Docket No. 10-1001.

On March 20, 2012, the Supreme Court found that ineffective assistance of counsel in asserting an "ineffective-assistance-of-trial-counsel claim in a collateral proceeding" "may establish cause" to excuse a procedural default. *Martinez v.*

[2] References to 08-99021 ER is to the Excerpt of Record filed in the original appeal.

Ryan, 566 U.S. ___, 132 S.Ct. 1309 (2012). That same day, Lopez filed a Motion with the Arizona Supreme Court suggesting that it delay ruling on the then pending Motion for Warrant of Execution because *Martinez* had been decided that very morning and that it was appropriate to "take pause" and assess the impact of *Martinez* on Lopez's case. ER 351. The State of Arizona opposed the motion and the warrant for execution was issued later in the day. ER 354.

On April 9, 2012, Lopez filed Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) or in the Alternative Petition for Writ of Habeas Corpus. ER 98. Lopez attached numerous exhibits to his motion which factually establish the post-conviction counsel was ineffective under *Strickland,* and which establish that the underlying claim of IAC Sentencing is substantial, as required by *Martinez*.[3] The State filed its Response in Opposition on April 20, 2012. ER 72. Lopez replied on April 24, 2012. ER 22. The Court entered its order denying relief, but granting a COA on April 30. ER 3. Lopez immediately noticed this appeal. ER 1.

[3] The district court misunderstood the import of Russell Stetler's declaration. ER 185. Mr. Stetler's declaration was offered to establish post-conviction counsel's ineffectivenss under *Strickland*. The same is true for the Affidavit of post-conviction counsel , Robert Doyle, ER144; Affidavit of Statia Peakheart, ER 146; Affidavit of Joel Brown, ER 232; and Affidavit of Samuel Lopez, ER 347, and letter from Samuel Lopez to Mr. Doyle, asking Mr. Doyle to "please ask for more time before you file an amended petition." ER 184. Moreover, Petitioner has not expanded his IAC Sentencing Claim from that presented in his amended petition. Petitioner has always maintained that had trial counsel conducted a proper social history investigation, he would have presented it to Dr. Bendheim and Dr. Bendheim's opinion would be in line with that of Dr. Woods. ER 233. Though Dr. Woods has recently reaffirmed his declaration by Affidavit, the document offered is the exact same declaration that was presented to the district court previously. Thus, Mr. Lopez is seeking to reopen his habeas petition under *Martinez* as it relates to his IAC sentencing claim that the district court and this court erroneously found procedurally barred.

ARGUMENT

If Lopez's habeas case had been pending in the district court when *Martinez* was decided, he unquestionably would have received merits review of his IAC sentencing claim. The question before this Court is will Lopez be executed without any court ever having reviewed his claim pursuant to an opinion from this Court which is now clearly wrong.

Martinez is about equity. The Court's holding is born from the need to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel[.]" *Martinez*, 132 S.Ct. at 1315. What could be more inequitable, than executing a man without reviewing a serious claim of constitutional error that goes right to the heart of the reliability of his sentence? *See Id*. at 1317 ("A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system.")

Given the change in law brought by *Martinez* and all the equities in this case, Lopez makes out "extraordinary circumstances" warranting relief from judgment under Fed.R.Civ.P. 60(b)(6). This Court should reverse the judgment of the District Court.

Given the centrality of *Martinez* to this Court's review, Lopez will in Section I *infra* first discuss and explain the significance of *Martinez*, and then in Section II proceed to show how the District Court manifestly erred in its weighing of the equities under, *inter alia*, *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). Section III argues in the alternative, that pursuant to *Martinez-Villareal*, 523 U.S. 637 (1998), *Slack v. McDaniel,* 529 U.S. 473 (2000), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), Lopez should be allowed to pursue in IAC sentencing claim as a first-in-time petition because the claim has only become ripe for review after the Supreme Court's decision in *Martinez*.

I. *Martinez v. Ryan*, 566 U.S. ___ (2012) Fundamentally Alters The Federal Habeas Corpus Equities For Ineffective-Assistance-Of-Counsel Claims That Were Not Previously Presented In State Court Because Of The Ineffective Assistance Of Post-Conviction Counsel.

