LOPEZ V. RYAN
CASE NO. 12-99001
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TO EXCERPT OF RECORD

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SAMUEL V. LOPEZ, Petitioner, vs. TERRY STEWART, et al., Respondents.	)	**CAPITAL CASE** **EXECUTION DATE: MAY 16** CIV-98-0072-PHX-SMM NOTICE OF APPEAL

COMES NOW Petitioner, by counsel, and hereby gives notice of his intent to appeal this Court's Order dated April 30, 2012, Docket Entry No. 249, denying his Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) or in the Alternative Petition for Writ of Habeas Corpus.

Respectfully submitted this 30th of April, 2012.

/s/ Kelley J .Henry
Kelley J. Henry
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Attorneys for Samuel Lopez

Copy of the foregoing served this
30th day of April, 2012, by CM/ECF to:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Samuel Villegas Lopez, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-98-72-PHX-SMM DEATH PENALTY CASE **ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT**

Before the Court is Petitioner's motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure or in the alternative petition for writ of habeas corpus. (Doc. 237.) The motion asserts that the Supreme Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), provides a proper ground for this Court to reopen Petitioner's federal habeas proceeding. Respondents oppose the motion. (Doc. 246.) For the reasons that follow, the motion is denied.

BACKGROUND

This case derives from the 1986 murder of 59-year-old Estafana Holmes in her Phoenix apartment. Police found the victim's partially nude body after conducting a "check welfare" call. She had been blindfolded with her pajama pants, and her mouth was stuffed with a scarf. The apartment was blood-spattered and in disarray with broken and displaced furnishings. The victim's throat had been sliced, and she had been stabbed more than twenty times in her left breast, upper chest, and lower abdomen. Seminal fluid was found in both

her vagina and anus.

Petitioner was seen in the neighborhood the night before the crime as well as in the early morning after the murder, looking wet as if he had just bathed. While under questioning several days later about an unrelated matter, Petitioner asked about a woman who had been stabbed and had her throat slashed. Information that the victim's throat had been cut had never been publically released. Petitioner's fingerprints matched prints found in the victim's apartment, and his bodily fluids were consistent with those obtained from her body.

In 1987, a jury convicted Petitioner of first degree murder, sexual assault, kidnapping, and burglary. The trial court sentenced him to death for the murder after finding the existence of two aggravating factors: a prior felony conviction "involving the use or threat of violence on another person," Ariz. Rev. Stat. § 13-703(F)(2) (1992) (transferred and renumbered to § 13-751), and commission of the offense in an especially heinous, cruel, or depraved manner, *id.* § 13-703(F)(6) (1992). On direct appeal, the Arizona Supreme Court affirmed the convictions but vacated the "prior felony conviction" aggravating factor and remanded for resentencing on the murder count. *State v. Lopez*, 163 Ariz. 108, 116, 786 P.2d 959, 967 (1990).

Resentencing took place in 1990. The trial court again sentenced Petitioner to death, finding that the murder was committed in an especially cruel, heinous, or depraved manner and that no mitigating circumstances were sufficient to warrant leniency. On appeal, the Arizona Supreme Court affirmed. *State v. Lopez*, 175 Ariz. 407, 857 P.2d 1261 (1993). With regard to mitigation, the court found *inter alia* that Petitioner had failed to prove that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired at the time of the offense as a result of intoxication, *see* Ariz. Rev. Stat. § 13-703(G)(1) (1992) (transferred and renumbered to § 13-751), or that he suffered from a condition known as "pathological intoxication."

Petitioner then sought state postconviction relief ("PCR") under Rule 32 of the

Arizona Rules of Criminal Procedure. Among other claims in his PCR petition, Petitioner asserted that trial counsel had been ineffective in failing to provide his "pathological intoxication" expert with pretrial statements and testimony of two witnesses who had observed Petitioner's actions and behavior a few hours before the murder. The trial court dismissed the petition without a hearing. With regard to the counsel ineffectiveness claims, the court found that Petitioner had failed to show "counsel's performance fell below prevailing professional norms" or a "reasonable probability that the result of the trial or sentencing procedures would have been different." The Arizona Supreme Court summarily denied a discretionary petition for review.

Petitioner filed a petition seeking federal habeas relief in 1998. After initial briefing limited to procedural default issues, the Court dismissed a number of Petitioner's claims as procedurally barred, premature, or plainly meritless. (Docs. 92, 160). In their answer regarding the procedural status of Petitioner's claims, Respondents conceded that Petitioner had properly exhausted his ineffectiveness claims (Doc. 37 at 12), and therefore the Court ordered merits briefing on these claims (Doc. 160 at 7, 22). However, after Petitioner filed his merits brief, Respondents asserted for the first time that Petitioner had fundamentally altered one of the exhausted sentencing ineffectiveness claims and that this expanded habeas claim was procedurally barred from federal review. (Doc. 196 at 12-14.) In reply, Petitioner argued that "the claim is the same as that pleaded in state court: trial counsel rendered ineffective assistance when he failed to provide his expert the relevant information he needed to render a reliable opinion when he testified." (Doc. 199 at 21.) Petitioner did not, as an alternative argument, raise any grounds of cause and prejudice or miscarriage of justice to overcome the alleged default.

In a subsequent ruling, the Court determined that it had authority to address the newly-raised procedural default allegation and found that the expanded ineffectiveness claim had not been properly exhausted in state court and was procedurally defaulted. (Doc. 200 at 9-10 & n.7, 13-15.) Although Petitioner had not asserted cause and prejudice or miscarriage-of-

justice grounds to excuse the alleged default, the Court *sua sponte* considered hypothetical arguments, including ineffectiveness by postconviction counsel in failing to fairly present the broadened claim in the state PCR petition. (*Id.* at 15 n.8.) Pursuant to then existing law, the Court determined that any failure by PCR counsel to raise the claim could not constitute cause. (*Id.*) Recognizing that the issue was adequate to proceed on appeal, the Court issued a certificate of appealability on the question of whether Petitioner's expanded sentencing ineffectiveness claim was procedurally barred.

On appeal, the Court of Appeals for the Ninth Circuit declined to reach the procedural default issue and affirmed on an alternate ground. The court found that Petitioner was "independently 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. *See* 28 U.S.C. § 2254(e)(2)." *Lopez v. Ryan*, 630 F.3d 1198, 1201 (9th Cir.), *cert. denied*, 132 S. Ct. 577 (2011).

On March 20, 2012, the Supreme Court decided in *Martinez v. Ryan* that in order to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* [*v. Thompson*, 501 U.S. 722 (1991),] that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." 132 S. Ct. at 1315. Consequently, the Court held that in states like Arizona, which require ineffective-assistance-of-trial-counsel claims to be raised in an initial-review collateral proceeding, failure of counsel in an initial-review collateral proceeding to raise a substantial trial ineffectiveness claim may provide cause to excuse the procedural default of such a claim. *Id.*

On April 9, 2012, Petitioner filed the instant motion, arguing that *Martinez* represents a "watershed change in procedural law" that when applied to this case demonstrates that he has cause to overcome the finding of procedural default regarding his expanded sentencing ineffectiveness claim. (Doc. 237 at 4.) He seeks relief under Rule 60(b)(6) to reopen these proceedings so he can demonstrate that postconviction counsel's ineffectiveness constitutes

cause and to establish entitlement to federal habeas relief based on sentencing counsel's alleged ineffectiveness. In a footnote in his reply brief, Petitioner asserts for the first time that relief also should be granted under Rule 60(b)(5). (Doc. 248 at 12 n.7.)

DISCUSSION

Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on several grounds, including the catch-all category "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). A motion under subsection (b)(6) must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and requires a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

I. Second or Successive Petition

For habeas petitioners, Rule 60(b) may not be used to avoid the prohibition set forth in 28 U.S.C. § 2244(b) against second or successive petitions. In *Gonzalez*, the Court explained that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim *on the merits*." *Id.* at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at n.4. The Court further explained that a Rule 60(b) motion does not constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.*

Petitioner asserts that the latter situation applies here because the Court found his expanded ineffectiveness claim to be procedurally defaulted and did not address the claim "on the merits." (Doc. 237 at 9.) Petitioner is correct that under *Gonzalez* a district court has jurisdiction to consider a Rule 60(b) motion challenging a procedural default ruling. However, in this case, the Court is bound by the decision of the Ninth Circuit, which did not reach the procedural default issue and instead found that Petitioner was not entitled to habeas

relief because § 2254(e)(2) precluded consideration of new evidence not presented in state court.

Whether the appellate court's § 2254(e)(2) analysis is akin to a merits ruling appears to be an open question. Assuming the court impliedly found the claim to be meritless based on a lack of supporting evidence, such ruling is now law of the case. *See Pepper v. United States*, 131 S. Ct. 1229, 1250 (2011) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). If so, this Court must dismiss the instant motion because it constitutes a successive habeas petition seeking to re-raise a claim presented in a prior petition and denied on the merits. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."); *Gonzalez*, 545 U.S. at 530. Alternatively, even if the Court construes the Ninth Circuit's ruling as procedural and not on the merits, Petitioner's motion fails because, as discussed in Section II below, *Martinez* does not constitute extraordinary circumstances sufficient to reopen judgment in this case.[1]

As a separate matter, before undertaking its alternative analysis of Petitioner's motion, the Court must address the scope of Petitioner's sentencing ineffectiveness claim. In a footnote within the instant motion, Petitioner asserts that he seeks "review of Claim 1C as presented in the previous proceedings in this Court." (Doc. 237 at 7 n.1.) However, the body of the motion suggests that he is trying to pursue a different claim than that presented in either state court or his habeas petition. Specifically, Petitioner asserts that counsel was ineffective for failing to conduct a meaningful investigation into Petitioner's social history

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[1] The Court also summarily denies Petitioner's request for relief under Rule 60(b)(5). That provision permits relief if *prospective* application of a judgment or order "is no longer equitable." Fed. R. Civ. P. 60(b)(5). The judgment in this case is not prospective. *See Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir. 2008) ("The standard used in determining whether a judgment has prospective application is whether it is executory or involves the supervision of changing conduct or conditions.").

and to present evidence of Petitioner's "tragic life" as mitigation to the sentencing judge.[2] (Doc. 237 at 20-24.)

In his habeas petition, Petitioner framed Claim 1C as follows:

> Mr. Lopez's attorneys failed to investigate or prepare his case for trial and sentencing, including their failure to properly prepare the psychiatric expert, Dr. Otto Bendheim.
>
> Petitioner came from a poor, dysfunctional family who suffered severe problems and financial hardships which were exacerbated by his father's abandonment of Petitioner, his seven brothers and his mother when Petitioner was a young boy. R.T. 7/13/90 (p.m.), Ex. 8. Petitioner completed only the tenth grade, and has only a sixth grade reading level. ROA 99. Several of Petitioner's brothers have substance abuse problems, and have been imprisoned, including one brother for a serious assault and two brothers for a homicide.
>
> The unrefuted testimony at trial established that petitioner was intoxicated the night [of] the homicide. One witness, Yodilia Sabori, saw petitioner just forty-five minutes prior to the homicide. She described Mr. Lopez as:
>
> > He was different, he was shaking, like shaking, and he was—he acted like he was mad, like everything bothered him. He just couldn't stand still. He was just—he had to hold himself on the wall, stand on the wall, just stand on the pole.
>
> R.T. 4/21/87 at 73-74. Ms. Sabori's friend Pauline Rodriguez said that Mr. Lopez was "on something" the night of the homicide. R.T. 7/13/90 (p.m.), Ex. 11. Ms. Rodriguez's boyfriend, Raymond "Ralph" Hernandez also believed that Mr. Lopez was intoxicated that night. R.T. 7/13/90 (a.m.), Ex. 3.
>
> Both Ms. Rodriguez and Mr. Hernandez described Mr. Lopez as a different person when he is under the influence of intoxicants. R.T. 7/13/90 (p.m.), Ex. 11; R.T. 7/13/90 (a.m.), Ex. 3. Ms. Sabori described Mr. Lopez as undergoing a sudden and dramatic change in behavior after asking her if she wanted to get "high" and then going around the corner for approximately five minutes. R.T. 4/21/87 at 72-76; R.T. 7/13/90 (p.m.), Ex. 10. Despite the fact that Dr. Bendheim had reached a conclusion that Mr. Lopez likely suffers from pathological intoxication, the trial attorneys, both at trial and resentencing, failed to provide the testimony or taped interviews of Pauline Rodriguez and Yodilia Sabori to Dr. Bendheim. ROA 116, Ex. 3. This omission on the part of the attorneys severely undermined the testimony and opinions offered by Dr. Bendheim at sentencing. Once provided with this information, Dr.

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[2] In support Petitioner provides a 47-page affidavit obtained in February 2012 from the National Mitigation Coordinator for the Defender Services Division of the United States Courts detailing the "prevailing professional norms regarding the investigation and preparation of mitigation evidence in capital cases." (Doc. 239-5 at 1.)

> Bendheim was even more sure of his diagnosis. ROA 116, Ex. 3. The failure to provide this and other important background information to Dr. Bendheim was ineffective assistance of counsel. *Strickland v. Washington, supra*.
>
> Despite information that petitioner had a long term history of substance abuse and exposure to toxic substances, came from a dysfunctional family plagued by violence and neglect, was abandoned by his father at a young age, lived in extreme poverty, had little guidance because his mother was forced to work to support her eight children, had only a tenth grade education and sixth grade reading level, Mr. Lopez's attorney failed to properly prepare his case for trial and sentencing.
>
> Such investigation was necessary for the expert to review in order to establish a base line for Mr. Lopez's cognitive functioning, to compare his cognitive and behavioral functioning when intoxicated to his base line functioning, to determine if intoxication exacerbated any underlying physiological conditions with psychiatric consequences or psychiatric disorders, to determine the presence and course of his addictive disease, to determine the likelihood of the presence, severity and effect of neurologic deficits and the effects of intoxication on those deficits, and to determine any other factors that would have influenced or controlled his thought processes and behavior during the offense. The medical expert also required this information to weigh and assess lay witness reports of Mr. Lopez's behavior surrounding the offense, during interrogation by law enforcement, and during clinical interviews with Mr. Lopez. Counsel was ineffective. *Strickland v. Washington, supra.*

(Doc. 27 at 11-13.)

In its order finding procedural default, the Court determined that Claim 1C was substantially broader than the claim presented in state court:

> In his PCR petition, Petitioner alleged ineffective assistance of counsel (IAC) because counsel failed to properly prepare his expert, Dr. Otto Bendheim. (ROA 116 at 9.) Specifically, Petitioner alleged that counsel failed to provide Dr. Bendheim with four documents—the pretrial statements and trial testimony of Pauline Rodriguez and Yodilia Sabori. (*Id.*) Petitioner alleged this was deficient because the statements were available to counsel and they were particularly relevant to the doctor's assessment of pathological intoxication at the time of the crime as these witnesses saw Petitioner's actions and behaviors just a few hours before the murder. (*Id.* at 10.) Petitioner alleged he was prejudiced by counsel's failure because this information was the best evidence in support of pathological intoxication and, if it had been provided to Dr. Bendheim initially, he could have provided a more complete and stronger diagnosis at the time of sentencing. (*Id.* at 10-11.) The allegations in the Petition for Review are essentially identical and focus solely on counsel's failure to provide Dr. Bendheim the statements by Rodriguez and Sabori that were identified in the PCR petition. (PR Dkt. 1 at 11-13.)
>
> By continuing to characterize the claim as he did in state court—that counsel failed to prepare his expert witness—Petitioner attempts to shoehorn in the much broader claim that counsel failed to conduct an exhaustive social

> history investigation (which he should have used to prepare his expert). However, the claim asserted in state court was a very narrow one, focused solely on counsel's failure to provide the expert with four specific documents from percipient witnesses to support his tentative diagnosis of pathological intoxication. In contrast, the claim as alleged in this Court is counsel's failure to conduct a comprehensive investigation of Petitioner's background so that the expert could provide a complete and thorough assessment of Petitioner's cognitive functioning, as well as any psychological conditions, addictive diseases, or neurological deficits, and any other possible influences on Petitioner's behavior and thought processes at the time of the crime. (Doc. 28 at 9-10, 11-13.) In support of his exhaustion argument, Petitioner contends that his allegations in state court went beyond counsel's failure to provide Dr. Bendheim the four documents specifically identified and included counsel's failure to provide "all relevant information"; in support of this proposition, Petitioner quotes from his PCR reply brief and his Petition for Review. (Doc. 199 at 22.) This argument is not supported by the record. The quotes on which Petitioner relies regarding "all the relevant evidence" that counsel should have given Dr. Bendheim, when viewed in the context of the entire argument in those documents and his whole PCR proceeding, clearly refer to the statements by Rodriguez and Sabori that were relevant to his assertion of pathological intoxication not to potentially mitigating background information; they do not reference additional evidence never investigated. (ROA 116 at 9-11; ROA 138 at 3; PR Dkt. 1 at 11-13.)

(Doc. 200 at 13-14.)

The Ninth Circuit similarly found that Claim 1C was broader than the claim raised in state court. "Coupled with his claim regarding the two witnesses, Lopez newly alleged 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*, 630 F.3d at 1204. In finding that Petitioner was barred from relief under 28 U.S.C. § 2254(e)(2), the Court noted that Petitioner had not been diligent in developing his claim that counsel was ineffective in "failing to investigate Lopez's personal history and to furnish Dr. Bendheim with those facts." *Id.* at 1206.

Neither this Court nor the Ninth Circuit construed Petitioner's expanded habeas claim as asserting ineffectiveness based on a general failure to investigate Petitioner's background and to present such evidence as stand-alone mitigation to the sentencer. Rather, both courts found that Petitioner's claim, although broader than the claim presented in state court, was limited to a failure to investigate and provide background information to Petitioner's psychiatric expert.

To recap, this Court found procedurally barred Petitioner's claim of ineffectiveness based on counsel's failure to investigate *and provide to Dr. Bendheim* information concerning Petitioner's personal history. The Court did not rule "on the merits" of this claim and instead limited its merits analysis to counsel's failure to provide Dr. Bendheim with the statements and testimony of Rodriguez and Sabori. Assuming the Ninth Circuit also did not resolve Petitioner's expanded claim "on the merits," this Court has jurisdiction to consider Petitioner's Rule 60(b) motion, free of the constraints imposed by 28 U.S.C. § 2244(b) upon successive petitions, only to the extent Petitioner seeks to reopen judgment to revisit the procedurally barred aspect of Claim 1C. *See Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007) (finding § 2244(b) inapplicable where Rule 60(b) motion sought to reopen judgment on procedurally barred claim).

To the extent Petitioner seeks relief under Rule 60(b) to assert generally that counsel's representation at resentencing was ineffective because he failed to investigate *and present to the sentencing judge* evidence of Petitioner's background and upbringing (separate from presenting such evidence to Dr. Bendheim to aid diagnosis of Petitioner), the Court finds that the motion advances a new ground for relief. As such, this aspect of Petitioner's motion is the equivalent of a second or successive petition, and the Court may not consider Petitioner's general claim of ineffectiveness based on counsel's "failure to present mitigating evidence supporting a sentence less than death" absent authorization from the Ninth Circuit. *See* 28 U.S.C. § 2244(b)(3)(A).

II. Extraordinary Circumstances

The Court turns now to the issue of whether in this case *Martinez* constitutes an extraordinary circumstance justifying relief under Rule 60(b)(6) to reconsider the Court's procedural bar ruling as to the expanded aspect of Claim 1C. When a petitioner seeks post-judgment relief based on an intervening change in the law, the Ninth Circuit has directed district courts to balance numerous factors on a case-by-case basis. *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009). These include but are not limited to: (1) whether "the

intervening change in the law . . . overruled an otherwise settled legal precedent;" (2) whether the petitioner was diligent in pursuing the issue; (3) whether "the final judgment being challenged has caused one or more of the parties to change his position in reliance on that judgment;" (4) whether there is "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief;" (5) whether there is a "close connection" between the original and intervening decisions at issue in the Rule 60(b) motion; and (6) whether relief from judgment would upset the "delicate principles of comity governing the interaction between coordinate sovereign judicial systems." *Id.* at 1135-40. After consideration of these varied factors, the Court determines that the balance weighs against granting post-judgment relief.

Change in the Law

The first factor is whether the intervening change in the law overruled otherwise settled legal precedent. The decisions in *Gonzalez v. Crosby* and *Phelps v. Alameida* lend guidance for applying this factor.

In *Gonzalez*, the prisoner's habeas petition was dismissed as time barred when the district court concluded that an untimely successive motion for state postconviction relief was not a "properly filed" application sufficient to toll the limitations period under 28 U.S.C. § 2244(d)(2). 545 U.S. at 527. Seven months after the appellate court denied a certificate of appealability on the issue, the Supreme Court held in *Artuz v. Bennett*, 531 U.S. 4 (2000), that an application for state postconviction relief can be "properly filed" even if the state court dismissed it as procedurally barred. Gonzalez sought to reopen judgment, and the Supreme Court ultimately determined that *Artuz* did not constitute an extraordinary circumstance justifying relief under Rule 60(b)(6). In doing so, it noted that the district court's analysis of the limitations period "was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation of 28 U.S.C. § 2244(d)(2)." 545 U.S. at 536. The Court further observed that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id.*

In *Phelps*, the Ninth Circuit determined that a habeas petitioner was entitled to relief from judgment based on an intervening change in circuit law relevant to determining finality of a California postconviction petition for the purpose of tolling the limitations period under § 2244(d)(2). In doing so, the court observed that "the change in the law worked in this case . . . did not upset or overturn a settled legal principle" as did the change in the law at issue in *Gonzalez*. 569 F.3d at 1136. Rather, the core disputed issue in Phelps's case did not become settled until fifteen months after his appeal became final and was "decidedly *un*settled" when the petition was before the district court. *Id.* This, the court reasoned, distinguished *Gonzalez* and cut in favor of granting relief.

Comparing these two cases to the situation here, the Court readily concludes that Petitioner's case is more akin to *Gonzalez* than *Phelps*. 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. *See Coleman*, 501 U.S. at 736; *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996). In *Martinez*, the Court carved out a narrow exception to the rule in *Coleman*, recognizing for the first time that inadequate postconviction counsel may serve as cause to excuse a defaulted trial ineffectiveness claim when such claims may be raised only in a postconviction proceeding. 132 S. Ct. at 1315. Thus, the law was well settled that ineffective assistance of postconviction counsel could not serve as cause when this Court *sua sponte* considered and rejected hypothetical cause arguments for the default of expanded Claim 1C, including ineffectiveness by postconviction counsel. This factor weighs against reconsideration. *See Adams v. Thaler*, No. 12-70010, 2012 WL 1415088 (5th Cir. Apr. 25, 2012) (finding that *Martinez* is "simply a change in decisional law" and does not constitute an extraordinary circumstance justifying postconviction relief).

Diligence

The second factor, whether Petitioner was diligent in pursuing the issue, also weighs against reconsideration. This is not a case, such as *Phelps*, where the petitioner "pressed all possible avenues of relief" on the identical legal position ultimately adopted in a subsequent case as legally correct. 569 F.3d at 1137. Indeed, at no time prior to the instant motion did Petitioner urge ineffective assistance of postconviction counsel as cause to excuse the default of his expanded sentencing ineffectiveness claim.

In his initial response to Respondents' belated assertion of default, Petitioner argued only that the claim had been fully exhausted and was not substantially altered compared to that presented in state court. (Doc. 199 at 13-23.) In a motion for reconsideration from the Court's order finding the expanded aspect of Claim 1C defaulted, Petitioner argued that the Court had erred in not finding that Respondents' admission of exhaustion in their initial answer constituted an express waiver of any exhaustion defense. (Doc. 202 at 2-11.) On appeal, Petitioner again argued that the claim had been fully exhausted and that this Court erred in *sua sponte* revisiting the exhaustion issue following Respondents' initial concession. *Lopez*, 630 F.3d at 1205 & n.6. Petitioner did not assert to either this Court or the Ninth Circuit any alternative arguments based on cause and prejudice or fundamental miscarriage of justice to excuse the default.

In *Gonzalez*, the Supreme Court cited the petitioner's lack of diligence as a second factor militating against Rule 60(b)(6) relief. The Court observed that the petitioner had neither raised the issue addressed in *Artuz* in his application for a certificate of appealability before the circuit court, nor sought rehearing or certiorari from the appellate court's COA denial, despite the fact *Artuz* had been decided eight days after that denial. 545 U.S. at 537. "This lack of diligence confirms that *Artuz* is not an extraordinary circumstance justifying relief from the judgment in petitioner's case." *Id.*

Here, not only did Petitioner fail to advance the legal principle at issue in *Martinez*, he never challenged this Court's finding that ineffectiveness of postconviction counsel could not constitute cause for the default of the expanded sentencing ineffectiveness claim. This

lack of diligence cuts against Petitioner.

Reliance

The third factor is whether granting relief under Rule 60(b) would "'undo the past, executed effects of the judgment,' thereby disturbing the parties' reliance interest in the finality of the case." *Phelps*, 569 F.3d at 1137 (quoting *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987)). Post-judgment relief "is less warranted when the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment." *Id.* at 1138.

In *Phelps*, the court found that neither party had relied on the finality of the district court's dismissal of the petition as time-barred such that their legal position had changed due to the court's judgment. "To the contrary, when Phelps' petition was dismissed, his federal case simply ended: Phelps remained in prison, and the State stopped defending his imprisonment." *Id.* The court reasoned that there were no "past effects" of the judgment that would be disturbed if the case were reopened for consideration on the merits of the habeas petition because "the parties would simply pick up where they left off." *Id.* Therefore, the lack of reliance weighed in the petitioner's favor.

The same cannot be said here. When Petitioner's case became final, the State of Arizona sought and obtained a warrant of execution from the Arizona Supreme Court to carry out Petitioner's sentence; the execution is set for May 16. "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). As explained by the Supreme Court in *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.

523 U.S. 538, 556 (1998) (citations omitted). When the State's and victims' interests in finality are viewed in light of Petitioner's lack of diligence on the *Martinez* issue, the Court is compelled to conclude that the State's reliance on the Court's judgment weighs against granting post-judgment relief to assess whether, under *Martinez*, Petitioner could establish cause and prejudice to overcome the default of his expanded sentencing ineffectiveness claim.

Delay

The fourth factor looks at whether a petitioner seeking to have a new legal rule applied to an otherwise final case has petitioned the court for reconsideration "with a degree of promptness that respects the strong public interest in timeliness and finality." *Phelps*, 569 F.3d at 1138 (internal quotation omitted). Here, the motion was filed just three weeks after *Martinez* was decided. Petitioner did not delay seeking relief based on *Martinez*, and this factor weighs in his favor.

Close Connection

The fifth factor "is designed to recognize that the law is regularly evolving." *Id.* at 1139. The mere fact that tradition, legal rules, and principles inevitably shift and evolve over time "cannot upset all final judgments that have predated any specific change in the law." *Id.* Accordingly, the nature of the change is important and courts should examine whether there is a "close connection" between the original and intervening decision at issue in a Rule 60(b)(6) motion. *Id.*

In *Phelps*, the intervening change in the law directly overruled the decision for which reconsideration was sought. Additionally, the intervening precedent "resolved a conflict between competing and co-equal legal authorities." *Id.* (internal quotation omitted). As already addressed regarding the first factor, the change in the law at issue here overruled long settled precedent. More critically, there is no close connection between this Court's cause

determination and the decision in *Martinez* because the appeals court affirmed this Court's judgment on different grounds.

In *Lopez*, the Ninth Circuit expressly declined to address the propriety of this Court's procedural default ruling, finding instead that Petitioner was separately barred from relief by 28 U.S.C. § 2254(e)(2). 630 F.3d at 1202, 1205-06. The court's ruling did not rest on procedural default grounds and did not reach the question of cause. Thus, there is no "close connection" between the final judgment in this case and the *Martinez* decision, which provides a new cause argument for procedurally defaulted counsel ineffectiveness claims. Indeed, addressing cause would be an exercise in futility. This Court is bound by the Ninth Circuit's determination that Petitioner was not diligent in developing the expanded ineffectiveness claim in state court, and *Martinez* does not address postconviction counsel ineffectiveness in the context of § 2254(e)(2)'s diligence requirement.[3] The lack of connection between Petitioner's case and *Martinez* weighs heavily against reconsideration.

