No. 12–99001

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL VILLEGAS LOPEZ, Petitioner-Appellant, –vs– CHARLES L. RYAN, et. al., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV–98–0072–PHX–SMM

RESPONDENTS-APPELLEES' ANSWERING BRIEF

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STATEMENT OF JURISDICTION

The State agrees that this Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253.

CERTIFIED QUESTION PRESENTED FOR REVIEW[1]

I. Whether, under the facts of this case, *Martinez* serves as an extraordinary circumstance to reopen habeas proceedings under Rule 60(b)(6)?

UNCERTIFIED QUESTIONS

II. Whether Lopez's Rule 60 motion is, in substance, a second or successive petition barred by 28 U.S.C. 2244(b)(1)?

III. Whether Lopez's second habeas petition can be properly treated as a first petition?

[1] Whether a certificate of appealability (COA) is needed to appeal from a denial of a Rule 60(b) motion is an open question. *See United States v. Washington*, 653 F.3d 1057, 1065, n. 8 (9th Cir. 2011). Respondents-Appellees have therefore briefed all the issues presented by this appeal, but have addressed whether extraordinary circumstances exist to reopen habeas proceedings first and in greatest depth because that is the issue the district court certified on appeal.

STATEMENT OF THE CASE

Lopez is a death-row inmate who murdered Estefana Holmes in 1986. The facts of this brutal murder are described at *State v. Lopez* (*Lopez I*), 163 Ariz. 108, 786 P.2d 959 (1990) and *State v. Lopez* (*Lopez II*), 175 Ariz. 407, 857 P.2d 1261 (1993). Lopez has now had a sentencing and a resentencing, two state appeals, state post-conviction proceedings, and one full federal habeas proceeding. His petition for certiorari was denied by the Supreme Court. *Lopez v. Ryan,* No. 11–6117. This Court issued its mandate on November 17, 2011. *Lopez v. Schriro*, No. 08–99021. On March 20, 2012, the Arizona Supreme Court issued a warrant for execution. Lopez is scheduled to be executed on May 16, 2012.

Trial and appeal.

After Lopez's first trial and sentencing, The Arizona Supreme Court affirmed his convictions, but set aside the trial court's finding that Lopez's prior conviction qualified as a statutory aggravating circumstance under A.R.S. § 13–703(F)(2). *See Lopez I*, 163 Ariz. 108, 110–11, 786 P.2d 959, 961–62 (1990). *Id*. at 114, 965. Accordingly, the Arizona Supreme Court remanded to the trial court for resentencing on the murder count. *Id*. at 116, 967.

Lopez's resentencing was held in 1990. 08–99021 ER 13, 263.[2] The trial court again sentenced Lopez to death, finding that the murder was committed in an especially cruel manner and that the mitigation presented was not sufficiently substantial to call for leniency. *Lopez II*, 175 Ariz. at 410, 857 P.2d at 1264. After conducting an independent review of the record, the Arizona Supreme Court affirmed the death sentence. *Id*. at 417, 1271.

State post-conviction relief proceedings.

Lopez filed a petition and a supplemental petition for post-conviction relief (PCR) pursuant to Arizona Rule of Criminal Procedure 32. 08–99021 ER 278, 318. One of Lopez's claims of ineffective assistance of counsel (IAC) was that resentencing counsel had not provided the defense expert, Dr. Otto Bendheim, with the pretrial statements and trial testimony of Pauline Rodriguez and Yodilia Sabori. 08–99021 ER at 290. Lopez contended that, had Dr. Bendheim reviewed these documents prior to Lopez's resentencing, his diagnosis of pathological intoxication would have been stronger. 08–99021 ER at 291–92. The trial court dismissed the petition. 08–99021 ER 344. Lopez's

[2] Consistent with Lopez's opening brief, Respondents-Appellees cite the excerpts of record and supplemental excerpts of record from the original appeal in this Court as 08–99021 ER ___ and SER ___. Excerpts of record submitted with Lopez's opening brief in this appeal are cited as ER ___ and supplemental excerpts of record submitted with Respondents-Appellees' answering brief in this appeal are cited as SER ___.

PCR counsel filed a petition for review in the Arizona Supreme Court, thereby preserving the PCR claims for federal habeas review. 08–99021 SER, Exhibit L. The Arizona Supreme Court summarily denied Lopez's petition for review. 08–99021 ER 353.

Federal habeas proceedings in district court.

Lopez subsequently filed a petition for writ of habeas corpus followed by briefing on the merits. In his Claim 1(C), Lopez argued that resentencing counsel was ineffective for failing to provide Dr. Bendheim with the trial testimony and pretrial statements of Rodriguez and Sabori, as he had in his state PCR petition. He also claimed however that resentencing counsel was ineffective for failing to investigate and present to Dr. Bendheim a broad range of family background and social history information.[3] Lopez asserted that his habeas Claim 1(C) was the same claim PCR counsel had raised in state court.