As Justices Alito and Kennedy acknowledged in *District Attorney's Office v. Osborne*, 557 U.S. 52, ___,129 S.Ct. 2308, 2325(2009)(Alito, J., concurring), in 28 U.S.C. §2254(e)(2) of the AEDPA, Congress codified the standard "cause and prejudice" test governing a habeas petitioner's entitlement to an evidentiary hearing. *Id*. at 2325 (Alito, J., concurring)("Congress subsequently codified *Keeney [v. Tamayo-Reyes]*'s cause-and-prejudice rule in AEDPA, 28 U.S.C. §2254(e)(2)."). *Martinez v. Ryan*, 566 U.S. ___ (2012) has now, however, radically changed that "cause-and-prejudice" test by establishing the equitable principle that a habeas petitioner is *not* at fault for his attorney's failures to effectively raise

ineffective-assistance-of-trial-counsel claims at the first available opportunity. *Martinez*'s equity and fault analyses apply with equal vigor to §2254(e)(2), establishing that the failures of ineffective post-conviction counsel in failing to properly raise a claim of ineffective-assistance-of-trial-counsel precludes a finding that "the applicant" failed to develop the facts of his claim under (e)(2). Rather, *Martinez* makes clear that such fault lies with the attorney, not the petitioner. As such, Sam Lopez is *not* at fault for failing to develop his IAC claim in state court within the meaning of §2254(e)(2), because it was his attorney who abjectly failed to provide, in post-conviction proceedings, the one opportunity to present his IAC claim to which he was entitled.

A. *Martinez* Recognizes As An Equitable Matter That The Ineffective Assistance Of Post-Conviction Counsel In Failing To Properly Raise A Claim Of Ineffective Assistance of Trial Counsel Provides Grounds For Reviewing On The Merits An IAC Claim Not Properly Presented During Post-Conviction Proceedings

In *Martinez*, the Supreme Court recognized for the first time that it is virtually impossible for an inmate like Lopez to raise an ineffective-assistance-of-trial-counsel claim without the effective assistance of his post-conviction attorney: "To present a claim of ineffective assistance at trial . . . a prisoner likely needs an effective attorney." *Id.* 132 S.Ct. at 1317. Indeed, "While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id.*

In *Martinez*, the Supreme Court thus held that a petitioner's failure to raise an ineffective-assistance-of-trial-counsel claim in post-conviction proceedings **is not** attributable to the petitioner, if "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 (1984)." *Id.* at 1318. As the Court recognized, the holding of *Martinez* acknowledges that as a matter of equity, it is unfair to fault an incarcerated inmate for his attorney's failure to properly raise the inmate's claim of ineffective-assistance-of-trial-counsel.

In *Martinez*, the Supreme Court thus held that ineffective assistance of post-conviction counsel can establish "cause" for the procedural default of a claim of ineffective-assistance-of-trial-counsel. *Id*. The Supreme Court made clear that this conclusion is required as a matter of equity and fundamental fairness:

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors . . . caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

Id. at 1312. Indeed, federal habeas law itself reflects "the equitable judgment" that the "usual sanction of default" does not apply "where a prisoner is impeded or obstructed in complying with" a state's established procedures for presenting a

constitutional claim." *Id.* at 1318. *Martinez* makes clear that ineffective post-conviction counsel is such an impediment or obstruction when it precludes the proper presentation of an ineffective-assistance-of-trial-counsel claim.

B. In Light Of *Martinez*, Post-Conviction Counsel's Failure To Develop Lopez's IAC Of Trial Counsel Claim Is Not Attributable To Lopez Because Post-Conviction Counsel Was Ineffective For Failing To Investigate And Present The Claim During Initial-Review Collateral Proceedings: *Martinez* Turns On Its Head The Equities Previously Used To Bar Lopez's IAC Claim

When this Court initially reviewed Lopez's ineffective-assistance-of-trial-counsel claim, it stated in no uncertain terms that Lopez was "barred from seeking relief through his expanded allegations of ineffective assistance of counsel because he did not develop the factual basis for this claim in state court. 28 U.S.C. §2254(e)(2)." *Lopez v. Ryan*, 630 F.3d 1198, 1201 (9th Cir. 2011). This Court repeated that he was "barred from seeking relief under 28 U.S.C. §2254(e)(2)" (Lopez, 630 F.3d at 1205), the very same way that the court of appeals in *Martinez* found Martinez's ineffective-assistance-of-trial-counsel claims procedurally barred because they had not been properly presented in state post-conviction proceedings. *Compare Martinez*, 132 S.Ct. at 1314.

When this Court previously found Lopez's IAC claim barred because of §2254(e)(2), this Court specifically relied upon *Williams v. Taylor*'s statement that a habeas petitioner is at fault for "failing to develop" his claim if when that failure

is "attributable to the prisoner or the prisoner's counsel." *Lopez*, 630 F.3d at 1205, *quoting Williams*, 529 U.S. at 432. In concluding that "Lopez" had failed to develop the facts under §2254(e)(2), this Court then specifically listed any number of different failures of post-conviction counsel, not Lopez.