Comity

The last factor concerns the need for comity between independently sovereign state and federal judiciaries. *Phelps*, 569 F.3d at 1139. The Ninth Circuit has 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." *Id.* at 1140. For example, in *Phelps*, the district court dismissed the petition as untimely, thus precluding any federal habeas review of the petitioner's claims. The court found that this favored the grant of post-judgment relief in Phelps's case because dismissal of a first habeas

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[3] Even were the Court inclined to consider whether the rationale of *Martinez* extends to the diligence requirement of § 2254(e)(2), this Court is bound by the Supreme Court's directive in *Williams v. Taylor*, that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." 529 U.S. 420, 432 (2000) (emphasis added). In *Williams* itself, the Supreme Court found that state postconviction counsel's failure to investigate an available psychiatric report constituted a lack of diligence. *Id.* at 438-40.

petition "denies the petitioner the protections of the Great Writ entirely." *Id.*

Here, the Court's judgment did not preclude review of all of Petitioner'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.[4] While the Court declined to reach the merits of the expanded sentencing ineffectiveness claim based on Petitioner's failure to properly exhaust the claim in state court, the Ninth Circuit held that Petitioner was separately barred from relief under 28 U.S.C. § 2254(e)(2) because he had not been diligent in developing the claim. Given these circumstances, the comity factor does not favor Petitioner.

Conclusion

Having evaluated each of the factors set forth in *Gonzalez* and *Phelps* in light of the particular facts of this case, the Court concludes that Petitioner's motion to reopen judgment fails to demonstrate the extraordinary circumstances necessary to grant relief under Rule 60(b)(6). The Court's determination that ineffectiveness of postconviction counsel could not constitute cause was at that time legally correct under longstanding caselaw, and the State of Arizona has a strong interest in carrying out Petitioner's sentence. In addition, Petitioner never previously raised this issue, and the court of appeals affirmed on an entirely different

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[4] In affirming the denial of relief on this claim, the Ninth Circuit was "not convinced" that a more definitive diagnosis from Dr. Bendheim "would have changed the outcome of the sentencing proceeding." *Lopez*, 630 F.3d at 1209. The court noted:

> The new evidence would have done little to refute Dr. Dean's contrary assessment that Lopez did not suffer from pathological intoxication. As Dr. Dean pointed out, pathological intoxication is an extremely rare condition, Lopez did not exhibit any of the predisposing factors, and the evidence from his criminal file indicated that he did not react pathologically to alcohol or show reactions within the typical timeframe after drinking.

Id.

ground. Thus, reopening the case to revisit this Court's cause findings would be futile.

III. Second-in-Time Habeas Petition

As an alternative, Petitioner asks the Court to treat his Rule 60(b) motion as a proper second-in-time habeas application. Petitioner correctly notes that the Supreme 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." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007); *see, e.g.*, *Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000) (concluding that a petition filed after district court dismissed an initial petition for failure to exhaust state remedies is not "second or successive" petition); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-45 (1998) (holding that a second-in-time petition is not "second or successive" when it raises a claim previously dismissed as premature).

Petitioner argues that his second-in-time petition is not successive because his sentencing ineffectiveness claim "has only now become ripe because only now may he establish cause [based on *Martinez*] to overcome the procedural bar." (Doc. 237 at 42.) The Court declines to accept Petitioner's novel proposition that a previously ripe claim raised and dismissed with prejudice in an initial petition may be re-raised in a new petition based on a change in the law. Accordingly, Petitioner's alternative request is denied. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

CERTIFICATE OF APPEALABILITY

To the extent a certificate of appealability is needed for an appeal from this Order, *see United States v. Washington*, 653 F.3d 1057, 1065 n.8 (9th Cir.) (2011) (noting open question whether COA required to appeal denial of legitimate Rule 60(b) motion), *cert. denied*, 132 S. Ct. 1609 (2012), the Court finds that reasonable jurists could debate its resolution of Petitioner's Rule 60(b)(6) motion. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the Court grants a certificate of appealability on this issue.

Based on the foregoing,

IT IS ORDERED that Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)(6) or in the Alternative Petition for Writ of Habeas Corpus (Doc. 237) is **DENIED**.

DATED this 30th day of April, 2012.

Stephen M. McNamee
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Fifth Circuit has likewise rejected a similar argument. In *Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. Tex. 2007), the Fifth Circuit wrote,

> Significantly, the [*Gonzalez*] Court then explained that there is no new habeas claim when [a petitioner] merely asserts that a previous ruling which precluded a merits determination was in error -- for example, a denial for such reasons as

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As the Supreme Court recognized in *Hormel*

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

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

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

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

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

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

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

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

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

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

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

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

would not deny Ruiz a hearing on the merits.

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

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

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

A. Standard for Determining IAC of PCR counsel

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

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

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

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

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

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

B. Prevailing Professional Norms

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

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

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

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

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

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

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

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

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

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

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

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

> I never told Robert Doyle that the family was unwilling to sign affidavits. I would not have told him that because that was completely untrue.

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

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

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

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

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

C. The Prejudice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Respectfully submitted this 23rd of April, 2012.

/s/ Kelley J .Henry
Kelley J. Henry
Denise I. Young

Attorneys for Samuel Lopez

Copy of the foregoing served this
23rd day of April, 2012, by CM/ECF to:

Kent Cattani
Susanne Blomo
Assistant Attorney Generals
1275 W. Washington
Phoenix, AZ 85007-2997

/s/ Kelley J .Henry
Attorney for Samuel Lopez

Final Diagnostic Report

I. General Information

Student: Sammy Lopez

School: Murphy #3

Age: 13

Grade: 7

Sessions: Bi-weekly from 2/25/76-4/14/76

Tested: 4/26/76

II. Post Test Results

grade	word rec in isol	words in context	comp level
3		ind	ind
4	90%	~~ind~~ inst	ind
5	70%	~~ind~~ inst	ind
6		~~inst~~ frust	inst
7		frust	frust

III. Major Instructional Emphasis

A. Improve vocabulary

B. Reading for context

IV. Procedures, Techniques, and Materials

A. For vocabulary improvement Sammy wrote stories about different pictures and then took key words and wrote synonyms for them.

B. For reading for context, Sammy read Spooky Short Stories by Boris Karloff. After eadh story he answered questions the tutor posed about the readings.

V. Results

The post testing scores indicate that Sammy's lebels of reading remained the same He is independent at the third grade level. He is instructional at the fourth and fifth grade. He frustrates ant the sixth and seventh grade.

Sammy's attitude towrad reading changed little as the semester progressed. He seemed to become frustrated when his peers improved. With a little persuation from the tutor Sammy seemed to enjoy talking about what he read.

VI. Recomendations

Sammy is still reading below his ability, but with guidance and patience on his part and a tutor's his ability should increase.

Based on the semester of tutoring with Sammy the recomendations made are to continue to practice reading for context clues and questions. Sammy still finds a little difficulty in answering questions directly and with out prompting.

MEMORIAL HOSPITAL
PHOENIX, ARIZONA

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EMER VEH. ☐ AMBULANCE ☐ PRIVATE ☐ OTHER ☐

RESPONSIBILITY CODE: 01 02 03 04 05 06 BIC 08 09 FOR
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F | 21 | 22 | 23 | 24 | 25 | 26

MEDICAL RECORD USE ONLY
115098

ACCOUNT NO.	DATE	FAMILY PHYSICIAN	TIME CALLED	CLERKS INITIAL
11535 2	9-3-78	None		RBG

PATIENTS NAME	AGE	DATE OF BIRTH	PATIENTS TELEPHONE NUMBER
LOPEZ, Sammy	16	6-30-62	

PATIENTS ADDRESS	CITY	STATE	ZIP
2606 W. MELVIN	PHX	AZ	85006

PATIENTS SOCIAL SECURITY NUMBER	PATIENTS EMPLOYER AND OCCUPATION	EMPLOYERS ADDRESS	CITY	STATE	ZIP

EMPLOYERS PHONE	RESP. PARTY NAME	RELATIONSHIP	ADDRESS	CITY	STATE	ZIP
	Concha VILLEGAS	mother	Same			

RESP. PARTY SOC. SEC. NO.	RESP. PARTY PHONE	RESP. PARTYS OCCUPATION AND EMPLOYER	EMPLOYERS ADDRESS	CITY	STATE	ZIP
461-50-5666		Valley Distributing Co.				

RESP. PARTY EMPLOYER PHONE	CITY PRISONER NO.	OFFICERS SIGNATURE AND NUMBER	PREV. PT. AT MEMORIAL YES ☐ NO ☒	IF YES, NAME & DATE
269-2451				

COMPLAINT: Yesterday - Watching some welding being done - Since last nite eyes painful, watering

PHYSICIAN	CALLED	CALLED	CALLED	ANS	HERE
Heller	✓				

ALLERGIES: NKA
LAST TETANUS: 2 yrs
ADMITTING VITALS: BP [illegible] P 76 R 20 T 98.4 INT

FINDINGS AND TREATMENT	ORDERS	✓	TIME & [illegible]	VITALS
Rt eye 20/30 Lt eye 20/30 Scleras	Visine prn			
No other complaints - c/o hx.	Refer to Ophth. prn			
No Subjective Sx's - No pain.				
Eyes Mild conjunctivitis b/o welding				
No other injury Visine dc.				
Mother informed				

NURSES NOTES:

FINAL DISPOSITION: Home c Mother 3 pm

DIAGNOSIS: Mild conjunctivitis 2° to welding

E.D. OR ATTENDING PHYSICIAN SIGNATURE: [signature]
E.D. RN SIGNATURE: [signature]
PT. CONDITION AT DISCHARGE OR TRANSFER: Stable
TRANSPORTED BY: Pvt Car
REFERRAL/PT INSTRUCTIONS GIVEN BY: ☐ A ☐ B ☐ C ☐ D ☐ E ☐ F ☐ G

BY SIGNING IN SPACE TO RIGHT, PATIENT OR PATIENT'S AGENT CERTIFIES THAT HE HAS READ AND AGREES TO CONDITIONS PRINTED ON BACK OF THIS FORM.

PATIENT:
OR PERSON AUTHORIZED TO SIGN FOR PATIENT/RELATIONSHIP: Concha Villegas

ORM NO. SER-25 REV. 11-77 EMERGENCY DEPARTMENT MEDICAL RECORD

MEMORIAL HOSPITAL
P.O. BOX 21207 ■ PHOENIX, ARIZONA 85036

ACKNOWLEDGEMENT OF EMERGENCY TREATMENT
and
PERMISSION TO SEND MEDICAL REPORTS TO ATTENDING PHYSICIAN

Patient's Name SAMMY LOPEZ Date 1-4-80

I, the undersigned, being examined in the Emergency Department of Memorial Hospital, wish to have my reports sent to my attending physician.

I, the undersigned, certify that the medical care furnished was limited solely to emergency treatment.

I have been advised to see:

DR. R. ZESCHKE, M.D.
515 W. BUCKEYE RD.
254-7313

☒ Call Dr. _____ Office _____

and make an appointment tomorrow

☐ See above doctor in his office _____

1.) Read instruction sheets on wound care and head injury after care

2.) Call above doctor if any problems occurs or call EMERGENCY Room.

3.) PLAIN TYLENOL OR ASPIRIN FOR HEADACHE.

My signature acknowledges receipt of instructions.

Signed X Sandra Villegas
Patient or Representative

Mother
Relationship

Witnessed by: S Bach, RN

Original-Medical Records

Duplicate-Patient Copy

#SER-14 REV 1/77

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TIME ☐ PM ☐ AM

RESPONSIBILITY CODE

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STAT: M | S | 12 | 13 | 14 | 15 | 34 / SING | MAR | WID | DIV | SEP | CHILD / P | 21 | 22 | 23 | 24 | 25 | 44

MEMORIAL HOSPITAL
PHOENIX, ARIZONA

MEDICAL RECORD USE ONLY 15098

ACCOUNT NO.	DATE	FAMILY PHYSICIAN	TIME CALLED	CLERKS INITIAL
036478	1-3-80	NONE		FP

PATIENTS NAME	AGE	DATE OF BIRTH	PATIENTS TELEPHONE NUMBER
Lopez, Sammy	17	6-30-62	272-3787

PATIENTS ADDRESS: 2606 W. Melvin Apt 4 CITY: Glendale STATE: AZ ZIP:

PATIENTS SOCIAL SECURITY NUMBER | PATIENT'S EMPLOYER AND OCCUPATION: Concha Lopez, mother | EMPLOYERS ADDRESS | CITY | STATE | ZIP

EMPLOYERS PHONE | RESP. PARTY NAME: ~~Arcadio Lopez~~ | RELATIONSHIP | ADDRESS | CITY | STATE | ZIP

RESP. PARTY SOC. SEC. NO. | RESP. PARTY PHONE | RESP. PARTYS OCCUPATION AND EMPLOYER: Yellow Front - Warehouse | EMPLOYERS ADDRESS | CITY: Tempe | STATE | ZIP

RESP. PARTY EMPLOYER PHONE | CITY PRISONER NO. | OFFICERS SIGNATURE AND NUMBER: E M. TOWNSEND #444 II | PREV. PT. AT MEMORIAL: YES ☒ NO ☐ | IF YES, NAME & DATE: 6 mos

COMPLAINT	PHYSICIAN	CALLED	CALLED	CALLED	ANS	HERE
Alledged Assault, PPD. here	Zischke - Ref					

ALLERGIES: NKA | LAST TETANUS: ? | ADMITTING VITALS: BP 136/72 T 98 P 92 R 20

ON NO MEDS

FINDINGS AND TREATMENT	ORDERS	✓	TIME & INT	VITALS
Hx- 17y/o ♂ allegedly told Nurse that he was in a park & was hit in head with a bottle. PT brought in by friends who left immediately. PT tells me he doesn't know what happened. Breath smells like "model airplane glue"	D.T. - 0.5cc IM	✓	2330	(L) deltoid
	AP and LAT. SKULL		2345	SB
	Head sheet	✓	315	SB
PExx - Lethargic 17y/o ♂ responds to verbal stimuli & oriented to place & thinks it's Jan 1980. Speech is clear, not slurred & PT volunteers little info. Head - 1" curved lac on (R) post. scalp. Neck - Supple; chest & Abd no trauma. Neuro - CN II-XII intact, 5/5 strength & adequate grip, DTR's 2+ bilat Toe ↓ bilat, Romberg Neg but unable or unwilling to do F-F-N test.	Breathe Scalp c Xylocaine c Epi. Retrobulbar prep & irrigate c N.S. ~100 cc			
	Suture x 2 c 4-0 prolene			
	XR - None			

NURSES NOTES:
Pt. unsure of LOC. - was hit over head c bottle - ½ - ¾" laceration on back of head. PERRL. - Instructions given to mother - although Pt is sleepy he follow instructions well & has clear coherent speech pattern, will therefore d/c home c grants

FINAL DISPOSITION: ~~Home~~

DIAGNOSIS: (1) Scalp laceration (2) Lethargy 2nd to - alcohol sniffing

E.D. OR ATTENDING PHYSICIAN SIGNATURE: [signature] | E.D. RN SIGNATURE: Beck, RN

PT. CONDITION AT DISCHARGE OR TRANSFER: Stable | TIME OF DISCHARGE: 315 | TRANSPORTED BY: Car c mother | REFERRAL INSTRUCTIONS GIVEN BY: [signature] | ☐ D ☐ E ☐ F ☐ G

BY SIGNING IN SPACE TO RIGHT, PATIENT OR PATIENT'S AGENT CERTIFIES THAT HE HAS READ AND AGREES TO CONDITIONS PRINTED ON BACK OF THIS FORM.

PATIENT: X

OR PERSON AUTHORIZED TO SIGN FOR PATIENT/RELATIONSHIP: X Concha Villegas

FORM NO. SER-25 REV. 11-77

EMERGENCY DEPARTMENT MEDICAL RECORD

ARRIVED BY: EMER VEH. ☐ AMBULANCE ☐ PRIVATE ☒ OTHER ☐

TIME 1440 ☐ PM

RESPONSIBILITY CODE 01 02 03 04 21 12 27 99

DIS. MEDICARE 25 | CITY PRIS. 29 | MEDICAID 32 | OTHER 1 00

STAT: M 11 12 13 14 15 34 | SING MAR WID DIV SEP CHILD | F 21 22 23 24 25 44

MEMORIAL HOSPITAL
PHOENIX, ARIZONA

No Funds.

MEDICAL RECORD USE ONLY
115098

ACCOUNT NO.	DATE	FAMILY PHYSICIAN	TIME CALLED	CLERKS INITIAL
0590836	9-16-84	None.	314	RBG

PATIENTS NAME	AGE	DATE OF BIRTH	PATIENTS TELEPHONE NUMBER
LOPEZ, ~~Samuel~~ Sammy Y.	22	6-30-62	269-3132 msg.

PATIENTS ADDRESS	CITY	STATE	ZIP
MAIL: 2606 W. Melvin.	PHO	AZ	85009

PATIENTS SOCIAL SECURITY NUMBER	PATIENT'S EMPLOYER AND OCCUPATION	EMPLOYERS ADDRESS	CITY	STATE	ZIP
Doesn't Know it	Unemployed				

EMPLOYERS PHONE	RESP. PARTY NAME	RELATIONSHIP	ADDRESS	CITY	STATE	ZIP
	SELF	D1				

RESP. PARTY SOC. SEC. NO.	RESP. PARTY PHONE	RESP. PARTYS OCCUPATION AND EMPLOYER	EMPLOYERS ADDRESS	CITY	STATE	ZIP

RESP. PARTY EMPLOYER PHONE	CITY PRISONER NO.	OFFICERS SIGNATURE AND NUMBER	PREV. PT. AT MEMORIAL YES ☒ NO ☐	IF YES, NAME & DATE
				5-6 yrs.

COMPLAINT

got (L) hand caught in lawn mower @ 1400
Amp of one finger tip and part of another per report given to me @ EMS

PHYSICIAN	CALLED	CALLED	CALLED	ANS	HERE

ALLERGIES: NKA

LAST TETANUS: 5yrs

1430 ADMITTING VITALS: BP 160/88 T 99 P 80 R 18

FINDINGS AND TREATMENT — E. Key

This pt was brought to the ED for Tx/eval of inj's to (L) hand 2° injury by a lawn mower pt was alert & responsive: at first pt was cooperative and compliant: but when I obtained a mayo stand w/ a pillow on it for elevation of inj'd pt became apprehensive and got up quickly from the cart asking what I was going to do I told him that "I'm not going to do anything, doctor will examine you and Tx your inj's" He then asked me if this (EMH) was a hospital and if I had any proof that I was medical personnel, I assured the pt that this was a hospital and that he would be Tx'd by an MD and instructed pt to return to his cart. I then went over to T2 where I was attending a pt brought in by PFD. A few minutes later pt left. He did state that he did not "trust" hospitals.

ORDERS

J	TIME & INT	VITALS

NURSES NOTES:
Pt. was wandering around Trauma side of E.D. He was waiting to be seen by E.D. docts. He was seeing a critical pt. in T-2. I told this pt. he must stay in his own area to maintain privacy for other pts. He went back to his bed, but a minute later was wandering around again. Dr. Padilla spoke to him & a minute later, he was missing from T-3 &

FINAL DISPOSITION: Left ED. w/ knowledge of staff @ 1440 | had left E.D. /a.m.

DIAGNOSIS	E.D. OR ATTENDING PHYSICIAN SIGNATURE:	E.D. RN SIGNATURE
	PT. CONDITION AT DISCHARGE OR TRANSFER	REFERRAL/PT INSTRUCTIONS GIVEN
	TIME OF DISCHARGE	
	TRANSPORTED BY	BY

BY SIGNING IN SPACE TO RIGHT, PATIENT OR PATIENT'S AGENT CERTIFIES THAT HE HAS READ AND AGREES TO CONDITIONS PRINTED ON BACK OF THIS FORM.

PATIENT: Sammy O. Lopez 9-16-84

ON PERSON AUTHORIZED TO SIGN FOR PATIENT/RELATIONSHIP: PR Gillespie

FORM NO. SER-25 REV. 1-80

EMERGENCY DEPARTMENT

MEDICAL RECORD

SL-Memorial Hosp. Med. 004

FILED

MAR 30 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL VILLEGAS LOPEZ, Petitioner - Appellant, v. CHARLES L. RYAN,* Director, Arizona Department of Corrections, Respondent - Appellee.	No. 08-99021 D.C. No. 2:98-CV-00072-SMM District of Arizona, Phoenix ORDER

Before: GRABER, McKEOWN, and CALLAHAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

---

* Charles L. Ryan is substituted for his predecessor Dora B. Schriro as Director of the Arizona Department of Corrections. See Fed. R. App. P. 43(c)(2).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Leonard Green
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 18, 2008

Mr. Bradley A. MacLean
Ms. Jennifer L. Smith
Mr. Joseph F. Whalen III

Re: No. 02-6547/02-6548, *In re: Abdur'Rahman*
Originating Case No. 96-00380

Dear Counsel,

The Court issued the enclosed Order today in these appeals.

Sincerely yours,

s/Beverly L. Harris
Transcript/En Banc Coordinator
Direct Dial No. 513-564-7077

Enclosure

cc: Hon. Todd J. Campbell, Chief District Judge
Mr. Keith Throckmorton, Clerk

FILED

JAN 18 2008

LEONARD GREEN, Clerk

NOT FOR PUBLICATION

Nos. 02-6547/6548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re ABU-ALI ABDUR'RAHMAN,	)	
	)	**ON APPEAL FROM THE**
Petitioner-Appellant,	)	**UNITED STATES DISTRICT**
	)	**COURT FOR THE MIDDLE**
v.	)	**DISTRICT OF TENNESSEE**
	)	
RICKY BELL, Warden,	)	**ORDER**
	)	
Respondent-Appellee.	)	

BEFORE: SILER, BATCHELDER, and COLE, Circuit Judges.

After our previous panel opinion in this case in *Abdur'Rahman v. Bell*, 493 F.3d 738 (6th Cir. 2007), a rehearing en banc was granted and our opinion was vacated on October 19, 2007. Thereafter, the en banc court having referred this matter back to the original panel, we hereby find that Abdur'Rahman's motion was timely made pursuant to Fed. R. Civ. P. 60(b)(6) rather than a second or successive habeas corpus petition, and we remand this case to the district court for a determination of whether the motion should be granted.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL, Warden	)	DEATH PENALTY

MEMORANDUM

I. Introduction

Pending before the Court is Petitioner's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). (Docket Nos. 254, 286). The Respondent has filed a Response in opposition to the Motion (Docket No. 318), and the Petitioner has filed a Reply (Docket No. 319). The Court held a hearing on the Motion on May 6, 2008.

For the reasons set forth below, the Motion is GRANTED.

II. Procedural and Factual Background

In 1998, this Court considered Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254, and upheld the Petitioner's state court conviction, but granted the writ as to his death sentence based on ineffective assistance of counsel. (Docket Nos. 205, 206). Abdur'Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998). In reaching its decision, the Court denied Petitioner's claim that the state prosecutor engaged in prosecutorial misconduct during the proceedings leading to his death sentence. 999 F.Supp. at 1079-87. Specifically, the Court determined that those claims had not been exhausted in state court because the Petitioner failed to seek discretionary review of those claims in the Tennessee Supreme Court, and therefore, were defaulted. Id.

The parties appealed the Court's decision to the Sixth Circuit Court of Appeals. (Docket Nos. 207, 210). While the appeal was pending and before the Sixth Circuit issued an opinion in the case, on June 7, 1999, the United States Supreme Court issued its decision in O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, 1734, 144 L.Ed.2d 1 (1999). The O'Sullivan Court held that a prisoner was required to present his claims to the highest court in the state for discretionary review to satisfy the habeas corpus exhaustion requirement, *unless* a state court makes clear that discretionary review is "unavailable." Id.

On September 13, 2000, the Sixth Circuit affirmed the Court's decision upholding Petitioner's conviction, but reinstated the death sentence, finding that the Petitioner had not been prejudiced by his trial counsel's deficient performance. Abdur'Rahman v. Bell, 226 F.3d 696 (6th Cir. 2000). The Petitioner applied for a writ of certiorari in the United States Supreme Court, which was denied on October 9, 2001. Abdur'Rahman v. Bell, 534 U.S. 970, 122 S.Ct. 386, 151 L.Ed.2d 294 (2001). The Petitioner then applied for rehearing, which was denied on December 3, 2001. Id.

In the meantime, on June 28, 2001, the Tennessee Supreme Court promulgated Rule 39 of the Rules of the Supreme Court of Tennessee apparently in response to the Supreme Court's decision in O'Sullivan. Rule 39 provides as follows:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic

> review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

On November 2, 2001 and before the Supreme Court denied his petition for rehearing, the Petitioner filed a Motion For Relief From Judgment Pursuant To Fed.R.Civ.P. 60(b) (Docket No. 254) in this Court seeking to set aside the Court's dismissal of his prosecutorial misconduct claims based on the Tennessee Supreme Court's promulgation of Rule 39. Specifically, Petitioner asserted that under Rule 39, a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes, and therefore, the prosecutorial misconduct claims were exhausted. Consequently, according to the Petitioner, he should be allowed to proceed on the merits of those claims.

Based on the Sixth Circuit's decision in McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996), this Court determined that Petitioner's Rule 60(b) Motion presented a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court, and therefore, should be treated as a second or successive habeas petition subject to 28 U.S.C. § 2244. (Docket No. 267). Accordingly, the Court ruled that it was without jurisdiction to decide the Rule 60(b) Motion, and transferred the case to the Sixth Circuit on November 27, 2001. (Id.)

On January 18, 2002, the Sixth Circuit determined that the Petitioner's Rule 60(b) Motion was the equivalent of a second or successive habeas corpus petition, and concluded that the Petitioner had failed to meet the criteria for filing such a petition under 28 U.S.C. § 2244(b)(2). (Docket No. 274). In reaching its decision, the court noted its agreement with this Court that the prosecutorial misconduct claims had not been exhausted, under Silverburg v.

Evitts, 993 F.2d 124, 126 (6th Cir. 1993), because they had not been presented to the Tennessee Supreme Court. (Id.)

On April 22, 2002, the United States Supreme Court granted Petitioner's petition for writ of certiorari to resolve, in part, the question of whether relief from judgment is available in a habeas corpus case under Rule 60(b) or whether such relief is available only under the provisions of 28 U.S.C. § 2244(b), as held by the Sixth Circuit. Abdur'Rahman v. Bell, 122 S.Ct. 1605 (2002). (Docket No. 281). The Supreme Court subsequently dismissed the petition for writ of certiorari as improvidently granted. Abdur'Rahman v. Bell, 123 S.Ct. 594 (2002).

Based on Justice Stevens' dissent from that decision, the Petitioner filed, in this Court on December 12, 2002, a Motion for Relief From Judgment Exclusively Pursuant To Fed.R.Civ.P. 60(b). (Docket No. 286). Through the Motion, the Petitioner incorporated his prior Rule 60(b) Motion, but made clear that he sought relief under Rule 60(b) only, and did not request to file a second or successive habeas petition under 28 U.S.C. § 2244. (Id.) Petitioner filed the Motion in order to correct what he perceived to be a technical problem with the Court's prior ruling and which led to the Supreme Court's dismissal of the writ of certiorari – the Court's order did not expressly state that the Rule 60(b) Motion was *dismissed* for lack of jurisdiction. (Id.) After holding a hearing, the Court issued an Order on December 17, 2002 (Docket No. 289) denying and dismissing the pending Motion for lack of jurisdiction, and transferring the case to the Sixth Circuit for its consideration as a second or successive habeas corpus petition.

By Order issued on March 5, 2003 (Docket No. 300), the Sixth Circuit denied the Petitioner's request for a certificate of appealability, and to transfer the case back to this Court. The dissent argued that McQueen v. Scroggy, supra, had been wrongly decided. Id.