[3] The district court found that the expanded Claim 1(C), "although broader than the claim presented in state court, was limited to a failure to investigate and provide background information *to [Lopez's] psychiatric expert*," not to the sentencer. *Lopez v. Ryan* (*Lopez IV*), 2012 WL 1520172, *4, 7 (April 30, 2012) (emphasis added). This Court similarly described Lopez's expanded habeas claim as contending that "counsel *failed to furnish Dr. Bendheim* with a broad range of biographical data and family and social history that were necessary for a proper diagnosis." *Lopez v. Ryan* (*Lopez III*), 630 F.3d 1198, 1204–1205 (9th Cir. 2011) (emphasis added). To the extent that Lopez's Rule 60 motion seeks to reopen habeas proceedings to allege that resentencing counsel was ineffective for failing to investigate and present family background and social history

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In its response to Lopez's merits brief, Respondents alleged that Lopez's claim 1(C) "went far beyond" what was presented in state court and was accompanied by numerous exhibits never presented in state court. 08–99021 SER, Exhibit I, at 12.

In his reply, Lopez continued to insist that claim 1(C) was the same as the IAC claim raised by state PCR counsel. 08–99021 SER, Exhibit M, at 21. He further asserted that PCR counsel "diligently" supported the claim "with evidence in the record and outside the record." *Id*. at 23, 28 (emphasis in original). He did not alternatively argue that any cause existed to overcome procedural default.

In contrast, regarding other habeas claims, Lopez alleged cause or a miscarriage of justice to overcome procedural default, including arguing that ineffective assistance of trial and/or appellate counsel was cause. 08–99021 ER 411, 415, 420, 520, 523, 528, 529.

The district court found that portions of Claim 1(C) were fundamentally altered from what was presented during the state PCR proceedings. 08–99021 ER 869. The district court dismissed as procedurally barred "the portions of Claim 1(C) that extend beyond the narrow claim raised in Petitioner's PCR

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mitigation to the sentencer, it is a second and successive (SOS) petition barred under 28 U.S.C. § 2244(b)(2). *See Lopez IV*, 2012 WL 1520172, *7.

petition and Petition for Review." *Id*. The court also noted that ineffectiveness of PCR counsel—"even if alleged"—could not serve as cause to overcome procedural default. *Id*. The district court considered the merits of the exhausted portion of Claim 1(C) and denied relief. 08–99021 ER 876, 890.

In a motion for reconsideration from the district court's order finding the expanded portions of Claim 1(C) procedurally defaulted, Lopez made a new argument—that Respondents had waived procedural default as a defense. SER R, at 2–11. Again, Lopez did not allege any cause to overcome procedural default. *Id*. The district court denied Lopez's motion for reconsideration.

Appeal from denial of habeas relief.

On appeal, Lopez argued that the district court had erred in finding a portion of Claim 1(C) procedurally defaulted. Lopez argued that PCR counsel had raised the entirety of Claim 1(C) in state court and that Respondents had waived the defense of procedural default. *See Lopez III*, 630 F.3d at 1205, n. 6. Lopez did not allege cause to overcome procedural default.

This Court agreed with the district court that Lopez had not presented the expanded portion of Claim 1(C) in state court. *Id*. at 1206. Noting that the parties strongly contested whether Respondents waived procedural default, this Court stated, "We need not and do not address this issue, however, because we affirm the dismissal of Lopez's claim on an alternate ground." *Id*. Finding that

Lopez had not presented any evidence in support of his expanded claim in state court, this Court determined that he was not entitled to an evidentiary hearing or expansion of the record in federal court and therefore could not obtain relief. *Id*. (citing 28 U.S.C. § 2254(e)(2); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241–42 (9th Cir. 2005). This Court also addressed the properly exhausted portion of Claim 1(C) that the district court had adjudicated on the merits and found that Lopez had failed to establish any prejudice as a result of counsel's alleged errors. *Id*.

Petition for writ of certiorari.

After his assertion that he raised the entirety of Claim 1(C) in state court was repeatedly rejected, Lopez noted the concept of cause to overcome procedural default for the first time in his petition for writ of certiorari. In a footnote, he asked the Supreme Court to hold his petition in abeyance pending the resolution of *Martinez v. Ryan* and *Maples v. Thomas*.[4] SER P. Respondents apprised the Court that Lopez had never alleged cause and prejudice or a miscarriage of justice to overcome procedural default. SER Q. The Supreme Court denied Lopez's petition and declined to hold his case in abeyance pending *Maples* or *Martinez*. *Lopez v. Ryan*, 132 S.Ct. 577 (2011) (Mem.).