In fact, this Court's recitation of the facts provides a laundry list of post-conviction counsel's sheer ineffectiveness in presenting Lopez's ineffective assistance of counsel claim. This Court fully recognized the grave errors made by post-conviction counsel with regard to Lopez's claims of ineffective-assistance-of-trial-counsel:

– Post-Conviction counsel failed to raise the ineffective-assistance-of-counsel claim now raised by Lopez in habeas, having "failed to present the claim altogether" that trial counsel "fail[ed] to investigate Lopez's personal history and to furnish Dr. Bendheim with those facts."

– Post-Conviction counsel failed to "attach affidavits, record, or other evidence currently available to him supporting the allegations to his PCR petition," instead failing to submit any "of the contested evidence regarding his childhood, mental health, or family and social history."

Lopez, 630 F.3d at 1206. Based upon post-conviction counsel's failures during the post-conviction process, this Court thus repeated for a third time that under §2254(e), "[Lopez] is barred from seeking relief." *Id*.

Martinez, however, changes everything. In the very limited circumstances presented here – when a habeas petitioner presents an ineffective-assistance-of-trial-counsel claim that was mishandled or forgotten by post-conviction counsel – the Supreme Court has now held that a habeas petitioner is not barred from being heard on his claim if post-conviction counsel was ineffective. The equities have changed dramatically. Whereas, as an equitable matter, the law pre-*Martinez* was that the petitioner bore the burden of counsel's failures to properly present a claim, now the Supreme Court recognizes that "as an equitable matter . . . [an] initial-review collateral proceeding, if undertaken . . . with ineffective counsel" does not "ensure that proper consideration was given to a substantial claim" of ineffective-assistance-of-trial-counsel. *Martinez*, 132 S.Ct. at 1313. For that reason, post-conviction counsel's failures (when they rise to the level of ineffectiveness) can no longer be laid at the feet of the inmate.

And here, the proof is in the pudding. Lopez received no consideration of the otherwise possibly winning ineffective assistance claim presented in habeas because of the abject failures of post-conviction counsel. Just compare the dismal performance of post-conviction counsel to the compelling claim now before the

court, once presented by competent counsel. Post-conviction counsel's IAC sentencing claim was limited to information that could be easily gleaned from the record with no outside investigation. The weak and anemic claim actually presented was easily dismissed by this Court. In fact, post-conviction counsel's dismal performance is very much like the atrocious performance of post-conviction counsel in *Martinez* itself, another Arizona case where post-conviction counsel was a sole practitioner with a county contract. Like counsel in *Martinez*, post-conviction counsel did no investigation on his own. ER 144. Also like counsel in Martinez, post-conviction counsel did not follow the instructions of his client – in this case Lopez's request that his post-conviction counsel work with local resource counsel who was investigating the case. ER 144-184, 347-350. Like Martinez, Lopez has substantial underlying claim of ineffective assistance of sentencing counsel.

Mitigation Expert, Russell Stetler, has reviewed the performance of post-conviction counsel and found that post-conviction counsel's performance was well below prevailing professional norms at the time of the post-conviction. Stetler's affidavit is well-corroborated by the affidavit of Statia Peakheart, a lawyer with the Arizona Capital Representation project at the time of Lopez's post-conviction, whose assistance was ultimately spurned by post-conviction counsel. A seasoned capital habeas lawyer, Ms. Peakheart has sworn, "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." ER 152.

Here a series of untrained and inexperienced lawyers failed to conduct a minimally competent investigation into Lopez's social history and background so that their expert witness could reach a reliable and certain conclusion. Had they done so, they would have been able to present the testimony, such as that provided in Dr. Woods' declaration, that Lopez's upbringing, characterized by terror, brutality, and abject poverty, resulted in cognitive and mental impairments. Those impairments manifested themselves in dissociative episodes, night terrors, and substance abuse. The lawyers would have been able to corroborate those medical and psychiatric opinions thus mitigating and explaining the single aggravating circumstance in this case. The chaos of the crime is consistent with Lopez experiencing a post-traumatic dissociative episode brought on by the constellation of substance abuse and mental impairments. But no court has considered these facts because the evidence supporting them was not pursued by state court counsel. State court counsel have sworn under oath that the evidence presented to the district court was not withheld by them for any strategic reason. Rather, they did not know about it because they did not investigate.