On May 20, 2003 and before the Sixth Circuit ruled on Petitioner's request for *en banc* review, the Sixth Circuit issued its opinion in Adams v. Holland, 330 F.3d 398 (6th Cir. 2003), which held that Rule 39 made Tennessee Supreme Court review unavailable for federal habeas corpus exhaustion purposes, and that Rule 39 should apply retroactively to the petitioner's case, which was pending on appeal when the rule was promulgated.

On June 6, 2003, the Sixth Circuit granted Petitioner's request for hearing *en banc* of its prior ruling (Docket No. 274) – that the Petitioner's Rule 60(b) Motion was the equivalent of a successive habeas corpus petition, and holding that the Petitioner had failed to meet the criteria for filing such a petition under 28 U.S.C. § 2244(b)(2). (Docket No. 302). The *en banc* court subsequently overruled McQueen v. Scroggy, supra, reversed this Court's dismissal of the Petitioner's Rule 60(b) Motion as the equivalent of a second or successive habeas corpus petition, and remanded the case to this Court for consideration of the Motion under Rule 60(b). Abdur'Rahman v. Bell, 392 F.3d 174 (6th Cir. 2004).

The Respondent then filed a petition for writ of certiorari seeking review of the appeals court's decision. While the petition was pending, the Supreme Court decided Gonzalez v. Crosby, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), which held that the petitioner's Rule 60(b) motion challenging the district court's prior statute of limitations ruling was not a

second or successive petition, but affirmed the denial of the motion because the petitioner had failed to demonstrate "extraordinary circumstances."

On June 28, 2005, the Supreme Court granted the petition in this case, vacated the judgment of the *en banc* court, and remanded the case to the Sixth Circuit for further consideration in light of Gonzalez, supra. Bell v. Abdur'Rahman, 125 S.Ct. 2991 (2005).

The *en banc* court subsequently returned the case to the panel to which it was originally submitted for consideration, rather than remanding the case back to the district court as suggested by the dissent. Abdur'Rahman v. Bell, 425 F.3d 328 (6th Cir. 2005). On July 13, 2007, the original panel ruled that based on Gonzalez, the Petitioner's Rule 60(b) Motion should not be treated as a second or successive petition. Abdur'Rahman v. Bell, 493 F.3d 738 (6th Cir. 2007). The panel went on to hold, however, that the Motion should be considered under Rule 60(b)(1), rather than 60(b)(6), and consequently, the Motion was untimely because it was not filed within one year after the judgment was entered. 493 F.3d at 740-41.

On October 19, 2007, the Sixth Circuit granted rehearing *en banc*, vacated the panel opinion, and restored the case on the docket as a pending appeal. (Sixth Circuit Order entered October 19, 2007; Docket No. 312). On January 18, 2008, the panel issued an order finding that the Petitioner's Motion "was timely made pursuant to Fed. R. Civ. P. 60(b)(6) rather than a second or successive habeas corpus petition, and we remand this case to the district court for a determination of whether the motion should be granted." (Id.)

III. Analysis

A. Extraordinary Circumstances

Relying primarily on Gonzalez v. Crosby, supra, Respondent argues that Petitioner has not demonstrated "extraordinary circumstances" entitling him to relief under Rule 60(b)(6). Rule 60(b)(6) provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (6) any other reason that justifies relief.

The Supreme Court has held that in order to obtain relief under this provision, a movant must show "extraordinary circumstances" justifying the reopening of a final judgment. See, e.g., Gonzalez, 125 S.Ct. at 2649. Such circumstances, according to the Gonzalez Court, rarely occur in the habeas context. Id. This case is the exception to that general rule, however, given the promulgation of Tennessee Supreme Court Rule 39 and the Petitioner's diligence in seeking habeas relief.

At the time this Court dismissed Petitioner's prosecutorial misconduct claims for failure to exhaust the claims in state court, Sixth Circuit law required that a petitioner seek discretionary review of claims before the state's highest court in order to give the court "a full and fair opportunity" to rule on the claims. Silverburg v. Evitts, 993 F.2d at 126. The Supreme Court subsequently confirmed that principle, ruling in O'Sullivan that in order to provide the state courts with a fair opportunity to consider habeas claims, the petitioner is required to file petitions for discretionary review "when that review is part of the ordinary appellate review procedure in

the State." 119 S.Ct. at 1733-34. The Tennessee Supreme Court's promulgation of Rule 39 after the O'Sullivan decision was an unexpected declaration by the state that it did not want to review all habeas claims prior to their presentation to the federal courts. The Court concludes that such a declaration was an exceptional development in this area of the law warranting reconsideration of Petitioner's claims.[1]

The chronology of events in this case also argue in favor of granting Petitioner's Motion. The promulgation of Rule 39 occurred before the Supreme Court ruled on Petitioner's application for writ of certiorari on his original habeas petition. Petitioner filed his first Rule 60(b) motion, based on Rule 39, within five months thereafter, and before the Supreme Court denied his petition for rehearing on his habeas petition. Thus, there has been no undue delay or abandonment of the claim, and Petitioner has been diligent in seeking relief in this case.

Policy considerations also argue in favor of granting Petitioner's Motion. The federal courts have repeatedly expressed a desire to have their decisions reflect their interest in comity between the state and federal courts, especially in the habeas corpus context. Indeed, the purpose of the procedural default rules and the exhaustion doctrine is to encourage respect for state rules and decisions and promote federalism. Ignoring the state court's view of its own law in the Court's exhaustion analysis by refusing to reopen the judgment in this case would seriously undermine these policy considerations.

---

[1] Unlike Gonzalez, which involved different federal interpretations of the same federal statute, Rule 39 is a new state procedural rule that changed the contextual setting in which the federal courts apply federal exhaustion law.

For these reasons, the Court concludes that Petitioner's Rule 60(b) Motion should be granted. Accordingly, the Court will consider the prosecutorial misconduct claims that are the subject of the 2001 Rule 60(b) Motion.

The Court certifies that this case involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Memorandum and accompanying Order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Unless a party seeks an interlocutory appeal, the Petitioner shall file a supplemental brief regarding the prosecutorial claims that are the subject of his 2001 Rule 60(b) Motion on or before June 6, 2008.[2] The Respondent shall file any response on or before July 7, 2008. The Petitioner shall file any reply on or before July 22, 2008.

IV. Conclusion

For the reasons set forth above, Petitioner's Rule 60(b) motion is granted.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

[2] Petitioner does not request a reopening of the proof.

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

SUSANNE BARTLETT BLOMO
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION SECTION
1275 W. WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686
(STATE BAR NUMBER 014328)
E-MAIL: CADocket@azag.gov

ATTORNEYS FOR RESPONDENTS

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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

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

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

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

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

DATED this 20th day of April, 2012.

RESPECTFULLY SUBMITTED,

THOMAS C. HORNE
ATTORNEY GENERAL

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND.

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

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

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

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

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

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

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

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

A. *This Court lacks jurisdiction.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Between 1994 and 1997, Doyle represented Lopez in state PCR proceedings. (Exhibit 3.) Doyle filed a PCR petition alleging a number of claims including two claims of sentencing IAC. (Exhibit 1.) Specifically, Doyle argued that resentencing counsel was constitutionally ineffective because he failed to provide Dr. Bendheim with the pretrial statements and trial testimony of two witnesses who saw Lopez on the night of the murder. *See Lopez III*, 630 F.3d at 1208. Doyle submitted an affidavit from Dr. Bendheim in which he stated that if he had been provided with those materials, he could have made a more certain diagnosis of pathological intoxication. *Id*.

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

years, attempts to contact and learn more from family members has been met with resistance" and that family members contacted by volunteers were, as yet, unwilling to commit to signing affidavits).

Approximately 2 months after Doyle filed the PCR petition, the Arizona Capital Representation Project (ACRP) offered Doyle its volunteer assistance, and Doyle accepted. (Exhibit 3.) Doyle found, however, that the ACRP volunteers were not helpful. (*Id*.) In April 1995, ACRP pressured Doyle to request more time and more money from the court, but Doyle reasonably believed such requests would be denied by the PCR judge. (*Id*.) In fact, Doyle had previously requested additional time in which to file a supplemental PCR petition, and, although Doyle's motion was granted and the PCR court gave him until May 3, 1995 to file the supplemental petition, the court clearly indicated, "There will be no further extensions." (Exhibit E; Exhibit F.) When Doyle determined that the ACRP volunteers were undermining his relationship with Lopez, he stopped working with them. (Exhibit 3.)

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

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

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

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

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

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

The trial, sentencing, and resentencing judge presided over the PCR proceedings. He found that: (1) trial and resentencing counsel's performance did not fall below prevailing professional norms, and; (2) there was no reasonable probability of a different trial or sentencing outcome because of alleged ineffective assistance. (Exhibit 12.) *See Lopez III*, 630 F.3d at 1208. The PCR judge also rejected Lopez's other claims. (Exhibit 12.)

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

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

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

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

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

(continued ...)

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

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

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

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

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

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

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

Lopez was first sentenced to death in 1987 after a sentencing hearing at which he was represented by Joel Brown. Subsequently, Lopez's appellate counsel, George Sterling, successfully argued that Lopez's prior conviction for resisting arrest did not qualify as an aggravating circumstance because it did not necessarily involve the use or threat of violence. *State v. Lopez* (*Lopez I*), 163 Ariz. 108, 114, 786 P.2d 959 965 (1990). Thus, the Arizona Supreme Court reversed Lopez's original death sentence and remanded for a new sentencing proceeding. Brown's performance is therefore irrelevant, except to the extent that it informed or shaped the performance of Lopez's resentencing counsel. Lopez's resentencing counsel was Sterling, the attorney who had successfully represented him on appeal.

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

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

a. Factual Background.

Mental health expert, Dr. Otto Bendheim.

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

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

depression, hallucinations, delusions, or other mental illness. (*Id*. at 3, 5.) Dr. Bendheim's conclusion that Lopez did not suffer from psychological impairment corroborated testing conducted in the Department of Corrections in 1981 and 1985. (Exhibit L, at 7.) Dr. Bendheim "found no evidence that [Lopez] would have been unaware of the wrongfulness of his conduct or that he would have been unable to conform his conduct to the requirements of the law unless he was suffering from 'pathological intoxication.'" (Exhibit K, at 5.)

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

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

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

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

submitted the report at Lopez's resentencing proceeding in 1990. (Exhibit M, at 72.) Sterling also presented the videotaped testimony of Dr. Bendheim, in which he tentatively opined that Lopez suffered from pathological intoxication. (*Id*. at 70–71; Exhibit 11, at 30.) Sterling attempted to strengthen the evidence of intoxication that Brown had presented in 1987. Although Sterling could not locate witnesses Pauline Rodriguez and Yodilia Sabori, he submitted their pretrial statements in which both women described Lopez as drunk or "on something" in the hours before the murder. (Exhibit M, at 73; Exhibit 3, at 4; Exhibit N, at 5.) Sterling argued that the ingestion of even a small amount of alcohol could change Lopez from shy and retiring to aggressive and physically abusive. (Exhibit O, at 19.) This condition, Sterling argued, prevented Lopez from appreciating the wrongfulness of his actions. (*Id*.)

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

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

Investigation of social history mitigation.

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

> MR. BROWN: Both people were fully aware of the time [and] location. I gave them my number. Mr. Lopez, Frank, I spoke to him

> as recently as yesterday afternoon. He gave me every indication that he would be here today.
>
> I can tell you that I talked to his mother. His mother gave me indications that she may not appear, that she was having some sort of problems. I've talked to Mr. Lopez about this. I think Mr. Lopez will tell you he's strongly objected to me subpoenaing those people in, either his mother, his brother or any other persons. I think Mr. Lopez can tell the court that he strongly opposed me actually having those people subpoenaed in.
>
> Is that true?
>
> THE DEFENDANT: Yes.

Id.

Similarly, the author of the 1987 presentence report stated, regarding information from family members, "[Lopez] did not want [the presentence report writer] to contact anyone in particular." (Exhibit L, at 4.) Despite the presentence report writer's efforts to obtain information, Lopez's family did not offer any opinion regarding his sentence. (*Id*.)

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

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

Model prisoner mitigation.

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

Undermining the remaining aggravating factor with expert testimony.

Sterling also focused on undermining the validity of the single remaining aggravating factor. Sterling submitted a sentencing memorandum challenging A.R.S. § 13–703(F)(6), Arizona's especially heinous, cruel, or depraved aggravator, as unconstitutionally vague and overbroad. (Exhibit S.) Eight days *after* Sterling filed his memorandum and approximately 2 weeks *before* the resentencing hearing, however, the United States Supreme Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990), was handed down in which the Court held that Arizona's especially heinous, cruel, or depraved aggravator, as defined by the Arizona Supreme Court, was constitutional. *Id*. at 655.

Despite the decision in *Walton*, Sterling attempted to rebut the State's evidence that the murder was especially heinous, cruel, or depraved. Sterling presented the expert testimony of a medical examiner, Dr. Phillip Keen, and, based on that testimony, argued in his post-hearing sentencing memorandum that the aggravator had not been proven. (Exhibit T, at 1–8; Exhibit U, at 8–38.) In his memorandum, Sterling cited numerous Arizona cases in support of this contention. (*Id*.) Ultimately, Sterling was unsuccessful in his efforts. Had he been successful, however, Lopez would have been ineligible for the death penalty.

The sentencing judge's findings.

The sentencing judge found that the murder was especially heinous, cruel, or depraved. (Exhibit V, at 3–4.) He found that the proffered mitigating circumstances had not been proven by a preponderance of the evidence. (*Id*. at 6–

8.) He therefore found no mitigating circumstances sufficiently substantial to call for leniency. (*Id*. at 8–9.) In weighing the aggravation and mitigation, the sentencing judge found that the aggravation was particularly strong because the brutality of the murder caused it to "stand[] out above the norm of first degree murders." (*Id*. at 7.) He stated:

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

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

b. *Argument.*

At Lopez's 1990 resentencing hearing, Sterling expressed dismay at the lack of mitigation presented in 1987, but stated that on remand, he had presented as much mitigation to the court as he could find. (Exhibit O, at 18.)

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

The declarations from family members describing a dysfunctional childhood that now exist were simply not available at the time of Lopez's resentencing. In addition to the fact that Lopez's family failed to come forward with any evidence of a dysfunctional upbringing at his 1987 sentencing and his 1990 resentencing, Lopez himself did not indicate that his childhood was dysfunctional. The author of the 1987 presentence report noted that "[i]n other presentence reports [Lopez] did not mention any traumatic or serious events while he was growing up. [Lopez] stated that the biggest problem within the family was financial." (Exhibit L, at 7.) This information from Lopez himself is something Sterling would have been aware of when he prepared for Lopez's resentencing.

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

Sterling also retained two mental health experts. It is clear that the opinions of Lopez's experts—Dr. Bendheim and, presumably, Dr. Bayless—were that Lopez did not suffer from psychological problems, mental illness, or low IQ. It was reasonable for Sterling to rely on the opinions of these experts. *See Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 2008). Moreover, testing conducted in the Department of Corrections, information in the 1987 and 1990 presentence reports, and Lopez's own statements in both 1987 and 1990 also do not support Lopez's current allegations regarding psychological problems, mental illness, or low IQ. Although Dr. Bendheim believed that Lopez possibly abused marijuana and paint, Lopez denied that he was dependent on such substances or that his sporadic use of them created long lasting effects. (Exhibit K, at 5; Exhibit L, at 6.)

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

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

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

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

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

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

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

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

V. CONCLUSION.

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

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

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

RESPECTFULLY SUBMITTED this 20th day of April, 2012.

THOMAS C. HORNE
ATTORNEY GENERAL

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

CERTIFICATE OF SERVICE

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

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2661461

LIST OF EXHIBITS

Exhibit A.	Memorandum
Exhibit B.	Memorandum of Decision and Order
Exhibit C.	U.S. District Court Order filed 3/31/00
Exhibit D.	Motion for Discovery
Exhibit E.	Motion for Extension of Time
Exhibit F.	Maricopa County Superior Court Minute Entry filed 4/5/95
Exhibit G.	Reply to Response to Petition and Supplemental Petition for PCR
Exhibit H.	Motion for Rehearing
Exhibit I.	Petition for Review
Exhibit J.	Maricopa County Superior Court Minute Entry filed 4/2/90
Exhibit K.	Dr. Bendheim Report
Exhibit L.	Pre-Sentence Report (1987)
Exhibit M.	Reporter's Transcript dated 7/13/90
Exhibit N.	PCR exhibit E
Exhibit O.	Reporter's Transcript dated 8/3/90
Exhibit P.	Maricopa County Superior Court Order filed 6/20/90
Exhibit Q.	Reporter's Transcript dated 6/25/87
Exhibit R.	Subpoenas
Exhibit S.	Defendant's Pre-Sentence Memorandum
Exhibit T.	Defendant's Post-Hearing Memorandum
Exhibit U.	Reporter's Transcript dated 7/13/90
Exhibit V.	Special Verdict
Exhibit W.	Reporter's Transcript dated 4/25/86
Exhibit X.	Pre-Sentence Report (1990)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

COMES NOW Petitioner, Samuel Lopez, and moves this Court pursuant to Article III of the United States Constitution, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, 28 U.S.C. § 2241, *et. seq*., and Federal Rule of Civil Procedure 60(b) to grant him relief from its judgment denying his Petition

for Habeas Corpus Relief because there has been a significant change in procedural law under which he is entitled to relief from judgment. Alternatively, Petitioner seeks a Writ of Habeas Corpus overturning his unconstitutional capital sentence. In support of this Motion/Petition, Petitioner states the following:

I. MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)

A. *MARTINEZ V. RYAN*, CASE NO. 10-1001, ANNOUNCED A CHANGE IN FEDERAL HABEAS PROCEDURAL LAW THAT PROVIDES GROUNDS TO REOPEN PETITIONER'S FEDERAL HABEAS PROCEEDING UNDER FED. R. CIV. P. 60(B)

The United States Supreme Court Opinion in *Martinez v. Ryan,* Case No. 10-1001 holds, —as an equitable matter": —A procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id*., Slip. Op. at 8, 15. The court explained that counsel in initial-review collateral proceedings who fail to perform consistent with prevailing professional norms and as a result of negligence, inadvertence, or ignorance fail to raise claims of ineffective assistance of trial counsel are themselves ineffective and the prisoner is excused from failing to raise such claims at an earlier time. This holding modified the Court's holding in *Coleman v. Thompson*, 501 U.S. 722 (1991).

Martinez completely changes the legal landscape with respect to procedurally defaulted federal habeas claims of constitutionally ineffective assistance of counsel. Prior to March 20, 2012, if the cause of the default was ineffective assistance of post-

conviction counsel, then the claim was procedurally barred from federal review. No more. Recognizing this fact, Courts have already begun ordering supplemental briefing of the applicability of *Martinez*. *See e.g.*, *Smith v. Ryan*, No. CV-87-234-TUC-CKJ, 2012 U.S. LEXIS 38806 (D. Ariz. March 22, 2012); *Carter v. Ryan*, Case No. 2:02-cv-00326-TS, D.E. 504 (D. Utah March 22, 2012).

The equitable concerns expressed in *Martinez* are manifest in this case. The Court wrote, "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id*, Slip Op. at 7. The Court observed further, "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." *Id*. Such a result, the Court concluded is inequitable.

That is exactly what happened here. Petitioner deserves relief from this Court's now erroneous judgment.

B. PETITIONER PRESENTED HIS CLAIM AND THE EVIDENCE SUPPORTING IT IN HIS FIRST HABEAS PETITION, BUT THIS COURT FOUND THE CLAIM TO BE PROCEDURALLY BARRED. *MARTINEZ* REPRESENTS A CHANGE IN PROCEDURAL LAW WHICH WHEN APPLIED TO THIS CASE DEMONSTRATES THAT THE PROCEDURAL BAR RULING IS ERRONEOUS. PETITIONER IS ENTITLED TO REVIEW OF THE MERITS OF HIS CLAIM RAISED IN HIS FIRST HABEAS PETITION.

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. Ryan*, 566

U.S. ___ (No. 10-1001)(Mar. 20, 2012). *Martinez* represents a watershed change in the procedural law applied and relied on by this court. *Id*. (discussing Arizona District Court opinion that "Martinez had not shown cause to excuse the procedural default [] because under *Coleman, supra,* U.S. at 753-754, an attorney's errors in a post-conviction proceeding do not qualify as cause for a default."); *Wooten v. Norris*, 578 F.3d 767, 338 (8th Cir. 2009)("It is well established that ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default."); *Carter v. Werholtz*, 430 Fed.Appx. 702, 708 (10th Cir. 2011)("And we note that ineffective assistance of post-conviction counsel (who might have raised these ineffectiveness claims in Defendant's §60-1507 proceedings) would not be a cause that could excuse the default."); *Byers v. Basinger*, 610 F.3d 980, 986 (7th Cir. 2010)("But, we have held that an ineffective-assistance-of-post-conviction-counsel claim does not exhaust an ineffective-assistance-of-trial-counsel claim because the claims are more than a variation in legal theory."); *Haynes v. Quarterman*, 526 F.3d 189, 195 (5th Cir. 2008)(". Haynes also asserts that the alleged ineffectiveness of state habeas counsel supports the 'cause' prong of the 'cause and prejudice' exception to procedural default, but again … earlier precedent clearly foreclose this argument.").

In Petitioner's federal district court proceedings, procedural default was not asserted as a defense by Respondent until the very end of the proceedings. However, in its "Answer Regarding Procedural Status of Claims," Respondent argued with respect to other allegations of procedural default that "attorney error alone is insufficient [to

establish cause],” citing “*Coleman*” [*v. Thompson*, 501 U.S. 722, 750 (1991). *Id*., p. 12. Respondent contended:

> In order to be ‘cause,‘ the error must rise to the level of constitutionally ineffective assistance of counsel. *Id*. In the absence of a constitutional violation, the petitioner bears the risk in federal habeas of all attorney errors made in the course of representation.

Id., at 754.

This Court agreed and held.

> [P]etitioner has no constitutional right to counsel in state PCR proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989); thus no constitutional violation can arise from ineffectiveness of PCR counsel **and, even if alleged, it cannot serve as cause**. *Coleman,* 501 U.S. at 752; *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993).

Memorandum of Decision and Order, p. 15, n. 8 (U.S.Ariz. D.Ct. Jul. 15, 2008)(emphasis added). This was the law of the case when this Court found that Petitioner had not presented his ineffective assistance of sentencing counsel claim to the State court and was therefore procedurally barred from presenting it in federal court. D.E. 200, p. 13-15 (claim presented in state court “very narrow” and “different” from claim presented in federal court).

In holding that Petitioner‘s federally presented claim of ineffective assistance of sentencing counsel was unexhausted because it had not been presented and therefore procedurally defaulted, the Court went on to find the claim barred because:

> To properly exhaust the broad IAC allegations of Claim 1C, **PCR counsel should have included them in the PCR petition.** *See State v. Spreitz*, 190

> Ariz. 129, 146, 945 P.2d 1260, 1277 (1997). While constitutionally ineffective assistance of counsel can constitute cause for failure to properly exhaust a claim in state court, Petitioner had no constitutional right to counsel in state PCR proceedings, *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989); thus **no constitutional violation can arise from ineffectiveness of PCR counsel, and even if alleged, it cannot serve as cause**. *Coleman*, 501 U.S. 752; *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993).

Id., p. 15, n. 8 (emphasis added). Thus this court has already found that post-conviction counsel is at fault for not alleging Petitioner's allegations of constitutionally ineffective assistance of sentencing counsel.

Martinez establishes that this Court's holding that ineffective assistance in post-conviction cannot establish cause is in error. *Martinez* explained:

> To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of at trial.

Id., at p. 6. The *Martinez* court also noted:

> 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 effective assistance of counsel at trial is a bedrock principle in our justice system.

Id., p. 9. For that reason, the Court ruled:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective assistance claim in two circumstances…. The second is where appointed counsel in the initial-review collateral

> proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).

Martinez, at *11.

Lopez meets this standard. As shown below, his post-conviction counsel failed to abide by professional norms and failed to present Petitioner's substantial and meritorious claim of constitutionally ineffective assistance of sentencing counsel.

The Supreme Court's decision in *Martinez* applies here and constitutes an extraordinary circumstance under Rule 60(b)(6).

1. LOPEZ'S 60(B) MOTION IS PROPERLY PRESENTED HERE

Petitioner presented his claim of ineffective assistance of counsel in his amended petition, Amd.Pet.Writ of Habeas Corpus (Nov. 18, 1998), D.E. 27, and supported his claim with substantial evidence. D.E. 178-187.[1] This Court found that his claim had not been presented to the Arizona state court, and therefore was procedurally defaulted and procedurally barred. D.E. 200, pp. 13-15.

But as discussed above, for the first time the Supreme Court has ruled that ineffective assistance of post-conviction counsel in asserting an "ineffective-assistance-of-trial-counsel claim in a collateral proceeding" "may establish cause" to excuse a

[1] Petitioner's seeks review of Claim 1C as presented in the previous proceedings in this Court. Petitioner incorporates the record from those proceedings, including all of the records and statements previously provided to the Court. Many of those exhibits are also attached to this motion for ease of review given the May 16, 2012 execution date. *See* Exhibits 15, 17-30. Petitioner, however, continues to rely on the entire record in this Court.

procedural default. *Martinez, supra,* overruling Ninth Circuit precedent. *Martinez* represents an important change in the procedural law this Court applied and relied on when it earlier denied Petitioner's constitutional claim. *Id*.

Martinez thus is an extraordinary circumstance which entitles Petitioner to reopen these proceedings under Fed.R.Civ.P. 60(b)(6) so he can demonstrate his entitlement to relief. *See Moormann v. Schriro*, 2012 WL 621885 at *2 (9th Cir. Feb. 28 2012)(finding petitioner's 60(b) motion properly and "diligent[ly]" brought, and claims fully exhausted).

2. THE COURT'S DECISION IN *MARTINEZ* IS AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING RELIEF FROM JUDGMENT

It is settled law that Rule 60(b)(6) provides a vehicle for a federal habeas petition 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.

This Court has found that allegations similar to those raised here, are cognizable under Rule 60(b). *See Moormann, supra*.

Applying *Gonzalez*, the Ninth Circuit has observed that,

> 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 Petitioner's substantial and meritorious claim of ineffective assistance of sentencing counsel which proves that Petitioner, 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. Health Servs. Acquisition Corp*., 486 U.S. 847 (1988); *Klapprott v. United States*, 335 U.S. 601 (1949).

Martinez is grounded in principles of equity. The Court's holding is born from the need to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel[.]" 2012 WL 912950, *5. The Court

recognized the inherent unfairness in failing to provide effective counsel in initial review collateral proceedings:

> Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert*, 545 U.S., at 619, 125 S.Ct. 2582. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

Id., p. *7.

That inequity is apparent here, where this Court has already found the failure to present Petitioner's IAC at sentencing claim was post-conviction counsel's error. *Martinez*, an Arizona habeas case, is a fundamental change in the procedural law relied on by this Court to deny relief. *Martinez* provides a clear defense to procedural bar for Petitioner and left without its application to his case, no court will have ever adjudicated his meritorious IAC sentencing claim.

C. PETITIONER'S APPOINTED COUNSEL IN INITIAL-REVIEW COLLATERAL PROCEEDINGS WAS INEFFECTIVE

In August 1994, post-conviction counsel Robert Doyle was appointed for Petitioner. On December 19, 1994, Doyle filed a twenty-page petition for post-conviction relief. See Petition for Post-Conviction Relief, attached as Exhibit 1. In his petition, Lopez alleged only three claims: ineffective assistance of counsel for failing to move for a change of judge; ineffective assistance of counsel at sentencing for failing to

object to the introduction of presentence reports, and failing to properly prepare expert witnesses at sentencing by failing to provide the expert witness with two reports that were otherwise in evidence and before the sentencer; and a due process violation due to the victim impact evidence. *Id*.