[4] *Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Maples v. Thomas*, 132 S.Ct. 912, 927 (2012).

Lopez's motion for relief from judgment/successive habeas petition.

On April 9, 2012, Lopez filed a Rule 60 motion/habeas petition in district court arguing that *Martinez* represents a change in the law that when applied to his case demonstrates cause to overcome procedural default of his expanded Claim 1(C). *Lopez IV*, 2012 WL 1520172, *3. Lopez sought, under Rule 60(b)(6)[5] to reopen his federal habeas proceedings to establish cause and grounds for relief. Lopez alternatively argued that his motion for relief should be treated as a first habeas petition.

The district court found: (1) if this Court impliedly found the expanded portion of Claim 1(C) to be meritless based on a lack of supporting evidence, then Lopez's motion for relief from judgment constituted a successive habeas petition that must be dismissed; (2) extraordinary circumstances did not exist sufficient to reopen habeas proceedings under Rule 60, and; (3) there were no grounds to allow Lopez to file a second-in-time habeas petition. *Id*. at *4, 12. The district court granted a certificate of appealability on the question of whether extraordinary circumstances exist under Rule 60(b)(6). *Id*. at *12.

[5] In his reply brief below, Lopez also argued that relief should be granted under Rule 60(b)(5). *Id*. Lopez has not, however, raised this argument in this Court. In any event, this argument is waived because Lopez did not raise it until his reply brief below. Even if is not waived it is without merit because Rule 60(b)(5) applies to prospective application of judgments, and the judgment in

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SUMMARY OF ARGUMENT

Lopez failed to establish that the *Martinez* decision creates extraordinary circumstances under Rule 60(b) to reopen habeas proceedings. The procedural change worked by *Martinez* is based on principles of equity and is not an extraordinary circumstance. Moreover, *Martinez* "is all the less extraordinary" in this case because Lopez never pursued a claim that ineffective assistance of PCR counsel was cause to excuse procedural default. The State's reliance on the finality of this Court's mandate to obtain an execution warrant, the delay between the issuance of the mandate and the filing of Lopez's Rule 60 motion, the lack of any close connection between *Martinez* and this Court's opinion in *Lopez*, and principles of comity all weigh against a finding that extraordinary circumstances exist to reopen habeas proceedings.

This Court did not reach the question of procedural default in its opinion. To the extent that this Court's finding demonstrates that Lopez will be unable to prevail on the merits of his expanded and otherwise procedurally defaulted claim 1(C), it constitutes a merits ruling. Thus, Lopez's Rule 60 motion/habeas petition seeks review of a claim raised in a prior habeas proceeding. It is

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this case is not prospective. *See Lopez IV*, 2012 WL 1520172, at * 4, n. 1 (citing *Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir. 2008)).

therefore, in substance, a second or successive habeas petition that the district court was required to dismiss under 28 U.S.C. § 2244(b)(1).

ARGUMENTS

I

MARTINEZ DOES NOT REPRESENT AN EXTRAORDINARY CIRCUMSTANCE SUFFICIENT TO REOPEN HABEAS PROCEEDINGS.

A. THE *GONZALEZ* FACTORS.

In order to reopen a final judgment, Lopez must establish one of the grounds specified in Rule 60(b). Lopez contends that the Supreme Court's decision in *Martinez* constitutes an extraordinary circumstance under Rule 60(b)(6). In *Gonzalez v. Crosby*, the Supreme Court found that a change in the law did not create extraordinary circumstances justifying relief under Rule 60(b)(6). *Gonzalez*, 545 U.S. at 536–39. Similarly, the change in the law created by *Martinez* does not create extraordinary circumstances here.

The *Gonzalez* Court considered two factors in determining that a change in the law did not constitute extraordinary circumstances justifying relief under Rule 60(b)(6). 545 U.S. 524, 534 (2005). This Court should give the *Gonzalez* factors "significant consideration." *Phelps v. Alameida*, 569 F.3d 1120, 1136 (9th Cir. 2009).

1. *Martinez overruled an otherwise settled precedent.*

The first factor the *Gonzalez* court considered is whether the intervening change in the law overruled otherwise settled precedent. *See Gonzalez*, 545 U.S. at 536. In *Gonzalez*, the petitioner's habeas petition was dismissed as time

barred. Subsequently, the Supreme Court issued an opinion directly implicating the time bar ruling applied in Gonzalez's habeas proceedings. Gonzalez filed a Rule 60 motion seeking reconsideration of the time bar ruling. The Supreme Court concluded that the change in the law, while applicable to Gonzalez's case, was not an extraordinary circumstance under Rule 60(b)(6). The Supreme Court noted that the analysis applied in dismissing Gonzalez's petition was correct under then-existing law, and reasoned that the change in the law was, therefore, not an extraordinary circumstance. 545 U.S. at 536.