Martinez makes it eminently clear that in federal habeas corpus proceedings,

the incarcerated, uneducated inmate no longer bears the fault that is attributable to the ineffective post-conviction attorney upon whom the inmate had to depend. *Martinez* is based upon principles of equity and fairness, which provide the very foundation for the writ of habeas corpus itself. *Martinez* makes it eminently clear that both as a matter of equity and a matter of habeas procedure, the ineffectiveness of post-conviction counsel prevents a habeas petitioner from being procedurally barred or similarly "barred from seeking relief under 28 U.S.C. §2254(e)(2)" (*Lopez*, 630 F.3d at 1205) when the fault for failing to properly raise an ineffectiveness claim is the fault of post-conviction counsel, not the client. That is the precise situation here. Just as there was no bar in *Martinez*, there is no longer any bar here under §2254(e).

After *Martinez*, failures of post-conviction counsel that rise to the level of ineffectiveness are no longer attributable to the petitioner when claims of ineffective assistance of trial counsel are at issue. Whether those failures prevent a claim from being presented at all during initial-review proceedings, or whether those failures involve the failure to develop the facts in the initial-review proceeding, the effect is precisely the same: The ineffectiveness of post-conviction counsel has precluded the "proper consideration" of the ineffectiveness-of-trial-counsel claim that *Martinez* mandates. *Martinez*, 132 S.Ct. at 1313. *Martinez* applies with full force to Sam Lopez's case, effectively overruling this Court's

prior conclusion that post-conviction counsel's abject failures were actually "failures" attributable to Lopez within the meaning of §2254(e)(2). They no longer are. *Martinez* equitable holding dictates this result.

It is because *Martinez* reverses the habeas corpus equities to relieve Lopez of the burden of post-conviction counsel's failures that Lopez's habeas corpus proceedings on his IAC claim now takes on a completely different character and he is entitled to equitable relief in light of *Martinez*'s equitable ruling. The District Court, however, gravely erred in considering the equities, and must therefore be reversed.

II. The District Court Clearly Erred in Its Misapplication of *Phelps*

A. The District Court Erred In Maintaining That Lopez's Attack On The Integrity Of The Federal Court Judgment Could Not Be Pursued Via Rule 60(b)

It is settled law that Rule 60(b)(6) provides a vehicle for a federal habeas petitioner to seek relief from a judgment where the continued enforcement of that judgment is contrary to law and public policy.

> Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence. Rule 60(b)(6), the particular provision under which petitioner brought his motion, permits reopening when the movant shows "any . . . reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in Rules 60(b)(1)-(5). *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, n

> 11, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988); *Klapprott v. United States*, 335 U.S. 601, 613, 93 L. Ed. 266, 69 S. Ct. 384 (1949) (opinion of Black, J.).

Gonzalez v. Crosby, 545 U.S. 524, 528-529 (U.S. 2005) (internal footnotes omitted). The Court in *Gonzalez* held that when a habeas petitioner alleges a defect in the integrity of the federal habeas proceedings then such an attack is permitted under AEDPA. *Id.*, at 532. *Gonzalez* distinguished motions attacking the integrity of the federal court's resolution of procedural issues (there a statute of limitations issue) from motions alleging a defect in the substantive ruling on the merits of a claim or motions raising new claims for relief.[4]

[4] Finding it an open question, the district court wondered whether this Court's previous ruling that Lopez's post-conviction counsel was not diligent in post-conviction was a ruling on the merits of his claim, and if so, whether Lopez's motion under 60(b) was a second or successive petition. It is not. The Court's previous ruling was one of procedure – Lopez's post-conviction counsel had failed to exhaust. See *District Attorney's Office v. Osborne*, 557 U.S. 52__,129 S.Ct. at 2325 (slip op at 3)(2009)(Alito, J., concurring)(28 U.S.C. §2254(e)(2) of the AEDPA, Congress codified the standard "cause and prejudice" test governing a habeas petitioner's entitlement to an evidentiary hearing.) Further, Lopez's motion does not challenge the state court judgment, but the federal habeas court's denial of a merits ruling on Lopez's full IAC sentencing claim, where this Court previously said that under 2254(e) Lopez was "barred from seeking relief." Because of application of (e), Lopez did not get full consideration of his IAC claim. Lopez is not raising a new IAC sentencing claim, and indeed relies on the same facts and argument previously presented, but not considered. *See also*, *Mitchell v. Rees*, 261 Fed.Appx. 825, 829 (6th Cir. 2008)(habeas petitioner's Rule 60(b) motion arguing erroneous denial of an evidentiary hearing and requesting the district court reopen the case and grant a hearing, not a "claim" because it did not "assert an error in the state conviction and would not constitute a federal basis for relief. Respondent argues that this case is distinguishable from cases in which a limitations bar applies

This Court has found that allegations similar to those raised here, are cognizable under Rule 60(b). *See Moormann v. Schriro*, 672 F.3d 644, 647 (2012)(60(b) Motion brought pursuant to *Maples v. Thomas*, 132 S.Ct. 912 (2012).