In February of 1995, a few months after filing the post-conviction petition, Doyle was contacted by lawyers from the Arizona Capital Representation Project (ACRP). Exhibits 2 and 3. The ACRP is a non-profit legal service organization that assists indigent persons facing the death penalty in Arizona through consultation, training and education. ACRP offered to assist Doyle with Petitioner's case free of charge. ACRP proposed assigning some of its lawyers to conduct a full investigation on behalf of Petitioner. Given that Lopez was the first capital case that Doyle had ever handled, he readily agreed. Exhibit 3.

Beginning in February 1995, ACRP lawyers began work on Petitioner's case, collecting relevant documents, records, and other materials regarding Petitioner and his family. They interviewed many witnesses, including Lopez himself, and many of his family and friends. ACRP lawyers worked independently of Doyle, but shared their findings with him. They also provided him with support and advice on handling capital post-conviction cases. Affidavit of Statia Peakhart, Exhibit 4.

According to ACRP internal memoranda, in mid April 1995, they provided Doyle a draft of a motion for discovery as well as a motion for leave to proceed *ex parte* in requesting funds for investigative and expert assistance. April 25, 1995 Memorandum, Exhibit 5. They also drafted a motion for an extension of time for Doyle to review and

file with the court. See Motion for an Extension of Time, Exhibit 6. It was ACRP's position that "it [was] critical to move for additional time," which they made clear to Doyle in their communications with him. Exhibit 5. Doyle was reluctant to file the draft motions, fearful that they would not be granted by Judge D'Angelo. Exhibit 3, Doyle Affidavit.

In fact, ACRP lawyers, in an attempt to convince Doyle to request an extension of time in which to file the post-conviction petition, asked Lopez to write a letter to Doyle suggesting he file for an extension. Peakheart Affidavit, Exhibit 4. Lopez complied with ACRP's request, and wrote a letter to Doyle requesting that Doyle ask the post-conviction court for more time. Letter from Lopez to Doyle, Exhibit 7. Doyle was offended by this letter and severed ties with the ACRP. Doyle Affidavit, Exhibit 3. On May 2, 1995, counsel from ACRP provided to Doyle a number of documents relevant to the Lopez case, and Doyle signed a document confirming the receipt of such. May 1, 1995 Memorandum, Exhibit 8. The documents provided to Doyle pertained to Samuel Lopez, his trial, and all members of his family except his father. *Id*. Those documents contained information that provided important mitigating evidence. Exhibit 4.

On May 3, 1995, Doyle moved for an extension of time to file a supplemental petition, requesting more time to finish the investigation and to file a supplemental petition if circumstances warrant. Motion to Extend Time For a Supplemental Petition, attached as Exhibit 2. The motion Doyle filed with the court was not the motion that ACRP had drafted, and did not include much of what was included in the ACRP motion. Doyle indicated to the court that "attempts to contact and learn more from family

members has met with resistance." *Id*. He further stated that "no members of the family came forward to help trial attorney Joel Brown" and "no members of the family offered evidence" during the second sentencing. *Id*. Doyle indicated that "for the first time" some members of the Lopez family were willing to discuss Petitioner and his upbringing, but that "one of them are willing to commit to signing affidavits." *Id*.

Unfortunately, Doyle's statements to the court were misleading and untrue. Doyle characterized Lopez's family as unwilling to assist counsel, and unwilling to commit to signing affidavits. The truth was that Doyle himself had no personal knowledge of the Lopez family because he had relied entirely on the investigation of the ACPR lawyers. *See* Exhibit 3, Doyle Affidavit; Exhibit 4, Peakhart Affidavit. Doyle himself had not conducted any investigation into Lopez's family, nor had he personally spoken to any of them. *Id.* Yet, Doyle asserted to the court that Lopez's family refused to participate in Lopez's defense, when in reality, no one had asked them to sign an affidavit or provide other assistance. ACRP Attorney Statia Peakhart explains:

> I never told Robert Doyle that the family was unwilling to sign affidavits. I would not have told him that because that was completely untrue. I found the Lopez family to be cooperative and willing to help Petitioner. It was my professional experience and opinion that we had only begun to scratch the surface of the trauma and mental illness that pervaded the Lopez family. I have recently been shown the continuance motion that Doyle ultimately filed which alleged that the family had refused to sign affidavits and had been previously uncooperative. I have no idea where he got this information from, particularly since Mr. Doyle had no contact with the family – ACRP did all the investigation and interviews for him. This statement was not my experience with or knowledge about the family and I know from my conversations with this family that I was the first person who ever interviewed them about their background and history as it related to Petitioner's capital case.

Exhibit 4, Affidavit of Statia Peakhart, p. 3.

In truth, the family would have been willing to sign affidavits. ACRP attorney, Statia Peakhart, believed that further investigation was necessary before the family was asked to provide affidavits. Exhibit 4, Affidavit of Statia Peakhart. Her belief was not unreasonable given the very preliminary nature of the investigation at that point. Exhibit 9, pp. 33-35.

Also on May 3, 1995, Doyle filed a Supplemental Petition for Post-Conviction Relief, in which he alleged, as he did in his initial petition, that trial counsel was ineffective for failing to move for a new trial judge. Supplemental Petition for Post-Conviction Relief, attached as Exhibit 10. In the supplemental petition, Doyle asserted the discovery of new evidence to support this claim. Doyle attached the presentence report for Lopez's brothers Jose and George Lopez. *Id*. Jose's presentence report referenced how "worthless" the Lopez brothers were, and George's report described Lopez and his brothers as "extremely dangerous individuals." *Id*. Judge D'Angelo, the presiding judge in both Jose and George's murder cases, read and relied upon these reports in their sentencing.

Doyle's own pleading makes clear he was on notice that there was something amiss with the Lopez family. Doyle himself notes it was commonly known among the lawyers of the Maricopa County courthouse that there were serious problems that affected the Lopez brothers. *See* Exhibit 3. Doyle remembered rumors circulating about the Lopez brothers and what was wrong with them. *Id*. It was commonly known that four of the Lopez boys were in prison (two of them on death row), but the older four boys

were believed to be relatively successful. *Id*. Despite knowing this, and despite the persistent rumors about the Lopez family, Doyle failed to investigate that crucial question. Capital lawyers are professionally obligated to follow up on these "red flags." Lawyers that have failed to investigate such information have repeatedly been found constitutionally ineffective by the United States Supreme Court. See Exhibit 9; *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), *Porter v. McCollum*, 558 U.S. ____, 130 S. Ct. 447 (2009), and *Sears v. Upton*, 561 U.S. ____, 130 S. Ct. 3259 (2010).

Sometime in early May 1995, the tensions between Doyle and ACRP came to a head. When Doyle received the letter Lopez had written him asking that Doyle seek more time from the court, Doyle severed all ties with ACRP. Exhibits 3 and 4. Although ACRP were the only members of the defense team who had or were conducting any investigation on behalf of Petitioner, Doyle severed their connection. *Id.*

Doyle did contact Dr. Bendheim during post-conviction, providing him additional materials, including both trial testimony and witness interviews of Pauline Rodriguez and Yodilia Sabori. Exhibit 11. These exhibits were in the sentencing record and before the sentencing judge, but sentencing counsel had not thought to provide them to Dr. Bendheim. Based on this new information, Dr. Bendheim was able to make a "more certain diagnosis:" Lopez was pathologically intoxicated at the time of the crime. *Id*.

Judge D'Angelo, sitting as the post-conviction judge, denied relief without a hearing, concluding, without any analysis, that "counsel's performance" was not

ineffective, and no "reasonable probability" existed of "different" result. Exhibit 12. The Arizona Supreme Court denied review of that decision, without explanation. Exhibit 13.

When Doyle severed ties with ACRP, he abandoned the mitigation investigation entirely in dereliction of his professional obligations. After all, ACRP were volunteers. If he did not feel he could work with ACRP, the case was still his responsibility. Although Doyle had the documents collected by ACRP, and had been kept abreast of their investigation, which included a wealth of information about Lopez and his family, Doyle unilaterally ended the investigation where they had left it. And he did this despite the fact that he was on notice that there was something amiss with the Lopez family.

Russell Stetler, a mitigation specialist with decades of experience, who is employed by the Administrative Office of the Courts as National Mitigation Coordinator has reviewed Petitioner's case and explains:

> In a capital case, competent counsel have a duty to conduct life-history investigations, but generally lack the skill to conduct the investigations themselves. Moreover, even if lawyers had the skills, it is more cost-effective to employ those with recognized expertise in developing mitigation evidence. Competent capital counsel have long retained a "mitigation specialist" to complete a detailed, multigenerational social history to highlight the complexity of the client's life and identify multiple risk factors and mitigation themes. The Subcommittee on Federal Death Penalty cases, Committee on Defender Services for the Judicial Conference of the United States, for example, noted in 1998 that mitigation specialists "have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review."

Exhibit 9, pp. 12-13.

The prevailing professional norms at the time, as reflected in the ABA Guidelines and ABA Criminal Justice Standards also made clear Doyle's duties to investigate. Stetler explains:

> The 1989 edition of the ABA Guidelines reflected a national consensus among capital defense practitioners based on their practices in the 1980s. These Guidelines were the result of years of work by the National Legal Aid and Defender Association (NLADA) to develop standards to reflect the prevailing norms in indigent capital defense. NLADA published its Standards for the Appointment of Defense Counsel in Death Penalty Cases … in 1985. The ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), NLADA developed its expanded Standards for the Appointment and Performance of Defense Counsel in Death Penalty Cases … over the course of several years.

Id., p. 14. These standards are key —guides to prevailing professional norms." *Id.*, p. 15. But one fact is certain:

> A social history cannot be completed in a matter of hours or days.... It takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socio-economic status, religious and cultural practices, the existence of intra-familial abuse, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion….

Id., p. 16. These barriers require —an experienced mitigation specialist" to "break" them down —and obtain accurate and meaningful responses." *Id*. This key task is not easy or quick. Stetler opines:

> [A]n experienced mitigation specialist requires, at minimum, hundreds of hours to complete an adequate history-even working under intense time pressure.

Id.

According to Doyle, it was commonly known among the lawyers of the Maricopa County courthouse that there were serious problems that affected the Lopez brothers. Exhibit 3. Doyle remembered rumors circulating about the Lopez brothers and what was wrong with them. *Id*. It was commonly known that four of the Lopez boys were in prison (two of them on death row), but the older four boys were perceived to be relatively successful. *Id*. Despite knowing this, and despite the persistent rumors about the Lopez family, Doyle failed to answer, much less investigate, that crucial question. Had Doyle investigated, he would have discovered that the Lopez family is enormously damaged by the abusive environment in which they were raised.

Doyle relied entirely on the ACRP to conduct the essential mitigation investigation. When a conflict emerged with ACRP, Doyle's response was to simply cut all ties with ACRP, without discussing his decision and its implications with Lopez. Doyle's actions resulted in abandoning the investigation, and the meritorious claims that the investigation would have (and did) support. Not only did Lopez not consent to Doyle's actions, but Lopez was completely unaware of them. In fact, Doyle's actions were contrary to Mr. Lopez's wishes. "I told [Doyle] that I wanted him to work with ACRP and follow their advice." Exhibit 16, p. 1.

Doyle's conduct fell below the standard of competent counsel when he "failed to conduct an investigation that would have uncovered" witnesses and records "graphically describing" his "nightmarish childhood…" *Williams v. Taylor*, 529 U.S. at 395. Doyle's

decision not to investigate was not strategic. Indeed, Doyle admits that the evidence previously presented to this Court was the type of evidence he would have presented to the judge in post-conviction. Exhibit 3. Doyle's duty to conduct a thorough investigation was not only clear but well known:

> The ABA Guidelines have always emphasized the quality of legal representation during all stages of the case (see Guideline 1.1 in both the 1989 and 2003 editions). The extensive Commentary to Guidelines 10.15.1 (Duties of Post-Conviction Counsel) in the 2003 revision draws on the national experience litigating these cases in the 1990s and is instructive:
>
> > …[W]inning in collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and argument-those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal, are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system.… [T]he appreciable portion of the task of post-conviction counsel is to change the overall picture of the case…
> >
> > collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7…. [T]he trial record is unlikely to prove either a complete or accurate picture of the facts and issues in the case. That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

Exhibit 9, p. 22, citing 30 Hofstra L. Rev. 913, 1085-1086 (2003).

D. PETITIONER IS ENTITLED TO HAVE HIS HABEAS PETITION REOPENED AND FOR THIS COURT TO ADJUDICATE THE MERITS OF HIS INEFFECTIVE ASSISTANCE OF SENTENCING COUNSEL CLAIM

1. PETITIONER HAS A SUBSTANTIAL CLAIM OF INEFFECTIVE ASSISTANCE OF SENTENCING COUNSEL

Because of post-conviction counsel's breach of duty to Lopez, no court has ever reviewed the powerful mitigation in his case. Likewise, trial counsel Joel Brown never conducted any meaningful investigation into Lopez's upbringing. Much like Doyle, Brown never sought to obtain any relevant documents regarding Lopez and his family and never attempted to interview Lopez's family. As Brown explains in his affidavit:

> At the time I represented Petitioner, I had never been trained on how to present a case in mitigation. Back then, we did not have trial teams or mitigation specialists like we do now. When I look back now on how we did things back then it seems like we were in the dark ages.

Exhibit 14, Brown Affidavit. Mr. Brown continues:

> I did not have an investigator assigned to the case. I was by myself. I had no concept of aggravation or mitigation. I did not conduct a mitigation investigation."

Id.

Following his review of Lopez's trial transcripts, Stetler concluded:

> 38. [Petitioner] was arrested on November 3, 1986. He was indicted eleven days later and went to trial facing the death penalty in April; scarcely five months had elapsed. He was represented by a single lawyer, Deputy Public Defender, Joel T. Brown. The jury convicted Petitioner of capital murder and other charges on April 27. Two months later, there was a presentence hearing before Judge D'Angelo, and the public defender summarized his luckless preparation on the record as follows:

> Judge, we do not have anything to present at this point. I would like to leave it open for me getting in contact with his family, Petitioner' family by the sentencing date. I've been trying this week, I have not had any success at doing that.
>
> If it's going to be a matter of it being an extended hearing, I would inform your court of that. At this point I haven't had any luck. The only person is his mother. I haven't had any luck in trying to reach her.
>
> I don't know if you want to proceed to argument. I would also ask that to be precluded. As far [as] Dr. Bendheim, I do not intend to call him, based on my conversation with Dr. Bendheim two days ago. I have not received his report. I would like the benefit of the report before we proceed to any sort of argument. (Tr. 12-13, June 19, 1987.)

Argument was reserved until the sentencing date, six days later, by which time the court had already written its Special Verdict.

39. On June 24, 1987, Mr. Brown filed a Sentencing Memorandum consisting of three pages, plus notifications of service. The Memorandum pointed out – correctly – that Petitioner's prior conviction for resisting arrest did not involve the use or threat of violence, and thus did not constitute an aggravating factor under Arizona law. (The Arizona Supreme Court later agreed.) The rest of the slight Memorandum argued from the trial record that Petitioner was impaired on the night of the capital offense by virtue of intoxication. Two young women had testified that they had been talking to Petitioner on the evening of the murder; he left them and returned a few minutes later heavily intoxicated. He was "totally changed" according to the witnesses. Mr. Brown concluded, "Defendant's diminished capacity at the time of the offense, considered along with the fact that he is still a very young man without a prior history of assaultive behavior demonstrates enough mitigating factors so as to mandate a sentence of life imprisonment."

40. The trial court expressed concern on the record when the Sentencing occurred on June 25, 1987. As soon as the parties stated their appearances, the Court asked Mr. Brown to explain what he had done to prepare for sentencing:

> THE COURT: At the time of trial the court was concerned over the lack of any evidence presented on behalf of the

> defendant. I believe I so expressed to counsel, either formally or informally. . . .
>
> The court is now concerned with the fact that but for the sentence memorandum received just yesterday, the defense failed to present any mitigating circumstances to the court at the hearing, pursuant to A.R.S. 13-703B.
>
> If it does not violate any attorney-client privilege, I'd like the defense counsel to state on the record what effort his office made to determine any mitigating circumstances as might have reflected in favor of the defendant.

(Tr. 2-3, July 25, 1987.)

The defendant was not offered an opportunity to assert or waive any privilege. Mr. Brown proceeded to blame Petitioner and his family for failing to provide any mitigation. This was his response to the court's inquiry:

> MR. BROWN: Your Honor, after the trial in this matter, our office did hire Dr. Otto Bendheim to go to the jail to examine Petitioner, for the purpose of a presentence matter pursuant to Rule 26.5. Our office paid for that. That was done. . . .
>
> Additionally, I have, last Friday, at the time of the hearing, I told the court that I was having trouble contacting family members. I was able to contact both his mother and his brother, Frank. They were both fully aware of this setting. I told them at the last setting I had asked the court if that was possible that I could contact these people later, I would like the opportunity to present them today.
>
> Both people were fully aware of the time, location. I gave them my number. Petitioner, Frank, I spoke to him as recently as yesterday afternoon. He gave me every indication that he would be here today.
>
> I can tell you that I talked to his mother. His mother gave me indications that she may not appear, that she was having some sort of problems. I've talked to Petitioner about this. I think Petitioner will tell you he's strongly opposed to me subpoenaing those people in, either his mother, his brother, or

any other persons. I think Petitioner can tell the court that he strongly opposed me actually having those people subpoenaed in.

Is that true?

THE DEFENDANT: Yes. (*Id*. at 3-4.)

* * * *

42. The trial court …clarified that the public defender's office had done absolutely nothing else to investigate potential reasons to spare Petitioner's life:

THE COURT: What other efforts has your office made to determine the existence of any mitigating circumstances?

MR. BROWN: Your Honor, offhand, those are [sic] only ones I thought of. …(*Id*. at 8.)

Mr. Brown also volunteered that the psychiatrist evaluating Petitioner for sentencing also found him competent and that Petitioner was fully apprised of all the relevant reports and scientific examinations. *Id*. at 8-9. After a recess, the court returned to read its Special Verdict. Petitioner declined to say anything in response. Mr. Brown's remarks were only seven lines – fifty-seven words in which he relied on what he had said in his three-page Memorandum. The court sentenced Petitioner to death. *Id*. at 15.

To summarize a few key points, at the time of Petitioner's first trial, the public defender's office had every reason to focus its efforts on his mitigation case, since the defense experts on the physical evidence had apparently confirmed the strength of the prosecution's evidence of culpability. Nonetheless, six days before sentencing, the deputy public defender had failed to contact any member of Petitioner's family. He had some contact with Petitioner's mother and brother (Frank) in the final days before sentencing. One mental health expert was consulted, but he was provided with absolutely no social history information because no records had been obtained and no witnesses had been interviewed. It is my considered professional opinion that the first trial counsel's performance fell well below the prevailing norms of 1986-87 in his failure to conduct a thorough mitigation investigation.

Exhibit 9, Stetler Affidavit, pp. 24-26.

Like Brown, Sterling also failed to conduct an investigation into Mr. Lopez's family background and upbringing. Ms. Peakhart was the first person to interview the family —about their background and history as it related to Mr. Lopez's capital case." Exhibit 4, p. 6. And Ms. Peakhart opines that she —had only begun to scratch the surface of the trauma and mental illness that pervaded the Lopez family" before Doyle cut off ties. *Id*.

Because no lawyer during Lopez's state trial and post-conviction proceedings ever uncovered the actual conditions of Sammy Lopez's tragic life, no court has ever adjudicated this compelling mitigation evidence.

If permitted to proceed on his Sixth, Eighth, and Fourteenth Amendment claim of Ineffective Assistance of Sentencing Counsel, Petitioner would be able to show powerful mitigation which establishes a substantial claim of constitutionally ineffective assistance at sentencing. In fact, former trial counsel Joel Brown after reviewing this evidence, swore that it —is very valuable mitigation. I wish I had presented it at Mr. Lopez's sentencing hearing." Exhibit 14, p.1.

2. PETITIONER CAN SHOW PREJUDICE FROM COUNSEL'S UNPROFESSIONAL ERRORS

Lopez —was born into a volatile, chaotic, and unpredictable environment to cold, unaffectionate, and distant caretakers." Exhibit 15, Affidavit of Dr. George Woods, p. 3. Little is known about the background of Petitioner's father, Arcadio Lopez, other than that he was born in Tombstone, Arizona. It is known that Arcadio was a life-long alcoholic who suffered depression, and who repeatedly and brutally beat and raped his

common law wife, Petitioner's mother, Conception Lopez (she is known as Concha). The beatings were so terrible that Petitioner and his brothers often feared their father had killed their mother. Without provocation or justification, Arcadio beat and terrorized Petitioner and his brothers as well, threatening to kill them. *Id*., at p. 4-6. Although Arcadio was arrested once, he soon was released and returned to terrorizing his family. *Id*., at 46. Petitioner explains in his affidavit:

> My dad was a violent drunk. He used to beat my mother in front of all of us. He didn't just hit her once and stop. He hit her over and over until she was bloody. We tried to protect her, but then he beat us too. We were afraid of our dad the way some kids are afraid of monsters.

Exhibit 16, Lopez Affidavit.

Petitioner felt protective of his mother, Concha Villegas. Ms. Villegas was also raised in abject poverty and never learned how to parent children. Ms. Villegas is limited intellectually and emotionally. Lopez's mother came from a large, extremely impoverished family who migrated from Mexico to a small farming town in Texas. Concha was regularly beaten by her harsh mother for minor infractions. Her punishments included being forced to stand outside for hours in the hot sun without water, or whipped with a belt if her clothing was torn, or her shoes not shined to her mother's standards. And, when any one child engaged in some perceived transgression, her mother punished them all. Exhibit 15, p. 17-31.

Concha attended a segregated school for Mexican children. After school, she worked in the cotton fields where crop-dusting planes flew overhead, spraying pesticides directly on Concha and her family, and on the open water barrels from which they drank.

Id. When Concha was seventeen years old, she was raped and impregnated by a close friend of the family, who was much older than Concha. When her mother discovered what had happened, she blamed Concha, and beat her because she had "dishonored" her family. *Id*., pp. 24-27. She was banished to a back room of the small family house so that no one could see her. Once her child was born, Concha's mother made her leave her newborn child, and exiled her from the family home. Concha moved to Arizona where an aunt lived. *Id*.

In Arizona, while working in the agricultural fields, as she had in Texas, Concha met Petitioner's father, Arcadio, who operated the bus that she and the other workers took to the fields. One day, Arcadio showed up at Concha's apartment with his possessions and moved in with her against her wishes. *Id*., pp. 28, 33-35. Arcadio was a brutal man who raped and beat Concha repeatedly. As discussed more below, Concha's life experiences left her profoundly grief-stricken, traumatized and unable to protect herself against Arcadio's physical and sexual abuse, or to properly raise Petitioner and his seven brothers. She did not display love or affection for her children, and neglected them.

Dr. Woods explains the import of Concha's abuse:

> It is also important to understand Concha's own abuse history, cultural beliefs, and genetic heritage and how they found expression in the manner in which she reared Sammy and his siblings. Her deep religious and cultural beliefs gave her a path, if not the strength, to survive major stressors during the course of her life and are represented in her language, beliefs about family, and her self concepts. Concha's determination to keep her family together at all costs—even when the price was chronic brutality at the hands of the children's father—springs from her strong cultural beliefs about her obligations as mother, even though she was not able to actualize those beliefs with any of her children, due to her own trauma and neglect.

Id. p. 8.

The trauma Petitioner suffered thus began at the hands of his father who was "violent and unpredictable," and whose alcoholic rages and mental illness worsened over Petitioner's childhood. Petitioner lived in constant fear.

> I often sat at the window and kept a lookout for my dad. I felt like this was my job when I was a little boy. When I saw him, I told my mom to run and hide, and I ran and hid too. My mom worked and fed us and tried to protect us from my dad. She was the only one on our side and the only person that kept us alive. Every day I was afraid that my dad was going to kill her, and without my mom around, I would die too.

Exhibit 16. Dr. Woods explains that because Petitioner was in "constant danger" as a child, fearing for his own life as well as the lives of his mother and brothers, he developed an "anticipatory stress response" characterized by "symptoms of hyperarousal, hypervigilance, high anxiety, agitation, guardedness, paranoia, and sleeping difficulties." Exhibit 15, p. 4. To this day, Lopez's "ability to respond appropriately to emotional stimuli," known as affective dysregulation, "is grossly impaired." *Id*., p. 4.

The omnipresent chaos and danger in Lopez's childhood caused him to experience, among other things, "night terrors," a "common symptom in children who are traumatized." *Id*., p. 5. Lopez's family vividly describes Lopez's suffering as a child that worsened "after a particularly brutal beating from [his father.]" His family found him "crouched in the corner of the kitchen in the middle of the night shaking with fear. Sammy's mother was the only one who could wake him; once awake, Sammy burst into tears." *Id*.

Besides living in constant terror in his own home, Lopez lived in "profound conditions of neglect and poverty." School records document both these conditions. When he was just seven years old and enrolled in school for the first time, school officials reveal "he suffered from frequent tooth pain, cavities, repetitive tonsillitis, and ear infections." School personnel and others told Concha that Lopez needed to be examined by appropriate medical personnel, but his mother was too poor and ill-equipped to obtain the help he needed. *Id*., p. 69.

Lopez was described as a sad, fearful, lonely boy with low self-esteem, who, not surprisingly given his background, mistrusted others. *Id*., pp. 55-58. In a desperate attempt to control the stress and anxieties he suffered, he developed "certain behaviors, like keeping his belongings in perfect order." *Id*. This behavior, known as obsessive compulsive spectrum disorder, is consistent with Lopez's "attempts to control his overwhelming anxiety secondary to his traumatic stress." Without "these mechanisms or his self-medicating" through paint sniffing and alcohol, Lopez's affective dysregulation would take over, and [his] chaotic behavior would ensue." *Id*., p. 58.

When Lopez was seven years old, he suffered yet another loss. His sister, Gloria, was born with a serious birth defect that required repeated hospitalizations. Lopez, his mother, and seven brothers and sisters believed her birth to be a miracle, and the family's salvation in the otherwise wretched world in which they lived. "My mom and my brothers and I were all so happy to have a little girl in our family. It didn't matter to us that she was deformed. We felt like she was an angel sent from God. She was the one bright spot in our lives." Exhibit 16, Lopez Affidavit. But in yet another tragedy to

befall this family, Gloria died at ten months old, following an unsuccessful surgery. Petitioner's mother reacted to the loss of her only daughter by falling even deeper into her already debilitating depression. As a result, she was even less capable of caring for her eight sons. Petitioner's father's reaction was quite different: he abandoned his family and never returned. Exhibit 15 , pp. 59-60.

Although Lopez and his family never knew what happened to Arcadio, records show that after he abandoned the family, he moved to California. There, he worked sporadically in the agriculture fields, and was frequently arrested for drunkenness. He eventually drank himself to death when he was only 56 years old, from ~~–~~liver failure due to cirrhosis, lying in a field surrounded by empty beer and wine bottles." *Id*., p. 28-29.

Arcadio's abandonment of his family had three immediate and direct consequences. It left Lopez and his siblings uncertain, and thus anxious, as to whether his father was truly gone from the family or instead would return at some unknown time and continue to beat and terrorize them. It required Lopez's oldest brother Junior, who was in the 9th grade at the time, to drop out of school so he could work and care for Lopez and his six other brothers, and it deepened even more his family's abject poverty and harsh living conditions. *Id*., pp. 60-61.

Unfortunately, because Junior was still a child, and knew only the child rearing practices of his father to emulate, Junior continued to physically abuse and threaten Lopez and his other siblings. *Id*., pp. 62-65. When Lopez tried to intervene in one particularly terrible beating Junior was inflicting on their younger brother, Joe, Junior turned his anger and fury on Lopez, punching him repeatedly about the face and head

with his fists. Apparently realizing that he was doing what his father had done, Junior suddenly stopped the beating, and ran out the door. *Id*. Like his father, Junior too soon abandoned his mother and younger brothers. He married, moved out of the family home, and rarely had contact with his mother and brothers. Exhibit 15.