Although Lopez never asserted cause to overcome procedural default of the expanded portion of claim 1(C), the district court *sua sponte* addressed hypothetical cause arguments when it dismissed the expanded portion of the claim, and stated, "Petitioner had no constitutional right to counsel in state PCR proceedings, thus no constitutional violation can arise from ineffectiveness of PCR counsel, and, even if alleged, it cannot serve as cause." 08-99021 ER 869. The district court's language reflecting that ineffectiveness of PCR counsel could not serve as cause was correct under then-existing law. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Custer v. Hill*, 378 F.3d 968, 974–75 (9th Cir. 2004); *Bonin v. Calderon,* 77 F.3d 1155, 1159 (9th Cir.1996). Thus, *Martinez*'s "narrow, equitable exception to *Coleman*'s holding" represents a

change in well-settled procedural law. *See Adams v. Thaler,* 2012 WL 1415094, * 7 (5th Cir. Apr. 25, 2012).

In *Phelps*, this Court considered whether a change in Ninth Circuit law as applied to California state rules created an extraordinary circumstance. 569 P.3d at 1129-30. This Court found the law at the time the district court considered Phelps' habeas petition was "decidedly *un* settled" and "the change in the law . . . did not upset or overturn a settled legal principle." *Id*. at 1136 (emphasis in original). This Court thus found that the change in *Phelps* cut in favor of granting relief.

In contrast, the change represented by *Martinez* altered controlling law and is thus not "extraordinary" under *Gonzalez*. 545 U.S. at 536; *see also Adams,* 2012 WL 1415094, * 7 (finding that *Martinez* is "a change in decisional law," is "hardly extraordinary," and does not warrant relief under Rule 60(b)(6)).

2. *Lopez was not diligent in pursuing a claim that cause existed to overcome procedural default.*

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

second *Gonzalez* factor therefore weighs against a finding of extraordinary circumstances. *See id*.

During the original habeas proceedings—in response to Lopez's district court merits brief—Respondents argued that the expanded portion of Claim 1(C) was procedurally defaulted. Despite this, *Lopez did not assert any cause* to overcome his procedural default of the claim he now seeks to resurrect. Instead, Lopez insisted that his PCR counsel *raised* the entirety of Claim 1(C) in state post-conviction proceedings, and, thus, the claim was not procedurally defaulted. SER S, at 41. Lopez also asserted that his PCR counsel "diligently" supported the entirety of Claim 1(C) with evidence from the record and also with evidence obtained from an investigation outside the record. 08–99021 SER, Exhibit M, at 23, 28. As the district court noted when it decided Lopez's habeas claims, Lopez "did not allege cause and prejudice or a miscarriage of justice to overcome [procedural] default." 08–99021 ER 869. Even after the district court ruled that the expanded portion of Claim 1(C) was procedurally defaulted, Lopez did not argue in his motion for reconsideration that cause existed to overcome procedural default.

Lopez also failed to assert cause on appeal or in his petition for rehearing and suggestions for rehearing en banc in this Court. Instead, Lopez consistently and repeatedly asserted—in direct contradiction of his current position—that

PCR counsel raised Claim 1(C) in state PCR proceedings and diligently supported it with evidence.[6] *See Lopez III*, 630 F.3d at 1205, n. 6. Only after this assertion was rejected by the district court and this Court, after this Court denied his request for rehearing, after the Supreme Court denied his petition for certiorari, after this Court issued the mandate, and after the State requested a warrant for execution from the Arizona Supreme Court, did Lopez argue that the unexhausted portion of Claim 1(C) should be heard on the merits because PCR counsel was constitutionally ineffective by failing to raise it. Lopez clearly was not diligent in advancing a claim that cause existed to overcome procedural default. *See Gonzalez*, 545 U.S. at 537. "[The petitioner's] lack of diligence confirms that [a new case] is not an extraordinary circumstance justifying relief from the judgment in [his] case." *Id.*

To the extent that Lopez argues he was previously unable to assert that ineffective assistance of PCR counsel constituted cause to overcome procedural default because *Martinez* had not yet been decided, he is also incorrect. This Court's language in *Moormann v. Schriro*, 672 F.3d 644, 647 (9th Cir. 2012), aside, the Supreme Court has made clear that it is unimportant whether Lopez

[6] Such a dramatic change in positions in the same case is a "damning indication" that Lopez's current position—that PCR counsel was ineffective—is meritless. *See Phelps*, 569 F.3d at 1130. In fact, in *Phelps*, this Court found that the State was judicially estopped from taking such clearly inconsistent positions in the (continued ...)

was *aware* he could make the assertion as long as he *could* make it. *See Gonzalez*, 545 U.S. at 537–38, n. 10; *see also Ackermann v. United States*, 340 U.S. 193, 197–98 (1950) (petitioner cannot be relieved of his choice not to pursue a claim because hindsight seems to indicate that his decision was probably wrong).