Applying *Gonzalez*, this Court held,

> The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b) is the power "to vacate judgments whenever such action is appropriate to accomplish justice." Given that directive, we agree that "the decision to grant Rule 60(b)(6) relief" must be measured by "the incessant command of the court's conscience that justice be done in light of all the facts."

Phelps v. Alameida, 569 F.3d 1120, 1141 (9th Cir. Cal. 2009)(footnotes omitted)(quoting *Gonzalez*). Here, just like *Martinez*, no court has ever adjudicated Lopez's substantial and meritorious claim of ineffective assistance of sentencing counsel which proves that Lopez, if properly represented, would have been sentenced to life, not death. The "incessant command of the court's conscience that justice be done" demands Rule 60(b) relief. *See Liljeberg v.*

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because here the court actually decided Mitchell's original claim on the merits. While this may be true, the focus of the inquiry is not on whether the court reached the merits of the original petition but on whether the Rule 60(b) motion contains a claim. If it does not contain a claim, it is not a habeas petition, successive or otherwise. *See Gonzalez*, 545 U.S. at 530. Because Mitchell's Rule 60(b) motion challenges only the judgment on the evidentiary hearing, it does not make a claim but rather asserts an error in the federal habeas proceeding. Therefore, Mitchell's Rule 60(b) motion is not subject to the provisions of 28 U.S.C. § 2244(b).")

Health Servs. Acquisition Corp., 486 U.S. 847 (1988); *Klapprott v. United States*, 335 U.S. 601 (1949).

B. The District Court Clearly Erred In Weighing The Equities

While the District Court erred in thinking that Lopez could not use Rule 60(b)(6) to challenge the previous bar imposed upon his IAC claim, the District Court likewise clearly misapplied the equitable standards for granting 60(b)(6) relief, as articulated by this Court in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009).

Specifically, the district court abused its discretion because it: (1) abjectly failed to recognize that the new equitable ruling in *Martinez* (a) turns the equities of the prior judgment on their head and (b) is directly applicable here; (2) inequitably faulted Lopez for not prophesying the change in law wrought by *Martinez*; (3) erroneously gave significant equity to the state's claimed interest in finality of the erroneous federal judgment, when *Gonzalez v. Crosby*, 545 U.S. 524 (2005) holds that a state's interest in the finality of an erroneous federal judgment is negligible in 60(b) proceedings.

In *Phelps*, this Court addressed the consequences of its recent decision in those proceeding when shortly after its decision was announced, "there was 'a clear and authoritative change in the governing law'" announced:

Gonzalez v. Crosby, *supra*. *Phelps*, *supra*, at 1131 (internal citation omitted). The Court stated:

> The question we must now consider is what significance, if any, this intervening change in the law holds for Phelps' motion for reconsideration under Fed.R.Civ.P. 60(b)(6).

Id. In deciding that question, this Court identified six factors[5] designed to guide courts in determining whether extraordinary circumstances were shown by the petitioner seeking relief under the rule:

1. The "District Court's [initial] interpretation was by all appearances correct under the [] Circuit's then prevailing interpretation of" the law…. In other words, the intervening change in the law in [the opinion] overruled an otherwise settled legal precedent.

2. The "change in the law [was] all the less extraordinary because of his lack of diligence in pursuing review of the [issue].

3. "Whether granting the motion to reconsider would 'undo the past, executed effects of the judgment,' thereby disturbing the parties' reliance interest in the finality of the case."

4. Examining the "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief" to determine diligence in challenging the judgment on appeal

5. Examining the original and intervening decisions predicated on the intervening change in law to determine if "a close connection

[5]The Supreme Court announced the first two factors in *Gonzalez*.

> between the two cases" exist to find "the circumstances sufficiently extraordinary to justify disturbing the finality of the [original] judgment.
>
> 6. To correct erroneous legal judgment that, if left, uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard. In such instances… this factor will cut in favor of granting Rule 60(b)(6) relief.

Id., pp. 1135-1140. Lopez satisfies these six factors, and the district court below, based on clear errors of law, abused its discretion in denying his motion.