But before Junior left, Lopez's family suffered yet another terrible trauma. While walking home from the store, Concha was brutally assaulted and raped. When her attacker released her, she ran home nearly naked, where Lopez and some of his brothers were. Because the family had no telephone to call for help, Concha went to a neighbor's house where she was able to contact the police and get a ride to a medical facility for treatment of her injuries. *Id*., pp. 61-62. As Dr. Woods explains, the "witnessing of sexual assaults and abuse of loved ones can often be more devastating for children than if they were actually sexually assaulted and abused themselves." *Id*., p. 62.

Shortly after this latest catastrophic event, Concha allowed another man to move into the family home: Pedro. Like Arcadio, Pedro was an alcoholic and a physically abusive and dangerous man. Also like Arcadio, Pedro provided no financial assistance to the family. He kept guns in the house and liked to shoot up the house. He terrorized Lopez, beating him up, pointing a gun at him, and threatening to kill him. *Id*., pp. 65-67. Soon, his children from his prior marriage began moving in with Concha and her children. *Id*. Petitioner explains:

> Pete never liked me. One time he woke me up in the middle of the night and pointed a gun in my face, threatening to kill me. I hid his gun after that, and when Pete noticed it was gone, he turned red and threatened to kill me again if I didn't return his gun. Pete insisted that my mom kick me and my younger brothers, Joe and George, out of the house. She did.

Exhibit 16, Lopez Affidavit.

> Lopez lived in the poorest of neighborhoods in Southwest Phoenix:
>
> Southwest Phoenix is a racially segregated and violently charged community reserved for the metal recycling industry, foundries, and impoverished Latino families. Even among this impecunious community, Sammy's family stood out as being extremely poor.

Exhibit 15, Woods Affidavit, p. 4. It has long been known that "[p]overty and chronic poverty has the worst effects on child development. Chronic poverty is dehumanizing as it damages parents' capacities for maintaining any kind of hope." *Id*., p. 36. For Lopez, his poverty and the disadvantages he experienced "led to inadequate nutrition, inadequate housing and homelessness, inadequate child care, higher exposure to environmental toxins, such as the industrial and gas/diesel pollutants that surrounded their neighborhood, exposure to community violence, and lack of access to health care." *Id*. Records document that at one of Concha's homes, it was so cold that the water froze. *Id*., pp. 58-59.

"Latino families living in Southwest Phoenix experienced pervasive racism and segregation. Poverty, drugs, and crime plagued the community and destroyed dreams of a better future." Exhibit 15, pp. 35-36. Because of the Lopez family's poverty, Concha constantly changed residences because she was unable to pay the rent. Once, Concha was evicted for failure to pay the rent, and with nowhere to go, she and her children moved their belongings and stayed overnight in the neighborhood park. *Id*., pp. 35-39. A neighbor who knew the Lopez family explained:

> Concha and her boys were my neighbors for many years in the 1960's and 1970's. Our children were friends with her children and Concha and I were friends. Our neighborhood was not just poor, but filled with drugs and crime. We had to work all day to keep food on the table and have a roof over our heads. That meant our children were left to the many dangers of the neighborhood. I have experience with the dangers. Two of my seven children were in prison for many years. Another son was shot in our neighborhood. Concha's life was even harder because she did not have a husband to help her.

Exhibit 17, Declaration of Donitilla Servin.

Lopez's only escape from this pervasive neglect and abuse was the school he attended. He enjoyed school and worked hard to succeed there. Exhibit 15, pp. 68-70. But his family's instability made it difficult for Lopez to keep up with the other students. His "intense fears" and preoccupation that he, his brothers and mother would not survive the ever-present danger in his home from his father, and then Pedro, as well as the neighborhood violence and racism where he lived, also surely interfered with his success at school. As Dr. Woods explains:

> The constant mortal terror in the Lopez family prevented Sammy from developing what many of us take for granted: the comforting certainty that the world is a safe and secure place and that caretakers are ready, willing, and capable of providing us with safety and comfort. Emotions in Sammy's family were dangerous, erratic and pathologically extreme. Like all children, Sammy and his brothers craved affection from their mother, which provides the sense of security needed for normal development. Suffering, however, from her own severe psychological impairments, Concha could not provide her sons with the love and attention they so desperately needed.

Id., p. 7. Neuropsychological testing reveals that Lopez suffers significant brain damage that also would have contributed to his academic failures. But because he was well-behaved and well-liked, he was socially promoted to the next grade despite his inability to master the class materials. *Id*., p. 68.

Frustrated, bewildered and depressed, Lopez left school in the ninth grade. *Id*., p. 9. He soon turned to the same methods of survival that his older brothers used to get through each day: consuming alcohol and drugs. He sniffed paint daily, eventually suffering neurological damage. He was "homeless, living in cars, staying in the neighborhood park and the local cemetery." In a "desperate attempt to obtain money for drugs," he began to rob houses in the neighborhood when the residents were not at home. *Id*., p. 7. As one of his brothers explained, "d[]rinking and taking drugs was the only way [we] knew to bury all the bad feelings that were too much for a kid to handle." *Id*., p. 72.

Had a proper investigation been conducted, it would have revealed "the prevalence of alcoholism and drug addiction" in Lopez's immediate and extended family is remarkable and widespread. Alcoholism contributed to the chronic and pervasive interpersonal violence, poverty, chaos, and rejection that characterized [his] early life and potentiated other stressors he faced." Exhibit 15, p. 29.

"The relationship between chronic exposure to trauma, early childhood neglect, and alcoholism" is well documented in Lopez's immediate family, and his maternal relatives. *Id*., p. 30. Lopez's "father, mother, many of his brothers, and numerous maternal relatives display symptoms of depression, alcoholism, and post traumatic stress disorder that have significantly impaired their ability to function…." Their intoxication, like that of Lopez, "is frequently accompanied by bizarre changes in their behavior." *Id*.

Contrary to the courthouse rumors that the older boys were relatively successful, for most of Lopez's brothers, their alcoholism and/or drug addictions have resulted in legal problems. Lopez's older brother, Eddie, is an alcoholic who has been arrested

many times for alcohol related offenses. His brother Jimmy, too, is an alcoholic, although he apparently has avoided any legal ramifications resulting from his addiction. His brother, Steve, is an alcoholic, who was also addicted to inhaling organic solvents. He would sniff paint until he passed out. In 1978, Steve was arrested for armed robbery. Lopez's brother, Frank, suffers alcohol problems and has been arrested for drunken driving. Lopez's brothers, Joe and George, began drinking when they were 10 years old, and like Lopez, were heavy drinkers by the time they were teenagers, when they also began inhaling solvents, paints and glue and gas. *Id*., pp. 72-76. "Mental impairments in the family increased the likelihood of addictive disease, and many family members attempted to self-medicate with alcohol and drugs." *Id*., pp. 32-33.

Lopez quickly became addicted to inhaling these solvents and "continued to inhale these highly toxic substances into his adulthood despite their disastrous consequences." *Id*., p. 79. Dr. Woods explains:

> Inhalants enter the blood supply within seconds to produce intoxication. Effects of inhalants can cause an intoxicating effect resembling alcohol. The effects produce a decrease in inhibition, loss of control, mood swings, violence, speech and coordination problems, hallucinations, and delirium. The recovery time varies from user to user; some can require hours to come down, others do not come down at all.

Id.

Given this family's significant impairments, it is not surprising that they did not contact Petitioner's lawyers. They did not know that they could or that they had any information that could help. It was the professional responsibility of the lawyer to seek this information out. Exhibit 9, Stetler Affidavit. This information would have provided

the support Dr. Bendheim needed to change his tentative diagnosis regarding Lopez's impairment to one that he could state with a reasonable degree of medical certainty: Lopez's backgrounds and history established relevant mitigating evidence supporting a life sentence. With the information and records about Lopez and his family that Dr. Bendheim did not have, Dr. Woods concludes:

> Sammy's friends and family have documented that he suffers from a pathological response to alcohol, becoming unpredictable, irrational, agitated, and at times psychotic. When Sammy drinks, even just a small amount of alcohol, he quickly and dramatically changes. Sammy's intoxication and addictive disease were the direct consequence of a devastating accumulation of risks that shaped his development and behavior. As a child, Sammy had to contend with multiple risks: family mental illness, abandonment, family addictive and neurological disease, poverty, and constant life threatening danger at home and in his community. Each alone constituted a significant obstacle to healthy development, but in combination they resulted in devastating mental impairments.

Exhibit 15, p. 7.

> Genetic heritage and acquired brain damage combined to leave Sammy with crippling mental impairments. As a pre-adolescent, Sammy exhibited clear diagnostic signs of acute trauma. This was not merely the product of neglect and mistreatment; it was also the effect of growing up in constant fear for his life and the life of his mother. The chronic and horrific violence Sammy suffered, the physical and sexual assaults he witnessed against his mother, and endlessly repeated abandonments and ongoing neglect by his attachment figures left Sammy utterly unprotected from this recipe for developmental disaster. He has spent his entire life reaping the tragic seeds of his childhood.

Id., p. 4. Dr. Woods explains that Lopez suffers:

> [I]mpaired cognitive ability to inhibit his behavior once that behavior has started as well as his inability to effectively weight and deliberate, particularly in a fast changing, chaotic environment.

Id., p. 90. His low average IQ and —brain impairment creates a vulnerability to atypical drug responses." *Id*. His —cognitive impairments are manifested by his inability to

organize. He acts impulsively, has mental inflexibility (concrete thinking), and perseverates. [His] inability to organize only augments his overwhelming traumatic induced stress." *Id*., p. 91.

The mitigating evidence and records were available to sentencing and post-conviction counsel had they investigated. They could have discovered and presented evidence demonstrating:

> Sammy's long-standing mental disorder is characterized by paranoia, delusion, confusion, suspiciousness, loss of contact with reality and disordered thinking. Sammy is cognitively concrete and measures his interactions with others against his delusional belief system that others will harm him. He holds onto this belief regardless of evidence to the contrary. This disorder affects all aspects of his life, including written and verbal communications with others, the safety of meals he is provided, special meanings of words that only he understands, and strict, but secret, rules that must be followed in interpersonal relationships. Sammy displayed signs of a thought disturbance at times present in his speech patterns. He perseverates, displays impoverished speech, and has a limited range of affect.

Exhibit 15, p. 93.

Petitioner's sentencing lawyer failed in his constitutional duty to uncover any of this important mitigating evidence. Had he done so, Petitioner would not have been sentenced to death. The claim here is similar to claims that the United States Supreme Court has found to constitute ineffective assistance counsel. *See Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard*, *Porter v. McCollum*, *Sears v. Upton*.

There can be no doubt that sentencing counsel was ineffective under *Strickland*. But post-conviction counsel failed in his professional obligations to investigate and present this evidence in post-conviction. There was no strategy or reason for this failure. Post-conviction counsel's professional failings constitute an extraordinary circumstance

under Rule 60(b)(6). Post-conviction counsel has sworn, "I never personally spoke to any member of Mr. Lopez's family" and: "I did not intentionally or strategically withhold any evidence from the court. Current counsel for Mr. Lopez provided me with a number of declarations from family members and an expert witness detailing Mr. Lopez's upbringing and resulting mental difficulties. If I had been provided with such statements at the time of Mr. Lopez's post-conviction proceedings, I would have filed them in support of his petition." Exhibit 3, p. 2.

E. CONCLUSION: POST-CONVICTION COUNSEL'S INEFFECTIVENESS PREJUDICED LOPEZ AND ESTABLISHED CAUSE TO EXCUSE LOPEZ'S PROCEDURAL DEFAULT OF HIS INEFFECTIVE TRIAL COUNSEL CLAIM IN STATE COURT

Petitioner has provided this Court with ample evidence establishing that appointed contract counsel in this case failed to abide by the prevailing professional norms. He acted in direct defiance of his client's expressed wishes that he follow the advice of the project lawyers. Worse, he undermined Lopez's claim by representing, falsely as it turns out, that Petitioner's family had refused to sign affidavits. By failing to request additional time, funds and experts to investigate and present the claim, he failed to preserve any defect in the state court proceedings for federal review. "Effective trial counsel preserves claims to be considered on appeal … and in federal habeas proceedings." *Martinez*, *supra*, at *9 (internal citations omitted).

To be sure, Petitioner's family members are troubled. But that four of the nine children born to Mrs. Lopez end up in prison, and that the others struggle to survive every day as the result of the trauma and scars of the torture they experienced at the hands of

their brutal father, is rich mitigation. A lawyer faced with a client whose family isn't knocking down his door, has a duty to ask why and then to go and investigate. What he would have found had he only looked is a fractured family who suffer daily from their wounds and resulting mental illnesses. He would have found a family, all of whom were born on American soil, who never really felt like this was their home. A family who does not believe that the American judicial system is for them or cares about what they have to say. It is the lawyer's job to bring that family to the attention of the court and to tell their important story.

That did not happen here and it was not the fault of Petitioner. Claims of ineffective assistance of trial counsel require investigation and the gathering of evidence which —while confined to prison, the prisoner is in no position to develop the evidentiary basis for" — which often turns on evidence outside the trial record." *Martinez*, at *7. As discussed above, here the evidence supporting relief was almost entirely based on the fruits of an investigation conducted outside the record.

On these facts and law, Lopez requests this Court grant Lopez relief based on post-conviction counsel's —[i]nadequate assistance of counsel at initial-review collateral proceedings" when he failed to undertake a reasonable investigation--indeed any investigation--needed to establish the prejudice that resulted when Lopez's trial counsel failed to investigate Lopez's background and present mitigating evidence supporting a sentence less than death. *Id*., p. *5. Alternatively, Lopez requests this Court hold a hearing where Lopez can present the facts and witnesses demonstrating post-conviction

counsel's ineffectiveness in failing to investigate and litigate sentencing counsel's gross incompetence, and demonstrate the prejudice he suffered.

II. ALTERNATIVELY, PURSUANT TO ARTICLE III OF THE UNITED STATES CONSTITUTION, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND 28 U.S.C. § 2241 *ET SEQ*, PETITIONER PETITIONS THIS COURT FOR A WRIT OF HABEAS CORPUS TO RELEASE HIM FROM HIS UNCONSTITUTIONAL SENTENCE

A. CLAIM: PETITIONER RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner incorporates by reference the facts and law set forth in Section I, *supra*.

B. PETITONER'S CLAIM IS NOT BARRED AS SECOND OR SUCCESSIVE BECAUSE HIS CLAIM HAS ONLY NOW BECOME RIPE FOR FEDERAL REVIEW

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).

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 missed, 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 the claim had never been presented to the state court and was procedurally barred because ineffective assistance of post-conviction counsel could not be cause to overcome the procedural default. 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)(attached as Exhibit 31).

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 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. —[]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.

C. PETITIONER’S CLAIM IS NOT SUBJECT TO PROCEDURAL BAR

As previously stated, petitioner can establish that his post-conviction counsel provided ineffective assistance in that his counsel‘s performance was not in compliance

with objective professional norms for post-conviction counsel and petitioner was prejudiced by his post-conviction counsel's unprofessional errors. See Section I, *supra*, incorporated herein by reference. Petitioner has a serious and substantial claim of ineffective assistance of sentencing counsel that has not been adjudicated by any court. See Section I, *supra*, incorporated herein by reference.

D. PETITIONER IS ENTITLED TO A HEARING ON HIS CLAIM

Like the habeas petitioner in *Bilal*, Petitioner's post-conviction counsel here failed to present his claim of ineffective assistance of sentencing counsel, as previously found by this Court. Under *Martinez*, Petitioner is entitled to show that his post-conviction counsel's failures constitute ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984).

> [I]t is appropriate to allow Petitioner the opportunity to demonstrate that his [post-conviction] attorney was ineffective for failing to pursue, in the initial [post-conviction] proceeding, Petitioner's first claim of trial counsel ineffective assistance. **The best way to do that is to conduct an evidentiary hearing** where [post-conviction] counsel could explain why he failed to pursue the defaulted claim.

Bilal, *supra*, at *4 (emphasis added).

III. CONCLUSION

Had he only looked, Petitioner's post-conviction counsel would have discovered powerful facts supporting a sentence less than death—facts that neither Petitioner's trial counsel nor his resentencing counsel investigated. Petitioner was unable to assert his post-conviction counsel's ineffectiveness in earlier proceedings because longstanding Arizona law did not recognize the existence, much less validity, of such a claim. See, e.g., *State v. Krum*, 903 P.2d 596, 599-600 (1995)("ineffective assistance on a prior PCR petition is not a valid, substantive claim under Rule 32 because, for petitioners like Krum, there is no federal constitutional right to effective counsel in a PCR proceeding."). *Martinez* now provides Lopez the means to obtain relief based on his post-conviction counsel's flagrant errors and omissions in those key proceedings, and Lopez's motion seeking relief under Rule 60(b)(6) is "made within a reasonable time." Fed.R.Civ.P.60(c)(1). Based on the facts and law presented, Lopez requests this court grant him relief, or alternatively a hearing where he can present his facts and evidence demonstrating his entitlement to relief.

Respectfully submitted this 9th of April, 2012.

/s/ Kelley J .Henry
Kelley J. Henry
Denise I. Young

Attorneys for Samuel Lopez

Copy of the foregoing served this
9th day of April, 2012, by CM/ECF to:

Kent Cattani
Susanne Blomo
Jeffery Zick
Assistant Attorney Generals
1275 W. Washington
Phoenix, AZ 85007-2997

/s/ Kelley J .Henry
Attorney for Samuel Lopez

AFFIDAVIT OF ROBERT W. DOYLE

1. My name is Robert W. Doyle. I was admitted to practice in the State Bar of Arizona on October 23, 1982. I am currently a Judge in the Phoenix Municipal Court. I was appointed to the bench in 2006. Prior to that time I was an attorney in private practice. In 1994, I was appointed to represent Samuel Villegas Lopez in his first state post-conviction proceeding challenging his conviction for capital murder and death sentence. I was the only lawyer appointed to the case and I represented Mr. Lopez from the fall of 1994 through the winter of 1997.

2. At the time I accepted the appointment in Mr. Lopez's case, I was one of seven lawyers who shared a contract to accept criminal post-conviction cases in Maricopa County. The contract provided that the lawyers would split the post-conviction cases equally and take one capital case per year. At the time of my appointment, there were no standards for training or experience in order to be qualified to accept capital appointments. Mr. Lopez's case was my first capital case, though I had handled other post-conviction cases.

3. During the course of my representation of Mr. Lopez, I met with him in person at the prison on a couple of occasions. I found Mr. Lopez to be a very nice guy and I liked him. He was not an angry person. I was concerned that the years of incarceration had affected him.

4. At the time I represented Mr. Lopez, I was a sole practitioner and did not have a staff investigator or other resources available to me to conduct a social history investigation. I remember talking to Joel Brown about Mr. Lopez's case because I would see him around the courthouse. I do not remember talking to attorney George Sterling. I do not recall speaking to Jim Rummage, but I may have because I would often see him around the courthouse.

5. I do remember that the big question among the attorneys familiar with the case was what happened with the Lopez brothers. The story that went around the courthouse was that the older half of the brothers were successful and the younger half were all in prison. There was some talk that the father was not present for the younger boys.

6. I never personally spoke to any member of Mr. Lopez's family.

7. Shortly after I began representing Mr. Lopez, an attorney with the Arizona Capital Representation Project volunteered to help out with the investigation in the case. I initially accepted their help. I do not remember the name of the attorney, but it was a man.

8. Ultimately, the lawyers at the ACRP were no help to me. They wanted me to ask for more time and more money. I did not feel that those requests would be granted by Judge D'Angelo. I was seriously concerned that we would run out of time. The lawyers with the ACRP went directly to Mr. Lopez and got him to write me a letter asking me to agree to their requests. I felt that I could no longer work with investigators who were undermining my relationship with my client. I told Mr. Lopez that I was finished working with the ACRP. He was free to talk to whoever he

wanted, but I explained to Mr. Lopez that I was his appointed attorney and I would no longer work with the ACRP. To my recollection, the investigators never sent me any results.

9. I did not intentionally or strategically withhold any evidence from the court. Current counsel for Mr. Lopez has provided me with a number of declarations from family members and an expert witness detailing Mr. Lopez's upbringing and resulting mental difficulties. If I had been provided with such statements at the time of Mr. Lopez's post-conviction proceedings, I would have filed them in support of his petition. I did not intentionally waive any claim on Mr. Lopez's behalf.

10. This affidavit is based upon my personal recollection. It relates to my previous private law practice and is not made in my current capacity as a judge. It is not an expression of any opinion on behalf of my current employers, the City of Phoenix or the Phoenix Municipal Court.

Further affiant sayeth not.

Dated this __13th___ day of February, 2012 in Phoenix, Arizona.

Robert W. Doyle

Subscribed and sworn to before me this ____ day of February, 2012, in Phoenix, Maricopa County, Arizona.

Notary Public

Monica Zavalza
Notary Public
Maricopa County, Arizona
My Comm. Expires 09-10-15

AFFIDAVIT OF STATIA PEAKHEART

1. My name is Statia Peakheart. I am a Deputy Federal Public Defender with the Office of the Federal Public Defender for the Central District of California. Before my current employment, I was a staff attorney at the Arizona Capital Representation Project (ACRP) in Tempe, Arizona.

2. The ACRP was a nonprofit law office funded in large part by a grant from the Administrative Office of the United States Courts. The purpose of the ACRP was to provide assistance and resources for counsel appointed to represent indigent defendants whom the State of Arizona charged with or convicted of capital crimes. I worked with the ACRP from 1992 to 1995, when the ACRP lost its federal funding.

3. As a staff attorney for ACRP, I, along with attorney Michael O'Connor, was responsible for monitoring the state capital case of Samuel V. Lopez. Our role as resource counsel in the Lopez case was to assist his counsel with investigation, research, and drafting pleadings. Mr. Lopez had already been sentenced to death, and his direct appeal was concluded, so his case was at the state post-conviction level, awaiting his filing of a Rule 32 petition.

4. With the approval of Robert Doyle, Mr. Lopez's post-conviction attorney, I began meeting with Sam Lopez in the winter of 1994-1995. I explained

to Mr. Lopez the role of the ACRP and that we would offer our services, including some investigation and record gathering to Mr. Doyle. Mr. Lopez and Mr. Doyle accepted the Project's offer of assistance.

5. I met with Mr. Lopez often, both to develop his trust and to obtain information that would help Mr. Doyle in litigating his case. In every meeting, I found Mr. Lopez to be cooperative and helpful. Mr. Lopez did not understand the legal process and seemed to be totally dependent on his lawyer. Mr. Lopez seemed to be naïve in his dealing with his lawyer. He did not know what questions he should ask or even what direction to give his lawyer. For example, initially, Mr. Lopez did not understand the relationship between his crimes and death sentence and what I later learned was his horrific childhood. He did not know that information about his childhood or the period before the crimes was relevant to judge's sentencing decision. It appeared to me that I was the first lawyer to explain clearly to Mr. Lopez what a life history or a mitigation investigation is and how it related to the sentencing process in a death penalty case. I am not sure that I was ever able to get Mr. Lopez to understand completely, but he did sign authorizations for release of information forms so that ACRP could get life history and other records and he allowed ACRP to investigate his childhood and life history. At no time, did Mr. Lopez say "don't do

this" or "stay away from that"; so long as I kept him informed about what we were doing and why, Mr. Lopez agreed to the life history investigation.

6. Because I was able to develop his trust and confidence that ACRP was helping his attorney, Mr. Lopez was very open with me about the physical and mental abuse his whole family suffered at the hands of his violent, alcoholic father. He was also open about his family's poverty. He talked about when he started using drugs and alcohol and paint sniffing, and I think he came to realize it was to escape his life.

7. One thing I remember about Mr. Lopez is how betrayed he felt by his mother. It was clear to me that Mr. Lopez loved his family very much, yet none of his family visited him at the prison. Mr. Lopez felt like his mother and brothers had abandoned him. (I learned that his father had died; Mr. Lopez had not seen his father for many years, after he abandoned Mr. Lopez and his family and I was the one who told him about his father's death.) Another thing I remember about Mr. Lopez is that he comes from a family of eight brothers; the oldest was doing well in his life – in terms of stability, family life, and work history – the next brother was doing less well, until ultimately the youngest four, including Mr. Lopez, were in prison for very serious offenses. The picture was beginning to develop that the brothers' eventual circumstances evinced their family's situation

when they were children, including Mr. Lopez's – as the father became more violent, alcoholic and abusive, the family's poverty and turmoil increased. Even then, as capital defense attorneys, we knew that there would be a wealth of mitigation evidence available to any lawyer who merely bothered to look for it, and there was.

8. Once assigned to the case and with Mr. Doyle's knowledge and approval, I immediately began the time-consuming process of gathering records and interviewing the Lopez family. During just three months, we had gathered over 1500 pages of social history records in the case. It appears no attorney before ACRP had ever gathered those records, including trial counsel. We turned those records over to Mr. Doyle for his use in Mr. Lopez's Rule 32 petition. See Exhibit A, Receipt of Documents. That batch of documents was just the start, I knew that there was much more to be done.

9. When my requests failed, my associate, Michael O'Connor, tried to convince Mr. Doyle to seek more time and funding from the judge to complete the investigation and to identify appropriate witnesses and expert assistance to support relief. We even drafted motions for Doyle to file that included requests for a continuance, request for funds for an investigator, and request for the appointment of experts. These motions said what had been done so far, where the investigation

was headed, and how relevant the information was to the request for relief. I attach those motions to this affidavit as Attachments B-D.

10. Mr. Doyle refused to file these motions because, he said, he did not want to anger the judge. I remember this explanation clearly, even to this day. While this was a problem we encountered with the contract PCR counsel at the time – they were afraid that if they made the judge angry, the judge would not appoint them to any more cases – we told them their duty was to the client, not the judge, but this was often to no avail.

11. Michael O'Connor and I decided to ask another lawyer in our office, Oliver Loewy, to appeal to Mr. Doyle and convince him that the additional time and resources needed to be requested to present the information and experts to the state court, thus preserving the issue for federal review. I attach a memorandum regarding that meeting and its lack of success as Attachment E.

12. I have recently been shown the continuance motion that Doyle ultimately filed which alleged that the family had refused to sign affidavits and had been previously uncooperative. I never told Robert Doyle that the family was unwilling to sign affidavits. I would not have told him that because that was completely untrue. I found the Lopez family to be cooperative and willing to help Mr. Lopez. Also, I have no idea where he got this information from since Mr.

Doyle had no contact with the family – ACRP did all the investigation and interviews for him. I know from my conversations with this family that I was the first person whoever interviewed them about their background and history as it related to Mr. Lopez's capital case (my memory is that not even Mr. Lopez' trial attorney had met with them). It was my professional experience and opinion that we had only begun to scratch the surface of the trauma and mental illness that pervaded the Lopez family, and we needed time and funding to complete the effort.

13. In the summer of 1995, the ACRP lost its federal funding and began the process of shutting down. I took a position with the Capital Habeas Unit of the Federal Public Defender's Office in Los Angeles and had no further contact with the case.

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14. In the seventeen years since I left Arizona, Mr. Lopez's case has continued to bother me. 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.

Further affiant sayeth not.

Dated this 14th day of February 2012.

Statia Peakheart

Statia Peakheart

Subscribed and sworn to before me on this _____ day of February 2012 in Los Angeles, Los Angeles County, California.