Moreover, prior to *Martinez*, many habeas petitioners, including the *Martinez* petitioner, had contended that ineffective assistance of PCR counsel constituted cause to overcome procedural default. Some of these petitioners were represented by the Federal Public Defender's Office, which represented Lopez throughout habeas proceedings**.** SER T, at 81. Undoubtedly, Lopez's counsel could have asserted ineffectiveness of PCR counsel as cause to overcome procedural default, but chose not to make that assertion.

Furthermore, prior to *Martinez*, defendants, including Martinez, pursued claims if ineffective assistance of PCR counsel in state court, a pre-requisite to asserting such a claim as cause to overcome a procedural default. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Lopez did not attempt to assert this type of claim in state court until after the mandate issued in this case.

As the district court correctly noted, "This is not a case, such as *Phelps,* where the petitioner 'pressed all possible avenues of relief' on the identical legal

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same litigation. *Id*. at 1131.

position ultimately adopted in a subsequent case as legally correct." *Lopez IV*, 2012 WL 1520172, *9 (citing *Phelps*, 569 F.3d at 1137). Instead, Lopez chose not to advance the argument many other petitioners had made and never challenged the district court's *sua sponte* finding that ineffectiveness of PCR counsel could not serve as cause to overcome procedural default. Lopez's lack of diligence in advancing this argument weighs against finding that *Martinez* constitutes an extraordinary circumstance. *Cf. Ruiz v. Quarterman*, 504 F.3d 523, 528 (5th Cir. 2007) (petitioner granted Rule 60 relief to reopen previously procedurally defaulted claim where petitioner had claimed in his habeas petition that he satisfied the cause exception to procedural default).

B. THE *PHELPS*/*RITTER* FACTORS.

In *Phelps*, this Court cited as "useful" and "instructive" four additional factors in determining whether extraordinary circumstances existed for reopening habeas proceedings under Rule 60(b)(6). 569 F.3d at 1137. The *Phelps* court took those factors from *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir. 1987), noting that the Supreme Court had cited *Ritter* favorably in *Gonzalez*. ("Noting that '*Ritter* [was] cited favorably by the Supreme Court in *Gonzalez*,' we have previously stated that *Ritter* 'is instructive' for courts applying Rule 60(b)(6) to habeas corpus.") (citing *Harvest v. Castro*, 531 F.3d 737, 748 n. 8). In *Gonzalez*, The Supreme Court *did not*, however, adopt the

additional factors applied in *Ritter*. In fact, the Supreme Court merely cited *Ritter* as an example to note that sometimes "the State, not the habeas petitioner, [] seeks to use Rule 60(b), to reopen a habeas judgment *granting* the writ." 545 U.S. at 534 (emphasis in original). Nonetheless, applying the factors used in *Ritter* and *Phelps* to this case, there are not extraordinary circumstances to reopen habeas proceedings.

1. *Close connection*.

The mere fact that the law changes and evolves over time "cannot upset all final judgments that have predated any specific change in the law." *Phelps*, 569 F.3d at 1139. Therefore, a change in the law is not enough to require that habeas proceedings be reopened. It is the *nature* of the change that is important. *Id*.

Thus, courts should consider whether there is a close connection between the original judgment and the intervening law. Here, there is not a close connection between this Court's decision in *Lopez* and *Martinez* because this Court's decision in *Lopez* relied on alternative grounds independent of whether Lopez could establish cause to overcome procedural default on his IAC claim.

In *Ritter*, the intervening case was decided "for the express purpose of resolving the dispute" between the *Ritter* judgment and a contrary decision, and the cases were therefore "virtual legal twins." 811 F.2d at 1402–03. In *Phelps,*

the intervening change in the law "directly overruled the decision for which reconsideration was sought." 569 F.3d at 1139. In both cases, the intervening case "resolved a conflict between competing and co-equal legal authorities." *Id*. Close connections of these kinds carry great weight in establishing extraordinary circumstances. *Ritter*, 811 F.2d at 1403.