1. Intervening Legal Case

Here, the District Court erred in its application of this factor to Mr. Lopez. "As in *Gonzalez*, the procedural bar ruling now being challenged was correct under then-prevailing law. As Petitioner acknowledges, Martinez represents a significant shift in habeas procedural law. Prior to Martinez, both Supreme Court and Ninth Circuit caselaw held that an attorney's ignorance or inadvertence in a state postconviction proceeding did not qualify as cause to excuse a procedural default." ER 14. Fair enough. But the district court erred by stopping there. The Court in *Gonzalez* did NOT hold that every change in previously settled law would fail under 60(b)(6). Quite the contrary.

Other courts have 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). ER 62. 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. ER 63.

The Fifth Circuit has also found extraordinary circumstances to exist when there is a change in the law. *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007). 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

would not deny Ruiz a hearing on the merits.

Id., 504 F. 3d at 531-532 (emphasis added).

Unlike *Gonzalez*, the equities are in favor of Lopez. Lopez was denied relief based upon a clear misapplication of the law which assigns blame for failing to present facts in state court, and the equities here clearly favor Lopez because *Martinez* creates an equitable rule which places the burden on the state to provide competent counsel. Previously, this Court held it was Lopez's fault for not presenting the evidence in state court under (e). Martinez now says exactly the opposite with regard to counsel. If it was counsel's failure (as it was here), that blame falls on the state for appointing ineffective counsel. The very nature of the intervening case which creates an equitable rule places the equity on Lopez's side, just as in Abdur'Rahman. *See also Ritter v. Smith*, 811 F.3d 1398 (11th Cir. 1987)(finding extraordinary circumstances and granting 60(b)(6) relief to state in federal habeas corpus proceeding given intervening Supreme Court decision which altered equities of prior judgment).

2. Diligence: Faulting Lopez for Not Wasting The Court's Time

As Judge Sutton said in *Gencorp v. Olin Corp*, 477 F.3d 368, 374 (6th Cir. 2007), Lopez was not required to prophesy the change in the law or otherwise burden the court with a wasted argument. Lopez cannot be faulted for not wasting the court's time. Here, the equities weigh in favor of Lopez. To find otherwise, will

invite frivolous appeals, even more requests for overs-sized briefs, and require all appellant's to raise every issue on appeal, even where it is clearly futile and frivolous under the current state of the law. Thus, such ruling would require diligent counsel to weigh her obligations under Rule 11 against the risk of waiving an argument because someday the law might change. The Supreme Court has already rejected such rules.

"Instructing prisoners to file premature claims, particularly when many of these 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)).

Again, in this case, unlike *Gonzalez*, the equities weigh in favor of Lopez, whom the district court found diligent in pressing his argument under *Martinez*. Here, the United States Supreme Court did not grant certiorari in *Martinez* until well after proceedings in this Court are over. *See Martinez v. Ryan*, Supreme Court Docket No. 10-1001. Petitioner then included a citation to *Martinez* in his Petition for Writ of Certiorari.[6]

[6] The Petitioner in *Gonzalez* did not seek certiorari, even though *Artuz v. Bennett* was pending.

Petitioner cannot be faulted for failing to divine the significant change in the law brought about by the *Martinez* decision. In fact, the decision in *Martinez* was based upon resolution of a *non-constitutional question* of equity which was not even before the Supreme Court on the petition for writ of certiorari. Indeed, the Supreme Court only agreed to determine whether there was a constitutional right to counsel in post-conviction proceedings. How could it be that Lopez could have divined the particular ruling in *Martinez* when the parties in *Martinez* were arguing a completely different issue and had no clue that the Supreme Court would eventually decide the case on a non-constitutional ruling not argued by the parties?

This Court 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 "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).[7]

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*

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

New England (hereafter *Ayotte*). 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. Sixth Circuit Court of Appeals Docket # 04-4371.

On December 7, 2005, the Sixth Circuit heard argument in *Taft*. 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 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)(emphasis added). 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*, 132 S. Ct. at 1309 ("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.

3. Reliance and Comity (prongs 3 and 6): Rule 60(b) By Definition Creates an Exception to Finality.

The district court's holding on these prongs is at odds with *Gonzalez.* "[W]e give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (U.S. 2005).

Where the district court finds that the State relied on its erroneous judgment and there are comity interests, *Gonzalez* says those interests are extremely minimal -- especially where (as in Abdur'Rahamn) the State has no interest in preventing Lopez from being heard on serious IAC claim when federal law does not bar it.