See Attached

Notary Public

CALIFORNIA JURAT WITH AFFIANT STATEMENT

☑ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–5 to be completed only by document signer[s], *not* Notary)

Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

State of California

County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this 14th day of February, 2012, by

(1) Stacia Peckheart,
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me (.) (,)

(and

(2) _____,
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

Signature _____
Signature of Notary Public

MEAGHAN MCHUGH ROTH
Commission # 1853438
Notary Public - California
Los Angeles County
My Comm. Expires Jul 6, 2013

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: Affidavit

Document Date: 02/14/2012 Number of Pages: 7

Signer(s) Other Than Named Above: None

RIGHT THUMBPRINT OF SIGNER #1	RIGHT THUMBPRINT OF SIGNER #2
Top of thumb here	Top of thumb here

ATTACHMENT A

MEMORANDUM

Privileged and Confidential
Attorney Work Product

TO: *Lopez* file

FROM: Statia

RE: Transmittal of file documents

DATE: May 1, 1995

On May 2, 1995, I, Robert W Doyle received the following files from the Arizona Capital Representation Project:

1. Documents pertaining to Samuel Lopez;
2. Documents pertaining to Samuel Lopez's trial;
3. Documents pertaining to Concha Villegas Lopez;
4. Documents pertaining to Arcadio Lopez, Jr.;
5. Documents pertaining to Eddie Lopez;
6. Documents pertaining to Frank Lopez;
7. Documents pertaining to Steve Lopez;
8. Documents pertaining to José Lopez;
9. Documents pertaining to George Lopez; and,
10. Documents pertaining to Gloria Lopez.

ATTACHMENT B

Robert Doyle
Attorney-at-Law
1010 E. Jefferson
Phoenix, AZ 85034-2222
(602) 253-1010
State Bar No. 007380

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, vs. SAMUEL VILLEGAS LOPEZ, Petitioner,	NO. CR-163419 MOTION FOR EXTENSION OF TIME PURSUANT TO ARIZONA RULE OF CRIMINAL PROCEDURE 32.4(C) Assigned to: Hon. Peter T. D'Angelo

Petitioner moves that this Court grant him a thirty-day extension of time, until May 3, 1995, in which to file his petition for post-conviction relief, pursuant to ARIZONA RULE OF CRIMINAL PROCEDURE 32.4(c), the Fifth, Sixth, Eighth and Fourteenth Amendments, to the UNITED STATES CONSTITUTIONS and related provisions of the ARIZONA CONSTITUTION and laws. The most factually compelling reason to provide additional time is that counsel and his staff have uncovered approximately 1,500 pages of documents to be examined and considered before filing.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

Undersigned counsel was appointed by this Court to represent Petitioner in his post-conviction proceedings. ARIZ. R. CRIM. P.

32.4(c). A preliminary petition for post-conviction relief was timely filed.

Subsequently, the parties agreed to file a stipulated request to permit Petitioner to file a supplemental petition by April 3, 1995, and to extend the State's deadline for filing its response to forty-five days after April 3, 1995. While the parties did file a stipulated request, that request contained a typographical error. Thus, while the parties did agree in the stipulated request that Petitioner should have until April 3, 1995, to file a supplemental petition, the parties also and mistakenly asked that the State be granted until April 3, 1995, to file its response.

On February 8, 1995, this Court entered an order granting the requested extensions in time. Unfortunately, the order reflects the filed stipulation's typographical error, for it grants Petitioner no additional time in which to file a supplemental petition but does grant the State until April 3, 1995, to file its response.

Having believed that he had been granted until April 3, 1995, to file a supplemental petition, undersigned counsel and staff have been diligently conducting further investigation. A substantial amount of evidence relevant to Petitioner's post-conviction proceedings has been uncovered, but the investigation is not complete. For this reason, and for the additional reasons set out below, Petitioner respectfully requests that this Court grant him leave to file a supplemental post-conviction petition by or on May 3, 1995.

I. GOOD CAUSE EXISTS TO GRANT PETITIONER AN ADDITIONAL THIRTY DAYS IN WHICH TO FILE A SUPPLEMENTAL PETITION FOR POST-CONVICTION RELIEF.

RULE 32.4(c) of the ARIZONA RULES OF CRIMINAL PROCEDURE provides that post-conviction petitions may be amended upon a showing of good cause. ARIZ. R. CRIM. P. 32.4(c). In this case, good cause exists for additional time to complete the investigation necessary to fully presenting the claims of relief contained in his post-conviction petition and necessary to fully identifying and raising additional claims for post-conviction relief. Undersigned counsel has never before represented a capital defendant in post-conviction proceedings. Since filing the preliminary petition in this case, counsel has learned that much work remains to be done to adequately present Petitioner's case. While this necessary investigation is ongoing, much remains to be done. This postconviction case seeking relief from Petitioner's capital convictions and sentences is factually and legally extremely complex, and there are numerous potential guilt and penalty phase witnesses, and other technical issues.

A significant part of what might appear to be delay in this case can be attributed to inaccurate information received early in the investigation. In fact, then, undersigned counsel has not engaged in delay, and filed the preliminary petition in the initial time allotted. Before filing the preliminary petition, undersigned counsel interviewed two previous attorneys for Petitioner who said that their investigations found little or no documents concerning Petitioner. In just 60 days, current

counsel's investigatory staff has found an immense amount of material. This material must be reviewed and carefully considered before filing a supplemental petition.

Although a substantial amount of investigation has been accomplished since this Court's February 2 order, the investigation necessary to effectively representing Petitioner in these capital proceedings is far from complete. For example, while many records critical to Petitioner's post-conviction petition have been obtained and reviewed, additional records have been requested but not yet received. It often takes several weeks or months to get responses on record requests. In addition, Petitioner comes from a very large family; while diligent efforts have been made and are ongoing, to date only a few family members have been contacted --though the vast majority have been located. Many others are out-of-state. Interviewing and obtaining affidavits from Petitioner's family is an essential part of presenting potential guilt and penalty phase claims for post-conviction relief, including the issue of Petitioner's pathological intoxication. As the Court is aware, Petitioner's family did not significantly participate at either the first or second sentencing.

Significant progress has been made in the past 60 days. Records that previous lawyers for Petitioner did not locate have been found. These documents include over 1,500 pages, which counsel needs to review in greater detail. Undersigned counsel continues to receive additional relevant documents. Family members have been located and are being interviewed. Much work

that previous counsel failed to do is now being accomplished.

Finally, counsel has time-consuming responsibilities in numerous other cases in which he is counsel of record. These include two cases in which undersigned counsel was recently appointed, one a capital case on direct appeal, and the other a capital case in post-conviction proceedings.

II. THE FEDERAL AND STATE CONSTITUTIONS AS WELL AS THE VERY PURPOSE OF ARIZONA'S RULE 32 POST-CONVICTION PROCEEDINGS REQUIRE COUNSEL TO CONDUCT AN OUTSIDE-THE-RECORD INVESTIGATION INTO POTENTIAL GUILT AND SENTENCING PHASE CLAIMS FOR POST-CONVICTION RELIEF.

There are at least two reasons why undersigned counsel should be permitted additional time to complete his thorough investigation and amend his petition in this case. First, since Petitioner is entitled to effective assistance of post-conviction counsel as a matter of state and federal law, he is entitled to undersigned counsel's conducting a thorough investigation. Second, since Arizona's Rule 32 post-conviction proceedings are designed to permit petitioners to litigate, among other things, claims that they were denied effective assistance of counsel at trial, denying additional time to complete the investigation and amend the petition would be contrary to the very purpose of these proceedings.

A. Petitioner Is Entitled To Effective Assistance Of Post-conviction Counsel As A Matter Of State And Federal Law And, Therefore, Post-conviction Counsel Must Conduct A Thorough Investigation Into Guilt And Penalty Phase Issues.

Arizona law guarantees effective assistance of counsel to post-conviction petitioners. The Arizona Court of Appeals holds that, "for the right to counsel [under Arizona law] to be meaningful, it must encompass effective assistance of counsel" in state post-conviction proceedings. State v. Krum, 184 Ariz. Adv. Rep. 3 (Div. One, Feb. 14, 1995) (citing Strickland v. Washington, 466 U.S. 668, 685-86 (1984)). See also, ARIZ. R. CRIM. P. 32.2 (amended) (comment) (postconviction petitioner's failure to raise issue may be challenged as constituting ineffective assistance). Furthermore, ARIZ. R. CRIM. PRO., RULE 32 plainly contemplates investigation of issues outside the record. See, e.g., State v. Wood, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994) (declining to address on direct appeal ineffective assistance of counsel claims because they are fact intensive and, therefore, trial courts are far better situated to address them). Thus, effective representation of Petitioner requires that investigation outside the record be completed. Cf. Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (counsel's duty to make reasonable investigations or to make reasonable decision not to make particular investigations); Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (counsel's failure to investigate mental condition cannot be construed as trial tactic); Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991) (defense counsel is obligated to conduct mitigation investigation even where defendant instructs counsel not to present mitigation evidence); Liebman, J. FEDERAL HABEAS CORPUS

PRACTICE AND PROCEDURE, 7.1, p. 66 (1988) (proper representation on post-conviction requires a thorough factual investigation of all aspects of the trial and appeal).

The Sixth Amendment to the UNITED STATES CONSTITUTION also guarantees effective assistance of counsel to post-conviction petitioners in the same procedural posture as Petitioner. Specifically, where state post-conviction review serves as the only appeal on certain issues, those state post-conviction procedures must meet the same constitutional standards as must be met by the procedures for the first direct appeal of right. See Coleman v. Thompson, 111 S. Ct. 2546 (1991).

In Evitts v. Lucey, 469 U.S. 387 (1985), the United States Supreme Court held that Fourteenth Amendment's equal protection guarantee requires that the constitutional right to counsel on the first direct appeal of right in state court encompasses the right to effective assistance of counsel on that appeal. The Court went on to hold that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." Id. at 357 (emphasis in original).

In Arizona, criminal defendants are entitled to appeal from their convictions and sentences. However, Arizona provides that the first place criminal defendants may raise certain claims is in Rule 32 post-conviction proceedings, most notably ineffective assistance of trial counsel claims. State v. Wood, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994). In Arizona, then, the Rule 32 post-conviction proceeding is the one and only appeal of those

claims which criminal defendants have in Arizona. Under Evitts, then, if the merits of these claims by post-conviction petitioners in Arizona "are decided without benefit of counsel, ... an unconstitutional line has been drawn between rich and poor." Id. at 357. For these reasons, post-petitioners in Arizona are entitled as a matter of federal law to the effective assistance of counsel, at least with regard to those claims which can be raised for the first time only in post-conviction proceedings such as ineffective assistance of trial counsel.

Petitioner, then, is entitled to effective assistance of post-conviction counsel as a matter of state and federal law. Since trial counsel "must at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client," Sanders v. Ratelle, 21 F.2d 1446, 1456 (9th Cir. 1994), post-conviction counsel must determine whether trial counsel conducted a reasonable investigation. Similarly, under Arizona state law, "effective counsel must carefully investigate all available defenses[.]" State v. Ring, 131 Ariz. 374, 641 P.2d 862 (1982)(citing to State v. Lopez, 3 Ariz. App. 200, 412 P.2d 882 (1966). In the instant case, then, undersigned counsel must make an informed decision whether trial counsel rendered effective assistance by, among other things, conducting a reasonable investigation.

B. Independent Of Petitioner's Right To Effective Assistance Of Post-conviction Counsel, State And Federal Due Process And Equal Protection Guarantees --As Well As Common Sense-- Requires That A Thorough Investigation Be Conducted In

Order To Permit Post-conviction Claims To Be Fully Presented In These Proceedings.

Arizona Rule 32 post-conviction proceedings are designed to permit petitioners to litigate, among other things, claims that they were denied effective assistance of counsel at trial. In State v. Wood, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994), the Arizona Supreme Court very recently reaffirmed that claims that trial counsel was ineffective should be raised in post-conviction proceedings and not on direct appeal. Ineffectiveness claims should be brought in RULE 32 proceedings, the Court explained, because they are fact intensive and, therefore, trial courts are far better situated to address them.

As noted above, trial counsel "must at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client," Sanders v. Ratelle, 21 F.2d 1446, 1456 (9th Cir. 1994). As noted above as well, under Arizona state law, "effective counsel must carefully investigate all available defenses[.]" State v. Ring, 131 Ariz. 374, 641 P.2d 862 (1982)(citing to State v. Lopez, 3 Ariz. App. 200, 412 P.2d 882 (1966). In order for post-conviction counsel to determine whether trial counsel conducted the required investigation, post-conviction counsel must be afforded a reasonable opportunity to conduct an independent investigation.

IIII. CONCLUSION.

For all these reasons, good cause exists to grant this

motion for an extension of time in which to complete the investigation and file a supplemental petition for post-conviction relief. Petitioner respectfully requests that the Court grant a thirty-day extension of time provided for in ARIZ. R. CRIM. PRO. 32.4(c), setting the due date for the petition at May 3, 1995.

Respectfully submitted this _____ day of April, 1995.

By_____

Robert Doyle
Counsel for Petitioner

____

Copies of the foregoing mailed this _____ day of January 1995, to:

Hon. Peter T. D'Angelo
Judge, Maricopa County Superior Court

Dawn Northrup
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85003

by: _____

ATTACHMENT C

Robert Doyle
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1010 E. Jefferson
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(602) 253-1010
State Bar No. 007380

** FILED UNDER SEAL **

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, vs. SAMUEL VILLEGAS LOPEZ, Petitioner.	No. CR-163419 MOTION FOR LEAVE TO FILE UNDER SEAL AND FOR EX PARTE CONSIDERATION OF MOTION FOR FUNDS FOR EXPERT WITNESSES AND FOR AN INVESTIGATOR ASSIGNED TO: HON. PETER T. D'ANGELO

Petitioner, pursuant to Article I, Sections 4 and 24 of the ARIZONA CONSTITUTION, RULE 32.4.c. of the ARIZONA RULES OF CRIMINAL PROCEDURE, ARIZ. REV. STAT. 13-4013 and the Sixth, Eighth and Fourteenth Amendments to the UNITED STATES CONSTITUTION, makes this ex parte request (1) for leave to file under seal a motion requesting funds for expert witnesses; and, (2) that this Court conduct all further proceedings regarding that sealed motion ex parte. In support of this motion, Mr. Lopez states as follows.

There are numerous and compelling reasons why this Court should grant the instant motion. Denying it will compel Mr.

Lopez to disclose his defense and strategy and to incriminate himself, and will invade his right to counsel, his rights to due process and equal protection and force disclosure of attorney-client privileged and work-product materials. Further, denying Mr. Lopez's requests will force him to choose between constitutional rights guaranteed by both the federal and Arizona constitutions. Finally, any legitimate interest the state might have in guarding the public finances can be protected by this Court's exercise of its discretion.

Under Arizona law, this Court may grant Mr. Lopez's requests. His requests for funds are pursuant in part to ARIZ. REV. STAT. 13-4013, which nowhere suggests that the state must be involved in a courts ruling on such requests.1 While the Arizona Supreme Court holds that there is no constitutional requirement that hearings on requests for funds pursuant to Section 13-4013 be conducted ex parte, State v. Apelt, 176 Ariz. 349, 364-65, 861 P.2d 634, 649-50 (1993), this state's appellate courts have never held that ex parte consideration of such requests are prohibited.

1ARIZ. REV. STAT. 13-4013(b) provides:

> When a person is charged with a capital offense the court may on its own initiative and shall upon application of the defendant and a showing that the defendant is financially unable to pay for such services, appoint such investigators and expert witnesses as are reasonably necessary adequately to present his defense at trial and at any subsequent proceeding. Compensation for such investigators and expert witnesses shall be such amount as the court in its discretion deems reasonable and shall be paid by the county.

Moreover, Apelt is wrongly decided. Requests for funds pursuant to Section 13-4013 should always be under seal and considered ex parte for at least three reasons. If Apelt is correctly decided, this Court should exercise its discretion and grant this motion for these same three reasons.

First, if Section 13-4013 requests are not made under seal and considered ex parte, defendants' constitutional rights will be violated. Under Section 13-4013, a defendant must disclose "what [is] to be investigated and why it [is] believed to be material ... in order for the court to determine that the expenditure sought [is] reasonably necessary to enable defendant to present an adequate defense." State v. Greenawalt, 128 Ariz. 150, 156, 624 P.2d 828, 834 (1981). Therefore, the Supreme Court held, a trial court did not abuse its discretion when it denied funds to a defendant who had failed to make a showing of the subject matter to be investigated and its materiality to the case.

The showing required for entitlement to Section 13-4013 funds will always turn on a defendant's disclosing his defense and strategy and will often require a defendant to incriminate himself in violation of federal and state law, invade his right to counsel in violation of federal and state law and violate his rights to due process and equal protection as guaranteed by federal and state law. Further, it will often turn on the defendant's disclosure of attorney-client privileged information and work-product information.

A second reason that Section 13-4013 funds requests should

be made under seal and considered ex parte is that proceeding otherwise would compel defendants to choose between constitutionally guaranteed rights. The right to counsel guaranteed by the Sixth Amendment and the Due Process guaranteed by the Fourteenth Amendment to the UNITED STATES CONSTITUTION and by Article 2, Sections 4 and 24 of the ARIZONA CONSTITUTION entitles criminal defendants to "the raw materials integral to the building of an effective defense." Ake v. Oklahoma, 470 U.S. 68 (1985). Thus, requiring defendants to disclose to the State the bases for their request for Section 13-4013 funds would mean that defendants would have to choose between their constitutional rights. Specifically, they would have to choose between the state and federal due process rights to the "raw materials integral to the building of an effective defense" and the panoply of rights set out above. The UNITED STATES CONSTITUTION forbids requiring defendants to choose between their federal constitutional rights. Simmons v. United States, 390 U.S. 377 (1968). In addition to the federal constitutional safeguards, Arizona defendants should not be forced to choose between their state constitutional rights.

Third, Apelt's holding is contrary to ARIZ. REV. STAT. 1-211, providing rules of statutory construction. The Arizona Supreme Court has repeatedly held that a statute adopted from another state should be construed consistently with cases decided by the courts of that state. See, e.g., Gammons v. Berlat, 144 Ariz. 148, 696 P.2d 700 (1985), and State v. Tramble, 133 Ariz. 48, 695 P.2d 737 (1985).

Section 13-4013 was adopted from CALIFORNIA PENAL CODE 987. See Historical Note to ARIZ. REV. STAT. 13-4013. The California statute prescribes that "[t]he fact that an application has been made [for funds "reasonably necessary for the preparation or presentation of the defense"] shall be confidential and the contents of the application shall be confidential." Moreover, the court's ruling on the request "shall be made at an in-camera hearing." CAL. PENAL CODE 987.9 (1985 & Supp. 1990); Corenevsky v. Superior Court, 36 Cal.3rd 307, 321, 682 P.2d 360, 204 Cal.Rptr. 165 (1984).

The Apelt decision is inconsistent with the California courts's interpretation of Section 987 and, therefore, violates ARIZ. REV. STAT. 1-211.2

Finally, this Court should grant Mr. Lopez's requests because doing so will provide him the same basic rights available to a monied defendant. McGregor v. State, 733 P.2d 416 (Okla. Ct. Cr. App. 1987)("To allow participation, or even presence by the State would thwart the Supreme Court's attempt" in Ake to treat indigent and non-indigent defendants equally). That is, if

---

2Apelt is also wrongly decided to the extent that it turns on RULE 15.2, ARIZ. R. CRIM. PRO. Requiring defendants to disclose all witnesses and defenses violates their rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the UNITED STATES CONSTITUTION, including but not limited to their rights not to incriminate themselves, to counsel, to punishment which is neither cruel nor unusual, and to due process. Even if such requirements were constitutionally permissible, compelling defendants to disclose that they are exploring defenses and claims is constitutionally impermissible. It is just such compulsion that is at issue when defendants seek Section 13-4013 funds, so all proceedings on requests for Section 13-4013 funds should be sealed and ex parte.

Mr. Lopez were able to provide funds for his own investigation, his counsel would not have to reveal his strategey and preparation except as required by the discovery rules. See ARIZ. R. CIV. PRO. 26(b)(4)(work product privilege).

The high courts of various other states have determined that federal and state constitutional law entitle defendants to ex parte hearings on their motions for funds for expert witnesses. For example, in Brooks v. State, 385 S.E.2d 81 (Ga. 1989), the Georgia Supreme Court noted that while "the state may have an interest in examining the defendant concerning his indigency[,]" the defendant has a "legitimate interest" in not revealing his theory of the case to the state. Id. at 83. That court set about to resolve these conflicting interests by creating a procedure to "protect the legitimate interests of the state and the defendant." Id. at 84.

To protect the defendant's interest, the Brooks court held that an application for funds should be presented in chambers and heard ex parte. To protect the state's interest, the court held that the state may submit a brief to be considered at the time of the ex parte hearing regarding the defendant's indigency. To further protect the state's interest, the court held that "the state may always be represented when the defendant is examined as to his indigency." Id. at 84. See also North Carolina v. Ballard, 355 N.C. 515, 519, 428 S.E.2d 178, 180 (1993)(requests for state funded psychiatric assistance must be heard ex parte; to hear such requests in the state's presence violates the defendant's right to the assistance of counsel and his privilege

against self-incrimination, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the UNITED STATES CONSTITUTION); McGregor v. Oklahoma, 733 P.2d 416 (Okla. Ct. Cr. App. 1987)(Ake requires that hearings on motions for court-appointed psychiatrists be conducted ex parte); State v. Touchet, 642 So.2d 1213 (La. 1994) (creating partially ex parte mechanism to consider indigent defendant's funds applications for expert witnesses). For the same reasons relied on in these cases, this Court should grant Mr. Lopez's motion.

For all these reasons, Petitioner respectfully requests that this Court grant his motion to file his request for funds under seal and conduct all further proceedings regarding that motion ex parte.

Dated this _____ day of March, 1995.

By_____
Robert Doyle

Copies of the foregoing mailed this _____ day of March, 1995, to:

Hon. Peter T. D'Angelo
Judge, Superior Court of Maricopa County

Dawn Northrup
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85003

By:_____

Robert Doyle
Attorney-at-Law
1010 E. Jefferson
Phoenix, AZ 85034-2222
(602) 253-1010
State Bar No. 007380

** FILED UNDER SEAL **

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, vs. SAMUEL VILLEGAS LOPEZ, Petitioner,	NO. CR-163419 EX PARTE MOTION FOR FUNDS FOR AN INVESTIGATOR ASSIGNED TO: HON. P. D'ANGELO

Petitioner, Samuel Villegas Lopez, moves ex parte that this Court appoint an investigator to assist in the investigation of facts to support his petition for post-conviction relief. This motion is pursuant to his rights to due process and equal protection, to present a defense, to counsel, and to freedom from cruel and unusual punishment, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the UNITED STATES CONSTITUTION, by sections Four, Ten, Fifteen, and Twenty-four of Article Two of the ARIZONA CONSTITUTION, and by ARIZ. REV. STAT. 13-4013(B).

I. Mr. Lopez's Right to Ex Parte Consideration of Requests Made In Furtherance

ATTACHMENT D

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(602) 253-1010
State Bar No. 007380

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, vs. SAMUEL LOPEZ, Petitioner,	NO. CR-163419 MOTION FOR AN EXTENSION OF TIME PURSUANT TO ARIZ. R. CRIM. 32.4(c) AND 32.6(d) Assigned to: Hon. Peter D'Angelo

Petitioner, a capital defendant, through counsel and pursuant to ARIZ. R. CRIM. P. 32.6, ARIZ. CONST., art. II, secs. 4 & 24, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the UNITED STATES CONSTITUTION, and ARIZ.R.CRIM.P. 32.4(c) & 32.6(d), hereby moves this Court for an extension of time within which to file Petitioner's amended petition for post-conviction relief. In support of this motion, Petitioner states as follows:

1. Petitioner has exercised due diligence in investing this case and has uncovered many new issues which must be presented to this Court. The investigation of these issues continues, however, and more time is necessary to properly document these claims and present them to the Court as is required by ARIZ.R.CRIM.P. 32.5.

2. Issues uncovered by undersigned counsel's investigation and which require further investigation to provide the necessary documentary support for these claims include, but are not limited to the following:

a. Juror Mark Wigley said during voir dire that he never served on a jury before. An interview conducted with Juror McCrory revealed that Mr.

Wigley informed the jury that he had previously served on a jury and this served as a basis for electing him foreperson of the jury. More time is needed to obtain the affidavits supporting this claim. Moreover, many jurors remain to be interviewed and more time is needed to complete this investigation.

b. Juror McCrory also stated during voir dire that she had never served on a jury before. A recent interview with her revealed the fact that she actually had served on a jury prior to sitting on the Lopez case. More time is needed to obtain the affidavits supporting this claim.

c. Alfred Welker needs to be interviewed to determine whether he and the victim were involved in a romantic way and whether they had consensual intercourse earlier in the evening before she was killed. Trial counsel's failure to do this investigation was deficient and potentially prejudicial. More investigation needs to be done to determine whether prejudice exists.

d. Trial counsel failed to challenge the state's theory concerning time of death. The forensic pathologist testified that he had no way of determining the time of death from his tests. He also said that he presumed the victim died shortly before her body was discovered. There was no cross-examination concerning the onset of rigor mortis or relating to the victim's core body temperature at the time of the autopsy. These issues are critical to understanding when she died. If the victim died shortly before being discovered by the police, Mr. Lopez may be exonerated of this crime. A forensic pathologist must be hired to examine this evidence and the testimony given at trial.

e. Trial counsel was ineffective for failing to challenge the forensic serology evidence. Much of this evidence presented by the state was, at least,

misleading. For example, Cipriano Chayrez (Chapo) can not be excluded as a donor of semen found in the victim. His antigens would be masked by the victim's antigens. The tests done by the state show, at most, that an additional person deposited B antigens, not that Chapo's semen was not present. The conclusion that he may have been present is strengthened by the serologist's testimony concerning the amount of acid phosphatase found in the victim. (Also, acid phosphatase is a presumptive test for seminal fluid; it is not dispositive as it was portrayed. Acid phosphatase can last considerably longer than 13 hours, contrary to the State's testimony.) If Chapo was present we have no way of knowing who killed the victim. Even if Mr. Lopez was involved in a rape of the victim, the court's findings on heinous, cruel or depraved are unreliable since we have no way of knowing who did what to the victim. A forensic serologist must be hired to examine the test results in this case to properly rebut the serology evidence. This evidence is also cognizable as newly discovered evidence under ARIZ.R.CRIM.P. 32.1(e) & 32.2(b).

f. Trial counsel was ineffective for failing to investigate and present evidence of Mr. Lopez's deprived childhood, including but not limited to: a) possible malnutrition; b) overcrowded conditions, *i.e.*, the Lopez family living with over fifteen children and three adults in the two-bedroom house of Mr. Lopez's aunt; c) loss of Mr. Lopez's father at an early age and the lack of a strong male role model in the home; d) physical and mental abuse suffered by Mr. Lopez as a child; and e) Mr. Lopez's exposure to pesticides while working as a field worker, along with other members of his family. Significant investigation remains to be done in documenting these factors. Moreover, a cultural expert should be

appointed to examine the effects of Hispanic culture on the Lopez children.

g. Trial counsel was ineffective for failing to present evidence of organic brain dysfunction in Mr. Lopez. Investigation has uncovered evidence of prolonged paint sniffing and alcohol abuse by Mr. Lopez. Interviews with Mr. Lopez's siblings have revealed evidence of *petit mal* seizures that may have resulted from paint sniffing. In addition, Mr. Lopez has been characterized as having a severe alcohol problem in the months prior to the offense for which he was arrested. And, there is testimony at trial that Mr. Lopez was using other drugs. A neuropsychological examination of Mr. Lopez should be done to see if there are any verifiable organic effects of this serious abuse of inhalants and alcohol. Under *State v. Christensen*, these facts would have permitted a previously uninvestigated impulsivity defense. More investigation remains to document these facts.

h. Trial counsel was ineffective for failing to investigate and present evidence of the rape of Mr. Lopez's mother in the years immediately preceding the offense for which he stands convicted. This offense was reported to the police but the perpetrator was never caught. More time is needed to obtain the affidavits and documents supporting these facts.

i. Investigation has revealed that a Michael Carillo was arrested for armed robbery shortly before the trial in this case. Investigation remains to be done so that it may be determined whether this was one of the Michael Carillos who testified at Mr. Lopez's trial. If they are the same person, investigation must be conducted to see what, if any, agreement may have been reached between the prosecution and Mr. Carillo in exchange for his testimony.

j. Trial counsel was ineffective for failing to determine the identity of the person identified by witnesses as "Angel," and what role, if any, he may have played in this offense.

k. Trial counsel was ineffective for failing to investigate, uncover and present the fact that Pauline Rodriguez was the sister of a woman who Mr. Lopez was accused of assaulting immediately prior to his arrest.