Here, there is no such close connection. *Martinez* was not decided to resolve a dispute surrounding *Lopez*. In fact, *Martinez*, which did not resolve competing authorities but overturned well-established procedural law, does not address any question raised in *Lopez*. As discussed, the question of cause or of ineffectiveness of PCR counsel to constitute cause was not raised or addressed in *Lopez*. In fact, Lopez then maintained the position that PCR counsel was diligent. Moreover, in *Lopez*, this Court found it unnecessary to address procedural default because there was an alternative basis for rejecting Lopez's claim. This Court's decision rested on the requirements of § 2254(e)(2). Therefore, the core issues in *Martinez*—procedural default, cause, and IAC of PCR counsel—were not the same issues addressed in *Lopez*. This lack of a close connection between *Lopez* and *Martinez* weighs strongly against a finding of extraordinary circumstances. *See Ritter*, 811 F.2d at 1403.

2. *Reliance on finality.*

"Both the State and victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough,* 547 U.S. 573, 584 (2006). "[T]he presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Here, this Court issued the mandate, and the State subsequently requested a warrant for execution. Therefore, this is not a case like *Phelps*, in which neither party relied on the finality of the habeas dismissal. *See* 569 F.3d at 1138.

In assessing whether the State's reliance on the finality of Lopez's habeas judgment weighed against a finding of extraordinary circumstances, the district court appropriately quoted from *Calderon v. Thompson,* "a capital case in which the appellate court had sought to recall its mandate for the purpose of revisiting the merits of the prisoner's habeas petition":

> A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years 'the significant costs of federal habeas review,' the State is entitled to the assurance of finality. When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in

> punishing the guilty,' an interest shared by the State and the victims of crime alike.

Lopez IV, 2012 WL 1520172, at *10 (citing 523 U.S. 538, 556 (1998) (internal citations omitted).)

In *Gonzalez*, The Supreme Court held that little weight should be given to the consideration of finality *standing alone*. 545 U.S. at 529 (emphasis added). This Court his noted, however, that "when the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment," the balance cuts against a finding of extraordinary circumstances. *Phelps*, 569 F.3d at 1138.

The consideration of finality here does not stand alone. It should be considered along with the State's reliance on this Court's mandate and the factors discussed above and below—in particular, Lopez's failure to previously assert a cause claim. Accordingly, the fact that this Court, after close to 25 years of post-conviction proceedings, issued the mandate, and, in reliance on that, the State requested and obtained a warrant for execution, weighs against a finding that extraordinary circumstances exist to reopen habeas proceedings.

3. *Delay*.

In *Ritter*, the court observed, "The longer the delay the more intrusive is the effort to upset the finality of the judgment." 811 F.2d at 1402. Thus, an additional factor to be considered is whether Lopez petitioned the court to

reopen habeas proceedings "with a degree of promptness that respects 'the strong public interest in timeliness and finality.'" *Phelps,* 569 F.3d at 1138 (internal citation omitted). As the district court noted, Lopez did not delay seeking relief after *Martinez* was decided, and he filed his Rule 60 motion/habeas petition three weeks later. The district court therefore considered this in Lopez's favor. *Lopez IV*, 2012 WL 1520172, at *10.

Ritter and *Phelps*, however, treated the question of delay differently than the district court. In assessing whether there had been delay in *Ritter* and *Phelps*, the courts did not calculate the time between when the new law was decided and the Rule 60 motion was filed. Instead, the courts considered "the delay between the finality of the judgment and the motion for Rule 60(b)(6) relief." 569 F.3d at 1138; 811 F.2d at 1403. *Ritter*'s and *Phelps*' assessment of delay makes apparent that any weight considered in Lopez's favor regarding delay should be considered in light of the fact that the mandate was issued on November 17, 2011. Consideration of delay should also be balanced against the other timeliness factors discussed herein: (1) Lopez's lack of diligence in advancing a cause claim in his habeas proceedings, and; (2) the fact that Lopez's Rule 60 motion/habeas petition came after this Court issued the mandate and the Arizona Supreme Court issued an execution warrant.

4. *Comity*.

Finally, considerations of comity weigh against reopening final habeas proceedings. "The state has a strong interest in assuring that constitutionally valid state court judgments are not set aside and can be carried out without undue delay." *Ritter*, 811 F.2d at 1403. "A federal court's grant of a writ of habeas corpus upsets the finality of a state court judgment and is always a serious matter implicating considerations of comity." *Id*.

The *Phelps* court determined that principles of comity are not upset when an erroneous legal judgment, if left uncorrected, "would prevent the true merits of a petitioner's constitutional claims from ever being heard." 569 F.3d at 1140. For example, in *Phelps,* the habeas petition had been dismissed as untimely, thus precluding *any* federal habeas review of the petitioner's claims. These circumstances weighed in favor of reopening habeas proceedings, this Court reasoned, because Phelps would otherwise be denied habeas protections "entirely." *Id*. Lopez argues that this reasoning, in particular, requires that his habeas proceedings be reopened.