Moreover, the steps taken by the State in reliance on the Court's opinion were negligible. They filed a motion for an execution warrant. They did not change their position. That has been their position all along. Where, the State specifically urged the Arizona Supreme Court to move forward with the warrant even after *Martinez* had been decided and Lopez had noticed his intent to seek relief under *Martinez*, it cannot be said that this factor weighs in the State's favor.

Conversely, the district court failed to weigh the equities in this prong with respect to Lopez. Here, finality means he will be executed without any court hearing his substantial claim of IAC sentencing. That is exactly what *Martinez* seeks to avoid. This claim has always been his best claim. The IAC sentencing claim has consumed the bulk of the litigation in this case, it is no answer to say other claims were considered. Such is not the holding of *Martinez*. This prong weighs in Lopez's favor.

4. Delay: Lopez Was Diligent

The district court found Lopez diligent in pursuing his right to relief under *Martinez*. ER 17. He was.

5. Close Connection: *Martinez* is directly applicable

The district court is in error when it finds no close connection between *Martinez* and Lopez. As Lopez has already explained in greater detail in

Section I, the entire notion behind *Martinez* is that Lopez is not fault for the failings of his post-conviction attorney. The fact that this Court has already found that Lopez's post-conviction attorney was not diligent is a point in favor of Lopez, not against. It is a finding that post-conviction counsel was ineffective, at least as to prong 1 of *Strickland*.

The district court's holding that 28 U.S.C. §2254 (e)(2) is a separate bar to relief and that *Martinez* does not apply, undoes the holding of *Martinez*. If such were the law, then *Martinez* means nothing and even *Martinez* must lose under (e)(2). The Supreme Court did not intend such an anomalous result.

It makes more sense that *Martinez* also establishes an equitable exception to (e)(2). After all, the Court has held that AEDPA has equitable exceptions. *See Holland v. Florida*, 130 S.Ct. 2549 (2010)(AEDPA statute of limitations subject to equitable exceptions.

Martinez makes clear that Lopez is not at fault under (e), so there is a direct connection between the cases, which places the equity on Lopez's side again.

III. IF THE COURT CONCLUDES THAT PETITIONER CANNOT PROCEED UNDER RULE 60(B), THEN THIS COURT SHOULD HOLD THAT HE CAN PROCEED WITH HIS IAC AT SENTENCING CLAIM AS A FIRST-IN-TIME HABEAS PETITION.

Martinez, and its modification of the *Coleman* bar to the consideration of claims of ineffectiveness of post-conviction counsel in the ineffectiveness of sentencing counsel context, significantly changed the legal landscape to such an extent that a second-in-time habeas petition should not be treated as successive as that is "a term of art given substance in our prior habeas cases." *Slack v. McDaniel*, 529 U.S. at 486.

> The phrase "second or successive" is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. See *Slack v. McDaniel*, 529 U.S. 473, 486, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (citing *Martinez-Villareal, supra*); see also *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). **The Court has declined to interpret "second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application**. See, e.g., *Slack*, 529 U.S., at 487, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (concluding that a second § 2254 application was not "second or successive" after the petitioner's first application, which had challenged the same state-court judgment, had been dismissed for failure to exhaust state remedies); see also *id.*, at 486, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (indicating that "pre-AEDPA law govern[ed]" the case before it but implying that the Court would reach the same result under AEDPA); see also *Martinez-Villareal*, *supra*, at 645, 118 S. Ct. 1618, 140 L. Ed. 2d 849.

Panetti v. Quarterman, 551 U.S. 930, 943-944 (U.S. 2007)(emphasis added).

The district court characterized this argument as "novel" and denied it out of hand. But this case presents a novel situation and Lopez's argument cannot be so easily dismissed.

Procedurally, Petitioner's claim is akin to the claims considered in *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). In *Martinez-Villareal*, the habeas petitioner raised a *Ford* claim in his first-in-time habeas petition. The claim was dismissed as unripe. Once federal habeas proceedings concluded and an execution warrant was issued, *Martinez-Villareal* filed a second-in-time habeas petition which was dismissed by the district court as barred as a second or successive petition. The Supreme Court reversed, holding that AEDPA did not intend to foreclose federal habeas relief from petitioner's whose claims were previously unripe. "If the State's interpretation of 'second or successive' were correct, the implications for habeas practice would be far-reaching and seemingly perverse." 523 U.S. at 644. The Court went likened the unripe *Ford* claim to claims previously dismissed for procedural reasons.