3. A proper investigation of these issues is necessary at this time so that this Court may be fully apprised of all issues relevant to a fair proceeding. Moreover, a full investigation at this stage is in the interests of judicial economy, finality and preservation of the state's resources.

WHEREFORE, petitioner hereby requests that this court grant an additional thirty days within which to complete the necessary investigation and file a supplemental petition.

Respectfully submitted this _____ day of May, 1995.

By_____
Robert Doyle
Counsel for Petitioner

Copies of the foregoing mailed
this _____ day of May 1995,
to:

Paul McMurdie
Chief Counsel - Criminal Appeals Section
1275 West Washington
Phoenix, AZ 85003

by: _____

ATTACHMENT E

MEMORANDUM

TO: LOPEZ FILE
FR: OLIVER
RE: MEETING W/BOB DOYLE
DT: April 25, 1995

LAST FRIDAY, MOC & SAH ASKED THAT I MEET WITH BOB AS HE REVIEWED THE DOCUMENTS WE HAVE COLLECTED IN SAM LOPEZ'S CASE. THEY ALSO ASKED THAT I TALK WITH BOB ABOUT FILING TWO MOTIONS WE PROVIDED HIM PRIOR TO HIS FILING THE LAST MOTION REQUESTING ADDITIONAL TIME TO FILE A SUPPLEMENTAL PETITION. SPECIFICALLY, AT THAT TIME WE PROVIDED A MOTION FOR DISCOVERY AS WELL AS A MOTION FOR LEAVE TO PROCEED EX PARTE IN REQUESTING FUNDS FOR INVESTIGATIVE AND EXPERT ASSISTANCE. (WE LATER PROVIDED HIM A MOTION FOR FUNDS FOR INVESTIGATIVE ASSISTANCE.)

LAST THURSDAY, SAH AND MOC SPOKE WITH BOB RE FILING THE PREVIOUSLY PROVIDED MOTIONS AS WELL AS FILING A MOTION FOR MORE TIME. SAH & MOC INDICATED THAT BOB STATED THAT HE IS RUNNING THE CASE AND REFUSED TO COMMIT TO FILING ANY DISCOVERY MOTION OR THE MOTION TO PROCEED EX PARTE. HE ALSO REFUSED TO COMMIT TO FILING A MOTION REQUESTING ADDITIONAL TIME. IN MY CONVERSATION WITH HIM ON FRIDAY, HE CONFIRMED THAT HE HAD REFUSED TO COMMIT TO FILING THESE MOTIONS. IT SHOULD BE NOTED THAT BEFORE PROVIDING HIM THE DISCOVERY MOTION, BOB TOLD ME HE WOULD REVIEW IT AND FILE IT OR SOME EDITED VERSION OF IT SHORTLY AFTER RECEIVING IT. HE PROMISED, TOO, THAT HE WOULD TALK WITH THE PROJECT ABOUT ANY EDITS TO THAT MOTION. IT SHOULD BE NOTED AS WELL THAT BOB TOLD ME HE WOULD FILE THE MOTION TO PROCEED EX PARTE AND THE DISCOVERY MOTION A FEW DAYS AFTER THE JUDGE RULED ON THE MOTION FOR MORE TIME. AS OF TODAY, BOB FILED ONLY THE MOTION FOR MORE TIME.

WHEN I MET WITH BOB LAST FRIDAY, HE STATED THAT HE WOULD FILE AN EDITED VERSION OF THE DISCOVERY MOTION. HE ALSO STATED THAT HE WOULD FILE A MOTION REQUESTING ADDITIONAL TIME TO FILE A SUPPLEMENT TO THE PETITION. HOWEVER, YESTERDAY HE INDICATED TO MOC THAT HE WOULD NOT REQUEST ADDITIONAL TIME.

I MET WITH BOB FOR ABOUT AN HOUR TODAY AT HIS OFFICE TO EXPLAIN WHY I BELIEVE IT CRITICAL TO MOVE FOR ADDITIONAL TIME. I EXPLAINED THAT I WAS NOT SUGGESTING THAT WE REFUSE TO FILE A SUPPLEMENTAL PETITION NEXT WEEK NO MATTER WHAT. RATHER, I EXPLAINED (REPEATEDLY, FOR BOB KEPT SAYING THINGS WHICH MADE CLEAR THAT HE DID NOT UNDERSTAND WHAT I WAS SAYING) THAT WE SHOULD FILE THE MOTION FOR MORE TIME AND A MOTION FOR EXPEDITED CONSIDERATION OF THE MOTION FOR MORE TIME. I FURTHER EXPLAINED THAT IF EITHER (A) THE COURT DOES NOT RULE ON THE MOTION FOR MORE TIME BY NEXT WEEK OR (B) THE COURT DENIES THE MOTION FOR MORE TIME, THEN WE SHOULD FILE THE SUPPLEMENTAL PETITION.

WE ENDED OUR DISCUSSION WITH HIS PROMISE TO THINK ABOUT MY PROPOSAL AND GET BACK TO ME TOMORROW OR EARLY THURSDAY MORNING. HE ALSO AGREED AT THE END OF THE DISCUSSION THAT IF A SUPPLEMENTAL PETITION IS FILED THAT THE PROJECT WOULD BE INVOLVED WITH DRAFTING/EDITING IT.

Dear Wm. F. Doyle,

I know what has been done in my case. But I know that more needs be done.

Please ask for more time before you file an Amended Petition.

Respectfully

Wm. Darryl Lee

AFFIDAVIT OF RUSSELL STETLER

I, RUSSELL STETLER, being duly sworn, declare as follows:

Summary of Opinions

1. I was asked by counsel for Samuel Villegas Lopez to summarize the prevailing professional norms regarding the investigation and preparation of mitigation evidence in capital cases at the time of Mr. Lopez's trials in 1987 and 1990 and at the time of his state-court petition for postconviction relief in 1995 and to assess the performance of his trial and state postconviction counsel in mitigation development in light of those norms.

2. These questions are addressed in detail in this declaration, but the critical points can be summed up succinctly. The need for thorough mitigation investigation was well established at the time of Mr. Lopez's trials in 1987 and 1990. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (ineffective assistance where capital counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). The *Williams* case was tried in 1986. The need to investigate mental illness and brain damage in the context of mitigating evidence was also well established at that time. *See*, for example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538 (1998) and *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. REV. 26 (2000) (concluding that mitigation does matter, especially mental impairment and mental illness). The Eighth Amendment jurisprudence of the United States Supreme Court has mandated individualized sentencing in death penalty cases since 1976. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (finding Georgia's death penalty statute Constitutional in part because it allowed for mercy based on individualized consideration) and *Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding

mandatory statute unconstitutional because it would allow the blind infliction of the death penalty on members of a faceless undifferentiated mass).

3. Effective capital defense throughout the post-*Furman* era has required counsel to conduct a thorough investigation of the client's life. This investigation generally involves a multigenerational inquiry into the biological, psychological, and social influences on the development and adult functioning of the accused. Mitigation investigation involves parallel tracks of collecting and analyzing life-history records, and conducting multiple, in-person, face-to-face interviews. The purpose of this thorough investigation is to develop evidence that will humanize the defendant, help jurors and judges to understand why he may have committed the capital offense, and to evoke compassion and empathy by identifying the client's individual frailties that at once establish human kinship and expose vulnerabilities and disadvantage. The fruits of a thorough mitigation investigation not only provide capital defendants with the effective representation to which they are entitled under the Sixth Amendment, but assure the jurors and judges of the opportunity to consider all the evidence relevant to the reasoned moral judgment they are asked to render, thereby also assuring the courts of an outcome that is reliable and just. In my professional opinion, trial counsel's investigation and presentation of mitigating evidence in Mr. Lopez's case fell below the prevailing professional norms of 1987 and 1990.

4. The need for thorough postconviction mitigation investigation was also well established by the time of Mr. Lopez's state petition for postconviction relief in 1995. It was readily apparent in the 1990s that postconviction counsel needed to conduct a thorough mitigation investigation in order to assess the effectiveness of defense counsel's performance at trial under the familiar two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984),

requiring both deficient performance as measured against prevailing professional norms and resultant prejudice.[1] In my professional opinion, Mr. Lopez's state postconviction counsel also failed to satisfy the professional standards of care at that time by his utter failure to conduct a thorough mitigation investigation.

Background and Qualifications

5. I am the National Mitigation Coordinator for the federal death penalty projects, which are described more fully at their web site, www.capdefnet.org. This national position was created in 2005 in response to the increased demand for effective mitigation preparation in death penalty cases following the U.S. Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003) and the February 2003 revision of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. In this capacity, I consult with lawyers, investigators, mitigation specialists, and experts in connection with death penalty cases that are pending in the federal courts at trial or on habeas corpus (under 28 U.S.C. §§ 2254 and 2255).

6. From 1995 to 2005, I served as the Director of Investigation and Mitigation at the New York Capital Defender Office, which was established under New York State's death penalty statute with a mandate to ensure that indigent defendants in capital cases received effective assistance of counsel. The Capital Defender Office was charged with creating an effective system of capital defense throughout New York State by providing direct representation and

[1]Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 687. There is prejudice when confidence in the outcome of the proceeding has been undermined.

offering assistance to private counsel assigned by the courts to represent indigent capital defendants. I supervised a statewide staff of investigators and mitigation specialists, and I consulted with lawyers, investigators, mitigation specialists, and experts who were retained or employed by the Capital Defender Office or the private bar in connection with death penalty cases.

7. From 1990 to 1995, I served as Chief Investigator at the California Appellate Project, a nonprofit law office in San Francisco which coordinated appellate and postconviction representation of all the prisoners under sentence of death in California. In that capacity, I also supervised an in-house staff and consulted with staff attorneys and court-appointed counsel, as well as investigators, mitigation specialists, and experts outside the office who were retained to assist counsel representing death-sentenced prisoners.

8. I have investigated all aspects of death-penalty cases since 1980, first working in a private office in California and later in institutional offices. Since 1980, I have regularly attended seminars and conferences relating to the defense of capital cases at trial, on appeal, and in postconviction. Most of these conferences were organized and attended by attorneys specializing in capital work. I investigated mitigation evidence in over two dozen death penalty cases in California in the 1980s.

9. Since 1990, I have lectured extensively on capital case investigation, particularly the investigation of mitigation evidence. I have lectured on these subjects not only in New York and California, but in many other death-penalty jurisdictions, including Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina,

Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming, as well as in Puerto Rico, a jurisdiction where only federal death penalty cases are prosecuted. I have also lectured on numerous occasions under the auspices of the Administrative Offices of the United States Courts (in connection with federal death-penalty cases and habeas corpus litigation) and at the Fourth Capital Litigation Workshop of the U.S. Army Trial Defense Service. Over the past two decades, I have lectured at over three hundred continuing education programs around the country, including eight in the state of Arizona.

10. Since the 1990s, I have lectured on mitigation investigation in death penalty cases at multiple national training conferences sponsored by the following organizations: the NAACP Legal Defense Fund (annual Airlie conferences), the National Legal Aid and Defender Association ("Life in the Balance"), and the National Association of Criminal Defense Lawyers ("Making the Case for Life"). At various times over the past two decades, I have served on the planning committees for these national conferences, as well as the annual Capital Case Defense Seminar sponsored by California Attorneys for Criminal Justice (CACJ) and the California Public Defenders Association (CPDA), which is attended by over a thousand practitioners. I was a co-chair of the planning committee for this seminar in 2009 and 2011, and currently serve as a co-chair for the 2012 seminar. I have also taught at the death penalty colleges at the Santa Clara University School of Law in California and the DePaul University College of Law in Illinois. I have taught at a dozen capital seminars throughout the country under the auspices of the National Institute of Trial Advocacy and a dozen "bring-your-own-case" capital brainstorming seminars under the auspices of the National Consortium for Capital Defense Training.

11. Since 1993, I have contributed extensively to the California Death Penalty Defense Manual published by the California defense bar (CACJ and CPDA). This four-volume reference has a volume devoted to the investigation and presentation of mitigation evidence which I helped to shape in the 1990s. In 1999, I published articles on *Mitigation Evidence in Death Penalty Cases* and *Mental Disabilities and Mitigation* in THE CHAMPION, the monthly magazine of the National Association of Criminal Defense Lawyers, as well as an article entitled *Why Capital Cases Require Mitigation Specialists* in INDIGENT DEFENSE, published by the National Legal Aid and Defender Association. These and other articles of mine have been cited in the Commentary to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, rev. 2003, 31 HOFSTRA L. REV. 913 (Summer 2003), available at www.ambar.org/2003guidelines. At the request of HOFSTRA LAW REVIEW, I wrote an article for their symposium issue on the revised ABA Guidelines, entitled *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 HOFSTRA LAW REVIEW 1157 (Summer 2003). At the request of HOFSTRA LAW REVIEW, I also wrote an article for their symposium issue on the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 1067 (Spring 2008). At the request of UMKC LAW REVIEW, I contributed an article to their symposium issue devoted to "Death Penalty Stories," 77 UMKC L. REV. 947 (Summer 2009).

12. I am the coauthor of chapters on psychiatric issues in death penalty cases in two books: *Dead Men Talking: Mental Illness and Capital Punishment*, in FORENSIC MENTAL HEALTH: WORKING WITH OFFENDERS WITH MENTAL ILLNESS (Gerald Landsberg, D.S.W., and Amy Smiley, Ph.D., eds.; Kingston, New Jersey: Civic Research Institute, Inc., 2001) and

Punishment, in PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY, 2nd ed. (Richard Rosner, M.D., ed.; London: Arnold Medical Publishing, 2003; U.S. distribution by Oxford University Press). I am also a coauthor of A PRACTITIONER'S GUIDE TO REPRESENTING CAPITAL CLIENTS WITH MENTAL DISORDERS AND IMPAIRMENTS (Bishop Auckland, U.K.: International Justice Project, 2008)

13. I have qualified as an expert witness in multiple state and federal courts and have provided opinion evidence on standard of care issues in capital cases (especially in the investigation and presentation of mitigation evidence) by testimony or affidavit over a hundred times in numerous jurisdictions, including Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New York, North Carolina, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. I have testified as an expert witness fifteen times, including testimony in capital habeas corpus cases in the District of Arizona, the Eastern District of California, and the Northern District of Iowa. Over the years, I have been directly involved in hundreds of capital cases in California and New York, including scores of trials and postconviction hearings. I have also been consulted in various capacities on capital cases in numerous other jurisdictions around the country.

Prevailing Norms in the Development of Mitigating Evidence in Capital Cases in 2001

14. Investigation of a client's background, character, life experiences, and mental health is axiomatic in the defense of a capital case, and has been for as long as I have done this work. In every seminar I have participated in since 1980, instructors have emphasized the importance of

conducting a "mitigation investigation" in preparation for the penalty phase of a capital trial and developing a unified strategy for the guilt-innocence and sentencing phases. Investigation was already firmly established as an integral part of the criminal defense function generally. When the American Bar Association published the second edition of its STANDARDS FOR CRIMINAL JUSTICE (2nd edition 1980), Standard 4.4-1 of the Defenses Function described the duty to investigate as follows: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case *and the penalty in the event of conviction.*" (Emphasis added.) *Id.*, at 4:53. The Commentary to this Standard noted concisely, "Facts form the basis of effective representation." *Id.*, at 4:54. In discussing mitigation, the Commentary continued, "Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself." *Id.* at 4:55.[2] These ABA Standards were cited by Justice Stevens in reference to counsel's obligation to conduct a thorough investigation of a capital defendant's background. *Williams v. Taylor*, 529 U.S. at 396 (2000).

15. These ABA Standards covered criminal defense generally. Discussions of *capital* defense provided more specific detail about counsel's duties in investigating mitigating evidence. As early as 1979, Dennis Balske (an effective capital litigator then practicing in the South)

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[2]*See also* Joseph B. Cheshire V, *Ethics and the Criminal Lawyer: The Perils of Obstruction of Justice*, THE CHAMPION (Jan./Feb. 1989) at 12 ("Defense counsel have a right and a duty to approach and interview every witness that might have any information regarding the particular issue involved in their client's case."); and Robert R. Bryan, *Death Penalty Trials: Lawyers Need Help*, THE CHAMPION (August 1988) at 32 ("There is a requirement in every case for a comprehensive investigation not only of the facts but also the entire life history of the client.").

emphasized, "Importantly, the life story must be complete." Dennis N. Balske, *New Strategies for the Defense of Capital Cases,* 13 AKRON L. REV. 331, 358 (1979). In 1983, Professor Gary Goodpaster discussed trial counsel's "duty to investigate the client's life history, and emotional and psychological make-up" in capital cases. He wrote, "There must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the care with which it is conducted, cannot be overemphasized." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323-324 (1983). Writing in 1984, Mr. Balske advised capital defense counsel that they "must conduct the most extensive background investigation imaginable. You should look at every aspect of your client's life from birth to present. Talk to everyone that you can find who has ever had any contact with the defendant." Dennis Balske, *The Penalty Phase Trial: A Practical Guide*, THE CHAMPION (March 1984), at 40, 42. *See also* David C. Stebbins and Scott P. Kenney, *Zen and the Art of Mitigation Presentation, or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, THE CHAMPION, (August 1986) at 14, 18 ("capital defense attorney must recognize that the profession demands a higher standard of practice in capital cases").

16. At the beginning of the 1980s, a capital defense lawyer in California hired a former *New York Times* reporter to investigate the life history of his client. The reporter, the late Lacey Fosburgh, had previously written a best-selling book about a murder case she had covered for the newspaper, CLOSING TIME: THE TRUE STORY OF THE "GOODBAR" MURDER (1977). After her

successful work in developing the capital client's mitigation evidence, Ms. Fosburgh wrote about the critical role she had played:

> A significant legal blind spot existed between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process. Neither one was suited to the task at hand here – namely discovering and then communicating the complex human reality of the defendant's personality in a sympathetic way.
>
> Significantly, the defendant's personal history and family life, his obsessions, aspirations, hopes, and flaws, are rarely a matter of physical evidence. Instead they are both discovered and portrayed through narrative, incident, scene, memory, language, style, and even a whole array of intangibles like eye contact, body movement, patterns of speech – things that to a jury convey as much information, if not more, as any set of facts. But all of this is hard to recognize or develop, understand or systematize without someone on the defense team having it as his specific function. *This person should have nothing else to do* but work with the defendant, his family, friends, enemies, business associates and casual acquaintances, perhaps even duplicating some of what the private detective does, but going beyond that and looking for more. This takes a lot of time and patience. (Emphasis added.)[3]

17. Since the early 1980s, it has also been standard practice for competent defense counsel to determine whether their capital client suffers from organic brain injury, psychiatric disorders, or trauma outside the realm of ordinary human experience. Whenever brain-behavior relationships are at issue, a thorough investigation of the etiology of brain damage is needed to determine the interplay of genetics, intra-uterine exposure to trauma and toxins, environmental exposures, head injuries, etc. In a capital case, such investigation is particularly important because of the additional mitigating factors that may be disclosed beyond the fact of psychiatric disorder or organicity. *See*, for example, John Hill and Mike Healy, *The Death Penalty and the*

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[3]Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, in CALIFORNIA STATE PUBLIC DEFENDER, CALIFORNIA DEATH PENALTY MANUAL, 1982 supplement, N6-N10, N7 (July 1982). This article also appeared in the magazine of the California defense bar, FORUM (September-October 1982). *See also* Report by the Team Defense Project, *Team Defense in Capital Cases*, FORUM (May-June 1978), and Michael G. Millman, *Interview: Millard Farmer*, FORUM, 31-33 (November-December 1984).

Handicapped, FORUM, 18-20 (May-June 1986) (discussing implications of childhood disorders affecting the brain and other disabilities for penalty phases in capital cases); and David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988) at 34, 36 (discussing need for adequate time to overcome clients' distrust and the value of a neuropsychologist or neurologist in cases with head trauma).

18. Over the past twelve years, the U.S. Supreme Court has found trial counsel ineffective in five cases for failing to investigate potential mitigation evidence: *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith,* 539 U.S. 510 (2003), *Rompilla v. Beard,* 545 U.S. 374 (2005), *Porter v. McCollum*, 558 U.S. ____, 130 S. Ct. 447 (2009), and *Sears v. Upton*, 561 U.S. ____, 130 S. Ct. 3259 (2010). Every case but *Sears* was tried in the 1980s, and all five were tried prior to 2001. In *Williams,* the Court reaffirmed an all-encompassing view of mitigation and found trial counsel ineffective for failing to prepare the mitigation case until a week before trial in 1986 and failing to conduct an investigation of the readily available mitigating evidence (nightmarish childhood, borderline retardation, model prisoner status, etc.) In *Wiggins*, a case tried in 1989, trial counsel were found deficient in their performance, even though they had had their client examined by one mental health expert, because they failed to conduct a complete social history investigation in accordance with the ABA Guidelines. "Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." 539 U.S. at 524. In *Rompilla*, tried in 1988, counsel were found deficient "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available" and despite consulting three mental health

experts. Similarly, in *Porter*, also tried in 1988, counsel were found deficient despite a "fatalistic and uncooperative" client because "that does not obviate the need for defense counsel" to conduct mitigation investigation. Quoting *Williams*, the Court in *Porter* reaffirmed this duty: "It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" (Citation omitted.) Among the mitigation that Porter's counsel failed to present was "brain damage that could manifest in impulsive, violent behavior." 130 S. Ct. at 451. In *Sears*, the Court found trial counsel ineffective in a 1993 trial even though they had presented seven witnesses in the penalty proceedings. The Court noted, "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented . . ." (130 S. Ct. At 3266.) Postconviction evidence emphasized significant frontal lobe brain damage causing deficiencies in cognitive functioning and reasoning. (130 S. Ct. at 3261.)

19. In a capital case, competent defense counsel have a duty to conduct life-history investigations, but generally lack the skill to conduct the investigations themselves. Moreover, even if lawyers had the skills, it is more cost-effective to employ those with recognized expertise in developing mitigation evidence. Competent capital counsel have long retained a "mitigation specialist" to complete a detailed, multigenerational social history to highlight the complexity of the client's life and identify multiple risk factors and mitigation themes. The Subcommittee on Federal Death Penalty Cases, Committee on Defender Services for the Judicial Conference of the United States, for example, noted in 1998 that mitigation specialists "have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists

or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review." The subcommittee report also bluntly commented, "The work performed by mitigation specialists is work which otherwise would have to be done by a lawyer, rather than an investigator or paralegal." FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, Federal Judicial Conference (May 1998), *available at* http://www.uscourts/gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx.

20. As revised in 2003, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (*hereinafter*, ABA Guidelines (rev. 2003), *available at* www.ambar.org/2003guidelines) state unequivocally that lead counsel at any stage of capital representation (trial or postconviction) should assemble a defense team as soon as possible after designation with at least one mitigation specialist and at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments (Guideline 10.4), in order to conduct a thorough and independent investigation relating to penalty (Guideline 10.7 and Guideline 10.11). The original edition of the ABA Guidelines, adopted in 1989 (also *available at* www.ambar.org/1989guidelines), similarly required counsel to begin investigation immediately upon counsel's entry into the case and to "discover all reasonably available mitigating evidence." (1989 Guideline 11.4.1.C.) The 1989 Guidelines also required counsel to retain experts for investigation and "preparation of mitigation" (1989 Guideline 11.4.1.D.(7).) Notably, the 1989 Guidelines specifically stated that

"the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." (1989 Guideline 11.4.1.C.)

21. The 1989 edition of the ABA Guidelines reflected a national consensus among capital defense practitioners based on their practices in the 1980s. These Guidelines were the result of years of work by the National Legal Aid and Defender Association (NLADA) to develop standards to reflect the prevailing norms in indigent capital defense. NLADA published its Standards for the the Appointment of Defense Counsel in Death Penalty Cases (available at www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/NLADA_Counsel_Standards_1985.authcheckdam.pdf) in 1985. With initial support from the ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID), NLADA developed its expanded Standards for the Appointment *and Performance* of Defense Counsel in Death Penalty Cases (emphasis added) over the course of several years. In February 1988, NLADA referred the Standards to SCLAID, which reviewed them and circulated them to appropriate ABA sections and committees. SCLAID incorporated the only substantive concerns expressed (by the Criminal Justice Section) and changed the nomenclature to "Guidelines" as more appropriate than "Standards." Each black-letter guideline is explained by a commentary, with references to supporting authorities. (*See* Introduction to ABA Guidelines, 1989 ed.)

22. Courts have found the various editions of the ABA Criminal Justice Standards and Death Penalty Guidelines useful in assessing the reasonableness of counsel performance. As Justice Stevens noted in writing for the Court's majority in *Padilla v. Kentucky*, 559 U.S. ____, 130 S. Ct. 1473, 1482 (2010): "We long have recognized that 'prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what

is reasonable . . .'" Justice Stevens cited *Strickland*, 466 U.S. 668, 688 (1984), *Bobby v. Van Hook*, 558 U.S. ____, ____ (2009) (*per curiam*) (slip op., at 3); *Florida v. Nixon*, 543 U.S. 175, 191, and n. 6 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); and *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Justice Stevens concluded: "Although they are 'only guides,' *Strickland*, 466 U.S., at 688, and not 'inexorable commands,' *Bobby*, 558 U.S., at ____ (slip op., at 5), these standards may be valuable measures of the prevailing norms of effective representation . . ." Justice Stevens also cited law review articles and the publications of criminal defense and public defender organizations (the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association) as guides to prevailing professional norms.

23. Without a thorough social history investigation, it is impossible to ascertain the existence of previous head injuries, childhood trauma, and a host of other life experiences that may provide a compelling reason for the jury to vote for a life sentence. Moreover, without a social history, counsel cannot make an informed and thoughtful decision about which experts to retain, in order to gauge the nature and extent of a client's possible mental disorders and impairments. Mental health experts, in turn, require social history information to conduct a complete and reliable evaluation. *See* Richard G. Dudley, Jr., and Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008); and Douglas Liebert and David Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15:4 AM. J. FORENSIC PSYCHIATRY 43 (1994).

24. The social history investigation should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational,

employment, social service, and court records. Such contemporaneous records are intrinsically credible and may document events which the client and other family members were too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate. The collection of records and analysis of this documentation involve a slow and time-intensive process. Many government record repositories routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance. Careful review of records often discloses the existence of collateral documentation which, in turn, needs to be pursued.

25. A social history cannot be completed in a matter of hours or days. In addition to the bureaucratic obstacles to the acquisition of essential documentation, it takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socio-economic status, religious and cultural practices, the existence of intra-familial abuse, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion, politics, social values, gender, and sexual orientation.

26. Only with time can an experienced mitigation specialist break down these barriers, and obtain accurate and meaningful responses to these sorts of questions. In my professional opinion, an experienced mitigation specialist requires, at minimum, hundreds of hours to complete an adequate social history – even working under intense time pressure. One nationally

recognized authority in mitigation investigation, Lee Norton, writing in 1992, stressed the cyclical nature of the work and estimated that hundreds of hours will typically be required. *See* Lee Norton, *Capital Cases: Mitigation Investigation*, THE CHAMPION, 43-45 (May 1992).

27. Mitigation evidence is not developed to provide a defense to the crime. Instead, it provides evidence of a disability, condition, or set of life experiences that can inspire compassion, empathy, mercy and understanding. Unlike insanity and competency, both of which are strictly defined by statute, mitigation need not involve a mental disease or defect. Nevertheless, in many cases, defendants suffer mental impairments that do not meet the legal definition of insanity or incompetency, but are powerfully mitigating disabilities that are given great weight when juries are charged with assessing individualized culpability.