Lopez's case is distinguishable from *Phelps*. As the district court correctly noted, "Here, [this] Court's judgment did not preclude review of all of [Lopez's] federal constitutional claims. A number of the claims, including counsel ineffectiveness for failing to provide Dr. Bendheim with the statements

and testimony of two relevant witnesses, were addressed on the merits in both the district and appellate courts." *Lopez IV*, 2012 WL 1520172, at *11. Moreover, this Court declined to reach the merits of the expanded portion of Claim 1(C) not because it was procedurally defaulted, but because § 2254(e)(2) otherwise precluded Lopez from presenting evidence and prevailing on the merits. The greatest difference between *Phelps* and *Lopez* is evident from this Court's statement in *Phelps*: "We cannot imagine a more sterling example of diligence than Phelps has exhibited." 569 F.3d at 1137. In contrast, in describing Lopez, this Court found, "Lopez was not diligent in presenting the new evidence at issue,"[7] and presumably could have obtained the information from his family members without court order and with minimal expense. 630 F.3d at 1206. Moreover, while at every stage of his case Phelps "pressed all possible avenues for relief," Lopez failed to pursue a claim of cause to overcome procedural default until well after the denial of habeas relief became final. *See* 569 F.3d at 1137. While "fundamental fairness is the central concern of the writ of habeas corpus," the circumstances here reflect that comity and fairness weigh

[7] While Lopez attempts to blame his PCR counsel for this lack of diligence, the record shows that from his first sentencing proceeding, Lopez himself was not diligent. In fact, Lopez strongly opposed counsel subpoenaing any of his family members to his sentencing proceeding. 08–99021 SER F, at 4.

against a finding of extraordinary circumstances. *Strickland v. Washington*, 466 U.S. 668, 697–98 (1984).

C. CONCLUSION.

Applying both of the *Gonzalez* factors and all four of the *Ritter*/*Phelps* factors to "the particular facts of this case," the district court correctly found that *Martinez* does not constitute an extraordinary circumstance justifying the reopening of habeas proceedings. *Lopez IV*, 2012 WL 1520172, *7–11. Lopez appeals to the "equitable concerns of *Martinez*," but equity cuts both ways. OBR, at 28–29. For 12 years, Lopez argued that PCR counsel *was diligent* in raising claims and supporting them with evidence in state court. To allow Lopez to reopen habeas proceedings after the mandate has issued to make the argument that PCR counsel was constitutionally ineffective would not be equitable. That Lopez never previously asserted cause to overcome procedural default cannot be ignored and "confirms that [*Martinez*] is not an extraordinary circumstance justifying relief from the judgment in [this] case." *Gonzalez*, 545 U.S. at 537.

II

LOPEZ'S MOTION FOR RELIEF/HABEAS PETITION IS BARRED AS A SECOND AND SUCCESSIVE HABEAS PETITION UNDER 28 U.S.C. § 2244(b)(1).

The district court held that if this Court's § 2254(e) analysis in *Lopez* was akin to a merits ruling that the expanded portion of claim 1(C) *was meritless*

based on a lack of supporting evidence, then Lopez's motion must be dismissed as an SOS petition. *Lopez IV*, 2012 WL 1520172, at *4. Under those circumstances, Lopez's motion seeks "to re-raise a claim presented in a prior petition and denied on the merits." *Id*. Such an SOS application "shall be dismissed." *See* 28 U.S.C. § 2244(b); *Gonzalez*, 545 U.S. at 530.

Lopez contends that the district court went too far when it considered whether this Court's conclusion was essentially a merits ruling. However, this Court in fact resolved Lopez's expanded claim on the merits when it found that Lopez had not supported the expanded portion of Claim 1(C) with evidence, and thus, could not prevail on the merits. *See Lopez III*, 630 F.3d at 1205-1206. Thus, Lopez's Rule 60 motion constituted a successive habeas application that did not fall within a statutory exception and the district court was required to dismiss it. *See* 28 U.S.C. § 2244(b); *Gonzalez,* 545 U.S. at 530.

Where a Rule 60 motion for relief constitutes a "habeas corpus application," it is governed by 28 U.S.C. § 2244(b). *Gonzalez*, 545 U.S. at 530. A habeas corpus "application" is a filing that seeks "an adjudication on the merits of the petitioner's claim[s]." *Id*. Lopez's Rule 60 motion clearly sought review of the merits of his expanded Claim 1(C) when the same claim had been raised in his original habeas petition. ER 98–100; 103; 104, n. 1.