> We believe that respondent's *Ford* claim here -- previously dismissed as premature -- should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies. True, the cases are not identical; respondent's *Ford* claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore

> his competency to be executed could not be determined at that time. **But in both situations, the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.**

523 U.S. at 644-645 (emphasis added).

The Petitioner in *Slack* initially filed a habeas petition that contained exhausted and unexhausted claims. Because the petition was mixed, it was dismissed so that the Petitioner could return to state court to exhaust. After exhausting, the petitioner filed a second-in-time habeas petition re-raising the claims that had been previously dismissed. The Supreme Court found that the previous dismissal on procedural grounds did not bar the consideration of the petition which was now ripe for federal adjudication. A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition." 529 U.S. at 485-486.

In *Panetti*, the Supreme Court found that the petitioner who did not raise a *Ford* claim in his first in time habeas petition could nevertheless file a second-in-time petition raising the claim which should be treated as a first petition since the claim was not previously ripe for adjudication.

All of these cases are bound by the same guiding principle, that AEDPA does treat newly ripe claims, claims that were previously unavailable for a federal merits review, as second or successive because to do so would be to "'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Panetti* , 551 U.S. at 945-946, quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005). Such was not the intent of Congress, the court held.

Though Petitioner did previously present his ineffectiveness of sentencing counsel claim in his first-in-time petition for writ of habeas corpus, this Court did not adjudicate that claim on the merits. Instead, this Court found that was barred because post-conviction counsel did not exercise diligence. This now clearly erroneous procedural ruling by this Court did not constitute an adjudication on the merits of the claim and 28 U.S.C. §2244 (b)(1) does not bar consideration of the claim and is in fact, inapplicable. Indeed, Petitioner's claim is not a second or successive petition because his claim has only just now become ripe for adjudication on the merits.

Like the claims in *Martinez-Villareal*, *Slack*, and *Panetti*, Petitioner's claim has only now become ripe because only now may he establish cause to overcome the procedural bar. "Until *Martinez* was decided, cause could not be shown in this manner because there is no constitutional right to counsel in [post-conviction]

proceedings… nor a constitutional right to effective assistance of counsel in [post-conviction] proceedings. ***Martinez* has opened an avenue for cause that *Coleman* previously foreclosed**." *Bilal v. Walsh*, 2012 U.S. Dist. LEXIS 43663, *3-4 (E.D. PA March 29, 2012) (emphasis added).

Here, too, Lopez "'was entitled to an adjudication of all the claims presented in his earlier undoubtedly, reviewable application for federal habeas relief,'" and that is what he seeks under *Martinez*. As the Supreme Court explained: AEDPA's "purposes, and the practical effects of our holdings, should be considered when interpreting AEDPA. This is particularly so when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Panetti*, *supra*, 551 U.S. at 945-946, *citing Rhines v. Weber*, 544 U.S. 269, 275 (2005). "And in *Castro* we resisted an interpretation of the statute that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Panetti*, *supra*, citing *Castro v. United States*, 540 U.S. 269, 380-381 (2003).

Justice Kennedy recognized the procedural anomaly, and inequity, in a post-conviction lawyer's ineffectiveness resulting in the complete denial of judicial review by any court of a substantial claim of ineffective assistance of counsel. claim.

> This Court on direct review of the state proceeding could not consider or adjudicate the claim. *See, e.g., Fox Film Corp. v. Muller*, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158 (1935); *Murdock v. Memphis*, 87 U.S. 590, 20 Wall. 590, 22 L. Ed. 429 (1875); *cf. Coleman, supra*, at 730-731, 111 S. Ct. 2546, 115 L. Ed. 2d 640. [I]f 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.

Martinez, supra, *17.

Such a result here is troublesome and inequitable.

CONCLUSION

WHEREFORE, this Court should: a) grant a stay of execution and b) after careful, unhurried consideration, reverse the district court and remand this case with instructions to reopen Mr. Lopez's habeas petition to allow review for the first time of his IAC at sentencing claim that was previously barred for failure to exhaust. Alternatively, this Court should remand the case with instructions that Mr. Lopez be allowed to pursue his IAC at sentencing claim as a first-in-time habeas petition.

Respectfully submitted this 4th day of May, 2012.

Kelley J.Henry
Denise I. Young

BY: /s/ Kelley J.Henry

CERTIFICATE OF COMPLIANCE

I hereby certify that appellant's opening brief contains 8,839 words and is in compliance with the Word limits imposed by the Rules of this Court.

/s Kelley J. Henry
Attorney for Samuel Lopez

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

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