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

Moreover, in *Gonzalez*, the Supreme Court specifically noted that a successive petition should not be filed under the guise of a Rule 60 motion contending—as Lopez asserted—that a subsequent change in the law justifies relief. The Supreme Court has stated that such a pleading, "although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Gonzalez*, 545 U.S. at 531. A successive habeas petition that raises a previously presented claim must be dismissed, and even a new, retroactive rule of *constitutional law* does not create an exception. *See* 28 U.S.C. § 2244(b)(1); *Gonzalez*, 545 U.S. at 530; *Cf.* 28 U.S.C. § 2244(b)(2)(A) (providing exception to rule of dismissal for successive petition raising *new claims*). *A fortiori*, there can be no exception for a new rule regarding cause. Thus, even assuming *Martinez* could be construed to be retroactively applicable, it does not create a basis for consideration of the merits of Lopez's previously presented claim.

Lopez argues that his motion for relief alleged a defect in the resolution of a procedural issue, rather than a merits ruling and was therefore not subject to § 2244(b)'s limitations. OBR at 18, n. 4. While the *Gonzalez* court made a distinction between Rule 60 motions that attack procedural defects and those that attack merits resolutions, the distinction makes no difference here. Lopez did not "merely assert[] that a previous ruling which precluded a merits determination was in error," *Gonzalez*, 545 U.S. 532, n. 4, he asked the district court to grant him "review of the *merits* of his claim raised in his first habeas petition." ER 100 & 104, n. 1 (emphasis added). This is in contrast to *Gonzalez*, where the petitioner merely asked the district court to correct a time-bar ruling. *Gonzalez*, 545 U.S. at 527.

Lopez admits that the same federal constitutional issue his Rule 60 motion asked the district court to review on the merits was presented in his first habeas petition. ER 100 & 104, n. 1; OBR at 18, n. 4. Thus, this claim falls squarely into the category of claims discussed in *Gonzalez* that constitute a second or successive petition. *See Gonzalez* 545 U.S. at 530. Therefore, Lopez's Rule 60 motion was also properly dismissed because it was in substance a successive habeas petition.

III

LOPEZ'S SECOND HABEAS PETITION CANNOT PROPERLY BE TREATED AS A FIRST PETITION.

Lopez contends that 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), his second-in-time habeas petition should not be treated as successive. None of these cases is applicable to Lopez's case and, upon review, these cases do not support Lopez's argument, which the district court characterized as "novel." *Lopez IV*, 2012 WL 1520172, at *12.

Martinez-Villareal held that a habeas petition claiming that the petitioner was incompetent to be executed was not a second or successive petition where the original petition was dismissed by the district court as premature. 523 U.S. at 640–42. In *Slack*, the Court held that the district court could treat a second petition as a first petition where the petitioner's original habeas petition was dismissed for failure to exhaust state remedies and the petitioner then exhausted those remedies and returned to federal court. 529 U.S. at 487-88. In *Panetti*, the Court applied its holding in *Martinez-Villareal* in the context of a petitioner raising a claim of incompetence to be executed for the first time after having already filed a habeas petition that was rejected. 551 U.S. at 944–47

In each of these cases, the original habeas petition was dismissed with the expectation that the petition—or a claim unripe at the time of the original

petition—could be re-filed when procedurally appropriate. Such is not the case here. Moreover, a cause argument is not subject to the same "ripeness" concerns as the claims made in *Martinez-Villareal*, *Slack*, or *Panetti*. Lopez could have claimed in his original habeas proceeding that the ineffectiveness of PCR counsel was cause to excuse procedural default. Such a claim would not have been unripe. As discussed above, many habeas petitioners, including Martinez, made such a claim. The fact that *Martinez* had not yet been decided did not preclude Lopez from making the argument. *See Gonzalez*, 545 U.S. 537–38 (petitioner could have pursued review of a statute of limitations issue even though it had not yet been decided by the Supreme Court).

As discussed above, a claim re-raised in a second habeas petition that was presented in a prior habeas petition is barred under 28 U.S.C. § 2244(b)(1). There are no exceptions to this provision, and dismissal is required without further analysis. *See Gonzalez*, 545 U.S. at 530.

CONCLUSION

Based on the foregoing, Lopez's Rule 60 motion/habeas petition constituted a second or successive petition that was properly denied by the district court. Even if Lopez's motion could be correctly considered a Rule 60 motion, Lopez failed to establish the extraordinary circumstances necessary to reopen habeas proceedings.

This Court previously determined that it was unnecessary to address the issue of procedural default of Lopez's IAC claim. *Martinez* does not call that ruling into question, and there is no reasoned basis for Rule 60 relief. Moreover, as a second habeas petition, Lopez's petition does not meet any exception that would allow its consideration. *See* 28 U.S.C. § 2244. This Court should summarily deny relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2012 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6,506 words.

/s/_____
Susanne Bartlett Blomo

No. 12-99001

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL V. LOPEZ, Petitioner-Appellant, –vs– CHARLES L. RYAN, et. al., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV–98–0072–PHX–SMM STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

DATED this 8th day of May, 2012.

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