28. For clients who are psychiatrically disordered or brain damaged, mitigation evidence may explain the succession of facts and circumstances that led to the crime, and how that client's disabilities distorted his judgment and reactions. Of all the diverse frailties of humankind, brain damage is singularly powerful in its ability to explain why individuals from the same family growing up in the same setting turn out differently. It is an objective scientific fact. It does not reflect a bad choice made by the client.

29. Over the years, I have been involved in hundreds of capital cases, including dozens of trials and postconviction hearings, throughout the country. I have provided evidence as an expert on the standard of care in investigating capital cases and mitigation by live testimony or affidavit in scores of cases around the country. *(See* ¶ 11, *supra.)* My personal experience of the effectiveness of mitigation evidence accords with the empirical research of social scientists who have studied the decision-making processes of actual jurors in death-penalty cases. *See*, for

example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538 (1998) and *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. REV. 26 (2000) (concluding that mitigation does matter, especially mental impairment and mental illness).

Standard of Care in Capital Mental Health Evaluations

30. Both anecdotal reports from capital defense practitioners and social science research indicate that defense experts are viewed with great skepticism and often regarded as "hired guns" unless their conclusions are supported by abundant, credible evidence from lay witnesses and historical experts (i.e., the professionals who encountered the capital client long before the alleged offense).[4] (*See*, for example, Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997), finding that two-thirds of the witnesses jurors thought "backfired" were defense experts.) Thus, if only

[4]During the operative years of the New York death penalty statute (1995 to 2004), for example, the Capital Defender Office offered the testimony of historical experts in several cases. A school psychologist who had tested a client routinely as part of mandated triennial review for Special Education explained the significance of his borderline intellectual functioning (FS IQ 76-81). People v. George Davis Bell (Ind. 128-97, Judge Cooperman, Queens County, N.Y., 1999). In another case, a different school psychologist explained the impact of learning disabilities (at age 11, reading just above a second grade level; at 14, just above fourth grade; and at 17, just above fifth grade). People v. José J. Santiago (Ind. 1210/99, Judge Bristol, Monroe County, N.Y., 2000). In a third case, a psychiatrist had treated the client's mother after her suicide attempt when the client was nine – 30 years before the capital trial. From the records, the psychiatrist testified to the history of mood disorders and suicidality in the maternal lineage, as well as family dysfunction, including fights over promiscuity, gambling, and drinking. From her current perspective, the psychiatrist opined about the devastating impact on the children of the mother's mood disorder, suicidality, and psychiatric removal from the family. People v. John F. Owen (Ind. 547-99 cons. with 414-99, Judge Egan, Monroe County, N.Y., 2001). *See* Russell Stetler, *The Mystery of Mitigation : What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237, 258 (n. 92) (2007-08).

for pragmatic reasons, capital defense counsel are well advised not to rely on expert testimony without the corroborative lay witnesses whose identity and potential evidence can only be discovered through life-history investigation. However, it is equally important to offer well-prepared expert testimony to explain the effects of life experiences on an individual's functioning and behavior. Lay witnesses on their own are unlikely to understand the significance of the symptoms and behaviors they describe, and only an expert is likely to be able to provide an overview of the factors that shaped the client over the course of his life and to be able to offer an empathic framework for understanding the resultant disorders and disabilities.[5] Expert testimony is essential for placing the factual details elicited from lay witnesses into an interpretive context that explains how various life events shaped the capital client's brain and behavior.

31. The proper standard of care for a competent mental health evaluation also requires an accurate medical and social history as its foundation. Because psychiatrically disordered or cognitively impaired individuals are by definition likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client (for clinical, not simply forensic, reasons). Additional components of a reliable evaluation will include a thorough

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[5]It has long been recognized that lay and expert testimony must be harmonized to be credible to the trier of fact. As one capital defense lawyer pointed out in 1988, "[T]estimony about the psycho-social development of the defendant explains the psychological diagnosis in human terms that the jury can understand." He continued, "Typical psychological testimony on sanity, competency, or diminished capacity sounds like it comes out of a textbook. Despite the best efforts of the mental health professional and the attorneys, most of this type of testimony is incomprehensible to a lay juror. There is also an unfortunate tendency to get caught up in technical terms that bore the jurors and do nothing to humanize the client. It makes little sense to spend several days putting on the testimony of relatives and friends of the defendant about the human characteristics of the defendant, and then put on a psychologist or psychiatrist who immediately turns this around by making the person sound like a casebook study out of some obscure and arcane psychology textbook." David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988), at 34, 38.

physical examination (including neurological examination) and appropriate diagnostic testing. The standard mental status examination cannot be relied upon in isolation for reliable clinical assessments any more than the expert can be relied upon in isolation in the courtroom context.

32. Except when clients exhibit such florid symptomatology that immediate clinical intervention is patently warranted, capital defense counsel are well advised to conduct a thorough social history investigation before retaining mental health experts. Only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kind of culturally competent expert is appropriate to the needs of the case, what role that expert will play, and what referral questions will be asked of the expert. Psychiatrists and psychologists have different training and expertise, and within each profession are numerous subspecialties including neuropsychology, psychopharmacology, and the disciplines which study the effects of trauma on human development. The potential roles of experts include consultants; fact gatherers needed to elicit, or assess the credibility of, client disclosures; and testifying witnesses, to name but a few. To make informed decisions about the kind of experts that may be needed and the referral questions they will address, counsel first needs a reliable social history investigation.

33. The importance of independently corroborated social history data was also well recognized among mental health practitioners as early as the 1980s. A leading psychiatric text in that period described an accurate and complete medical and social history as the "single most valuable element to help the clinician reach an accurate diagnosis." H. KAPLAN AND B. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 837 (4th ed. 1985). The same text noted that the individuals being evaluated are often poor historians: "The past personal history is somewhat

distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan & Sadock at 488. Thus, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id.* This problem is particularly acute in the forensic context, as two other leading authorities pointed out in 1980:

> The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980). Capital defense lawyers also appreciated this need: "A psychologist armed with all of the records of the client's history is much better equipped to present a sympathetic and truthful explanation of the client's psychological make-up and of how the crime occurred." David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988) at 34, 37.

Postconviction Duties

34. As the Chief Investigator at the California Appellate Project from 1990 to 1995, I was intimately familiar with the prevailing professional norms in the area of postconviction mitigation investigation since my own work was exclusively in postconviction cases in that period. *See* ¶ 7, *supra*. I was personally involved in numerous cases that won relief in this period as a result of thorough investigation, and I taught at numerous continuing legal education

seminars on postconviction investigation and prevailing standards. I have also published articles in this specific area. *See* Russell Stetler, *Postconviction investigation in death-penalty cases*, THE CHAMPION (August 1999) at 41; and Mark E. Olive and Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction,* 36 HOFSTRA. L. REV. 1067 (2008).

35. The ABA Guidelines have always emphasized the quality of legal representation during "all stages" of the case (*see* Guideline 1.1 in both the 1989 and 2003 editions). The extensive Commentary to Guideline 10.15 .1 (Duties of Post-Conviction Counsel) in the 2003 revision draws on the national experience litigating these cases in the 1990s and is instructive:

> Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments—those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal—are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system. Because an appreciable portion of the task of post-conviction counsel is to change the overall picture of the case, Subsection E(3) requires that they keep under continuing review the desirability of amending the defense theory of the case, whether one has been formulated by prior counsel in accordance with Guideline 10.10.1 or not.
>
> For similar reasons, collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case. That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.
>
> Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but

> also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.
>
> 30 HOFSTRA L. REV. 913, 1085-86 (2003); citations omitted.

36. In an article entitled *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, Chief Judge Helen G. Berrigan of the United States District Court for the Eastern District of Louisiana has also noted the critical importance of mitigation investigation in postconviction review: "A mitigation specialist on postconviction can investigate and gather the evidence that was available but failed to be developed at the trial stage." 36 HOFSTRA L. REV. 819, 821 n. 13 (2008).

Review of the Samuel Villegas Lopez Case

37. At the request of counsel for Mr. Lopez, I have reviewed the following transcripts and documents from the Maricopa County Superior Court file of *State of Arizona v. Samuel Villegas Lopez*, No. CR 163419 (all before the Hon. Peter T. D'Angelo, Judge): Reporter's Transcript of Proceedings (*hereinafter*, "Tr."), Presentence Hearing, June 19, 1987; Tr., Sentencing, June 25, 1987; Sentencing Memorandum, submitted June 24, 1987, and filed June 25, 1987; Special Verdict, filed June 25, 1987; Tr., Presentence Hearing, July 13, 1990, with Tr. of Videotaped Deposition of Dr. Otto Bendheim, July 11, 1990; Tr., Sentencing, August 3, 1990; Defendant's Post-Hearing Memorandum Concerning Aggravating and Mitigating Factors under A.R.S. Sec. 13-703, filed July 19, 1990; Supplemental Sentencing Memorandum submitted by County Attorney July 23, 1990; Special Verdict, filed August 3, 1990; Petition for Post-Conviction Relief, submitted December 19, 1994, with forty exhibits; Memorandum re Transmittal of file documents to postconviction counsel from Arizona Capital Representation

Project, May 2, 1995; Supplemental Petition for Post-Conviction Relief, submitted May 3, 1995; Motion to Extend Time for a Supplemental Petition, filed May 3, 1995; and ghostwritten Motion for an Extension of Time Pursuant to Ariz. R. Crim. 32.4(c) and 32.6(d), not filed. I have also been briefed by current counsel about the procedural history and other aspects of Mr. Lopez's case.

Mr. Lopez's first sentencing proceeding in 1987

38. Mr. Lopez was arrested on November 3, 1986. He was indicted eleven days later and went to trial facing the death penalty in April; scarcely five months had elapsed. He was represented by a single lawyer, Deputy Public Defender Joel T. Brown. The jury convicted Mr. Lopez of capital murder and other charges on April 27. Two months later, there was a presentence hearing before Judge D'Angelo, and the public defender summarized his luckless preparation on the record as follows:

> Judge, we do not have anything to present at this point. I would like to leave it open for me getting in contact with his family, Mr. Lopez' family by the sentencing date. I've been trying this week, I have not had any success at doing that.
>
> If it's going to be a matter of it being an extended hearing, I would inform your court of that. At this point I haven't had any luck. The only person is his mother. I haven't had any luck in trying to reach her.
>
> I don't know if you want to proceed to argument. I would also ask that to be precluded. As far [as] Dr. Bendheim, I do not intend to call him, based on my conversation with Dr. Bendheim two days ago. I have not received his report. I would like the benefit of the report before we proceed to any sort of argument. (Tr. 12-13, June 19, 1987.)

Argument was reserved until the sentencing date, six days later, by which time the court had already written its Special Verdict.

39. On June 24, 1987, Mr. Brown filed a Sentencing Memorandum consisting of three pages, plus notifications of service. The Memorandum pointed out – correctly – that Mr. Lopez's

prior conviction for resisting arrest did not involve the use or threat of violence, and thus did not constitute an aggravating factor under Arizona law. (The Arizona Supreme Court later agreed.) The rest of the slight Memorandum argued from the trial record that Mr. Lopez was impaired on the night of the capital offense by virtue of intoxication. Two young women had testified that they had been talking to Mr. Lopez on the evening of the murder; he left them and returned a few minutes later heavily intoxicated. He was "totally changed" according to the witnesses. Mr. Brown concluded, "Defendant's diminished capacity at the time of the offense, considered along with the fact that he is still a very young[6] man without a prior history of assaultive behavior demonstrates enough mitigating factors so as to mandate a sentence of life imprisonment."

40. The trial court expressed concern on the record when the Sentencing occurred on June 25, 1987. As soon as the parties stated their appearances, the Court asked Mr. Brown to explain what he had done to prepare for sentencing:

> THE COURT: At the time of trial the court was concerned over the lack of any evidence presented on behalf of the defendant. I believe I so expressed to counsel, either formally or informally. . . .
>
> The court is now concerned with the fact that but for the sentence memorandum received just yesterday, the defense failed to present any mitigating circumstances to the court at the hearing, pursuant to A.R.S. 13-703B.
>
> If it does not violate any attorney-client privilege, I'd like the defense counsel to state on the record what effort his office made to determine any mitigating circumstances as might have reflected in favor of the defendant. (Tr. 2-3, July 25, 1987.)

The defendant was not offered an opportunity to assert or waive any privilege. Mr. Brown proceeded to blame Mr. Lopez and his family for failing to provide any mitigation. This was his response to the court's inquiry:

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[6]Youth as a mitigating factor was unlikely to be given significant weight by Judge D'Angelo, who had sentenced Mr. Lopez's nineteen-year-old brother to death a year earlier. *See* ¶ 58, *infra*.

MR. BROWN: Your Honor, after the trial in this matter, our office did hire Dr. Otto Bendheim to go to the jail to examine Mr. Lopez, for the purpose of a presentence matter pursuant to Rule 26.5. Our office paid for that. That was done. . . .

Additionally, I have, last Friday, at the time of the hearing, I told the court that I was having trouble contacting family members. I was able to contact both his mother and his brother, Frank. They were both fully aware of this setting. I told them at the last setting I had asked the court if that was possible that I could contact these people later, I would like the opportunity to present them today.

Both people were fully aware of the time, location. I gave them my number. Mr. Lopez, Frank, I spoke to him as recently as yesterday afternoon. He gave me every indication that he would be here today.

I can tell you that I talked to his mother. His mother gave me indications that she may not appear, that she was having some sort of problems. I've talked to Mr. Lopez about this. I think Mr. Lopez will tell you he's strongly opposed to me subpoenaing those people in, either his mother, his brother, or any other persons. I think Mr. Lopez can tell the court that he strongly opposed me actually having those people subpoenaed in.

Is that true?

THE DEFENDANT: Yes. (*Id.* at 3-4.)

41. The prosecution then seized the opportunity to invite Mr. Brown to disclose more privileged confidential information in order to eliminate any lingering doubt about Mr. Lopez's guilt. The deputy county attorney noted that the defense had hired its own experts to examine the physical evidence, but chose not to call them as witnesses. The deputy county attorney concluded, "I was not afforded their reports, but it's my assumption that the reports merely would have verified the State's witnesses." No question was pending, but the deputy public defender responded anyway:

MR. BROWN: Your Honor, that's true.

Just referring to the post-trial matters, we've retained, that was, our office actually did, an expert in California, at the Institute of Forensic Science in Oakland. The blood samples that were produced into evidence were all analyzed, those pertaining to Mr. Lopez and the victim. The semen samples were analyzed. We retained an expert from Tucson, Mr. Chuck Rolf. He was retained at our office's expense to examine the fingerprints that were introduced into evidence. He did come up and examined the prints prior to trial. (*Id.* at 5-6.)

42. The trial court at least clarified that the public defender's office had done absolutely nothing else to investigate potential reasons to spare Mr. Lopez's life:

> THE COURT: What other efforts has your office made to determine the existence of any mitigating circumstances?
> MR. BROWN: Your Honor, offhand, those are [sic] only ones I thought of.
> THE COURT: Is the State aware of any mitigating circumstances?
> MR. AHLER: Absolutely none. (*Id.* at 8.)

Mr. Brown also volunteered that the psychiatrist evaluating Mr. Lopez for sentencing also found him competent and that Mr. Lopez was fully apprised of all the relevant reports and scientific examinations. *Id.* at 8-9. After a recess, the court returned to read its Special Verdict. Mr. Lopez declined to say anything in response. Mr. Brown's remarks were only seven lines – fifty-seven words in which he relied on what he had said in his three-page Memorandum. The court sentenced Mr. Lopez to death. *Id.* at 15.

42. To summarize a few key points, at the time of Mr. Lopez's first trial, the public defender's office had every reason to focus its efforts on his mitigation case, since the defense experts on the physical evidence had apparently confirmed the strength of the prosecution's evidence of culpability. Nonetheless, six days before sentencing, the deputy public defender had failed to contact any member of Mr. Lopez's family. He had some contact with Mr. Lopez's mother and brother (Frank) in the final days before sentencing. One mental health expert was consulted, but he was provided with absolutely no social history information because no records had been obtained and no witnesses had been interviewed. It is my considered professional opinion that the first trial counsel's performance fell well below the prevailing norms of 1986-87 in his failure to conduct a thorough mitigation investigation.

Mr. Lopez's second sentencing proceeding in 1990

43. George M. Sterling, Jr., was appointed to represent Mr. Lopez on his direct appeal to the Arizona Supreme Court. The appeal succeeded in striking the prior violent felony aggravator because the prior conviction for resisting arrest did not involve the use or threat of violence,[7] and the case was remanded to the trial court for resentencing. *State v. Samuel Villegas Lopez*, 163 Ariz. 108, 786 P.2d 959 (1990). The appellate lawyer remained on the case and represented Mr. Lopez at the resentencing only six months after the January 16, 1990, appellate decision. Unfortunately, the appellate lawyer simply recycled what was already in the file in terms of mitigation. There is no evidence that he made any attempt to gather life-history records or to interview potential mitigation witnesses. Mr. Sterling instead seemed to focus on challenging the remaining aggravating factor – the allegation that the offense was "especially heinous, cruel, or depraved," under A.R.S. § 13-703(f)(6). At the presentence hearing before Judge D'Angelo on July 13, 1990, the appellate lawyer offered the testimony of Dr. Phillip E. Keen, medical examiner of Yavapai County, in an attempt to establish that the multiple stab wounds to the victim were all directed at vital areas in an inept attempt to kill her, rather than with the sadistic intent to inflict unnecessary pain and suffering. (Tr. 8-24, July 13, 1990, morning session.)

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[7]There was no evidence before the court concerning the underlying facts of the prior conviction. The court held, "Because one can commit the crime of resisting arrest under A.R.S. § 13-2508(A) without using or threatening violence, a conviction under it does not qualify as a statutory aggravating circumstance under A.R.S. § 13-703(F)(2). Accordingly, the trial court's finding must be set aside." 163 Ariz. at 114, 786 P.2d at 965.

44. The appellate lawyer also introduced the videotaped deposition of Otto Bendheim, M.D., the psychiatrist who had examined Mr. Lopez on behalf of the public defender's office in 1987. Dr. Bendheim was unavailable on the date of the presentence hearing, so he was deposed at his office from 10:45 A.M. to 11:41 A.M. on July 11, 1990. (Deposition of Otto Bendheim, M.D., 1, 36, July 11, 1990.) Dr. Bendheim testified that he had interviewed Mr. Lopez at the request of the public defender's office on June 8, 1987; "these examinations are usually an hour and a half to two hours"; and he had not seen Mr. Lopez since. *Id.* at 4. Before the interview he had been provided no social history data, only police reports, a record of Mr. Lopez's criminal history, and the statement of a witness quoted in a police report. *Id.* at 3. Based on his brief encounter with Mr. Lopez, he found the "possibility" of a rare condition called "pathological intoxication." *Id.* at 4. The "differentiating point" in this condition "is that the person who reacts 'pathologically' reacts in a fashion which is unusual for all people." The reaction to alcohol, regardless of the amount consumed, is "unexpected, unpredictable and characterized frequently by extreme violence." *Id.* at 5. Dr. Bendheim emphasized that this was a "hypothesis," not a "definitive diagnosis." *Id.*

45. Appellate counsel had also provided Dr. Bendheim with no social history records or mitigation interview reports. There is no evidence that counsel had obtained any social history records or interviewed any mitigation witnesses. However, appellate counsel did provide the psychiatrist with a presentence investigation report from 1985 and a police report from an uncharged sexual assault incident that occurred on November 3, 1986. *Id.* at 8. These reports gave Dr. Bendheim additional evidence of criminal behavior under the influence of intoxicants (not just alcohol, but other intoxicants). He offered the opinion that this condition diminished

Mr. Lopez's capacity "to resist impulses," "judgment formation," and "constraints against unethical, immoral, unlawful behavior." *Id.* at 9. On cross-examination, the prosecutor asserted that the appellate lawyer had also had Mr. Lopez tested by a psychologist, but Dr. Bendheim said he had not been provided any information about the results. *Id.* at 16. He said he had been told by the original deputy public defender that there were "many character witnesses" who would describe Mr. Lopez as a mild person except when under the influence, but he admitted that he had no confirmation of that information. *Id.* at 16-17. He also conceded that he had no evidence that Mr. Lopez had any of the predisposing factors for reduced tolerance of alcohol. *Id.* at 22.

46. At the presentence hearing on the afternoon of July 13, 1990, the prosecution offered the testimony of a rebuttal expert before the court had had an opportunity to review the videotape or transcript of Dr. Bendheim deposition. The rebuttal expert, psychiatrist Robert T. Dean, Jr., M.D., was the co-founder of the Maricopa Council on Alcoholism. He testified that the condition known as pathological intoxication is so rare that he had never seen it in twenty-five years of practice. Tr. 17-18, 25, July 13, 1990, afternoon session. He enumerated numerous predisposing conditions that did not seem to apply to Mr. Lopez: epilepsy and temporal lobe spikes, trauma, disease (such as encephalitis), strokes, Alzheimer's disease, and organic brain damage. *Id.* at 27, 54.

47. Five additional pieces of evidence were introduced at the presentence hearing: Department of Corrections records on Mr. Lopez's prior incarcerations, a *Washington Post* editorial on the cost of the death penalty, two tape recorded interviews that the deputy public defender had conducted in 1987 with witnesses who had observed Mr. Lopez drinking on the night of the alleged offense, and the testimony of a classification counselor from the Maricopa

County Sheriff's Department. *Id.* at 6, 10, 11. The classification counselor, Rick Bailey, testified that Mr. Lopez had had no disciplinary write-ups since returning to the Maricopa County Jail, where he has been an exemplary prisoner. *Id.* at 57. On cross-examination, he said that he sees Mr. Lopez only once a week, for about ten minutes each time, and he had no idea how Mr. Lopez behaved in prison. *Id.* at 58. Defense counsel also put on the record that he had put on some mitigation out of his obligations under *State v. Carriger*, 132 Ariz. 301, 645 P.2d 816 (1982), "and I'm not trying to make a record or anything, just my client and I have not seen eye to eye on what mitigating factors to present or what position to take on this thing, so I have been guided by my obligation under *State versus Carriger* independent of his instructions." *Id.* at 59. A post-hearing memorandum submitted on July 19, 1990, foreshadowed the arguments counsel would make at sentencing.

48. At the sentencing hearing on August 3, 1990, defense counsel first argued that the remaining aggravating factor should be dismissed. He stressed that Mr. Lopez had no training in hand-to-hand combat, had not planned the murder, and had only the inefficient weapons of opportunity that he found at the victim's home. He meant only to kill the victim, not to inflict needless pain. (Tr. 4-18, August 3, 1990.) Turning to mitigation, Mr. Sterling continued:

> As to the mitigation, I think a very important thing must be done before I go into this. At the first trial, and at the first sentencing, there was no mitigation offered. I'm stuck with the trial record in this case, where the defense offered no witnesses, no testimony.
>
> But on remand, we have presented to the court *as much as I can find*, so that this court knows this defendant. (Emphasis added.) *Id.* at 18.

He emphasized that he had introduced the interviews of the young women who had reported the abrupt change in Mr. Lopez under the influence of intoxicants. *Id.* at 19. He had introduced Mr.

Lopez's entire prison file ("I know it's three and a half inches because I had to go through it too"), but pointed to the very portions of the file that suggested that Mr. Lopez was a potentially dangerous rule-breaker in prison because of his continuing access to alcohol. According to Mr. Sterling, ". . . they search the cell block for stills, illegal stills for the production of alcohol, he's getting written up because he's drunk, in prison." *Id.* at 21. Nonetheless, Mr. Sterling argued that the records establish that Mr. Lopez "has shown a steady progress towards becoming an acceptable inmate, a model inmate, if you will." *Id.* at 22. The remainder of the argument stressed the cost of "endless" appeals "with no real hope of an execution." *Id.* at 22-24.

49. The prosecution briefly pointed out that the remaining aggravating factor had already been found unanimously by the Arizona Supreme Court. *Id.* at 26. The prosecutor framed the case as depending entirely on the aggravating factor because there was no mitigation – and defense counsel concurred, although also maintaining that a life sentence would be cheaper for the taxpayers. Here is the bizarre exchange between prosecutor Paul Ahler and Mr. Sterling:

> MR. AHLER: . . . Where is there any mitigation in this man's life, either past, present or future, that is in any way socially redeeming? There is none. There's no mitigation here. There is extreme aggravation.
>
> If this court cannot find especially cruel, heinous and depraved under these facts, I submit, that you can't find them anywhere. We would ask this court to sentence this man to the most severe penalty society can exact, because this crime deserves it. We would ask that you sentence him to death.
>
> THE COURT: Anything further, Mr. Sterling?
>
> MR. STERLING: Yes, your Honor. There's nothing societally redeeming in the defendant's background. I wish we could all argue with Paul on that. Probably can't. *Id.* at 27.

50. To make matters worse, defense counsel ended by implying that Mr. Lopez *wanted* the death penalty, as did some other defendants, because death row offered single cells, better

televisions, and meals delivered to them in their cells. *Id.* at 32-33. The court inquired as to whether counsel really meant for this to be part of his record, and Mr. Sterling replied:

> Yes, your Honor, I'd like it to be. I would like the reality of what goes on. I think the court should evaluate this case and sentence this defendant to life, not to death, because that's the sentence that is warranted. And even if he wants the death penalty because of the privileges, the temporal privileges that it will provide him, the law is the law. The law determines what punishment is to be executed. . . . *Id.* at 33.

51. Judge D'Angelo responded that he had been practicing law since 1957, prosecuting and defending murder cases, and trying them as a judge. He said, "I have never seen one as bad as this one." *Id.* at 33-34. Once again, the court found no mitigation, affirmed the aggravating factor, and imposed a sentence of death. Once again, trial counsel's failure to conduct a thorough mitigation investigation constituted deficient performance under the prevailing professional norms of 1990.

The state petition for postconviction relief filed in 1995

52. An appeal was filed by the public defender's office, and the Arizona Supreme Court affirmed Mr. Lopez's new death sentence in 1993. *State v. Samuel Villegas Lopez*, 175 Ariz. 407, 857 P.2d 1261 (1993). The United States Supreme Court denied certiorari on April 18, 1994. *Lopez v. Arizona*, 511 U.S. 1046 (1994). Attorney Robert W. Dole was appointed to represent Mr. Lopez in state postconviction in August 1994, and four months later, on December 19, 1994, he filed a Petition for Post-Conviction Relief in Judge D'Angelo's court. Once again, appointed counsel conducted no mitigation investigation, but merely recycled what was in trial counsel's file. Although he alleged ineffective assistance of trial counsel, postconviction counsel merely claimed that trial counsel had failed to prepare his expert, Dr. Bendheim, by providing

him with the transcripts of interviews and trial testimony of the two witnesses who had observed Mr. Lopez in an intoxicated state on the night of the alleged capital offense. In a seven-sentence affidavit filed with the petition, Dr. Bendheim stated that these new transcripts "make my earlier tentative diagnosis of pathological intoxication more probable than previously expressed" and that he can now "make a more certain diagnosis of pathological intoxication."

53. On May 3, 1995, Mr. Doyle filed a Supplemental Petition, but included nothing related to the failure to investigate mitigating evidence or to prepare Dr. Bendheim by providing him with the independently corroborated social history information required for a reliable mental health assessment in death penalty cases. The Supplemental Petition provided an excerpt from the trial record in support of a claim that the court failed to exclude a stricken juror and included as exhibits the presentence investigation reports of Mr. Lopez's brothers, George and Jose, who had been tried before Judge D'Angelo a year before him. These reports were offered in support of a claim that trial counsel failed to request a change of judge.

54. On the same date that the Supplemental Petition was filed, Mr. Doyle filed a Motion to Extend Time for a Supplemental Petition. He termed his request "unusual," but requested "a reasonable extension of time to finish the investigation in this matter and to file a further supplemental petition should circumstances warrant." Mr. Doyle stated in his Memorandum of Points and Authorities that he had "diligently searched the record and available sources of information" to prepare the original and supplemental petitions, and "[v]olunteer lawyers, working separately from Petitioner's counsel, have developed significant leads to potentially important new information."

55. Mr. Doyle explained that these volunteer lawyers had approached him three months earlier and proposed doing further investigation. "Counsel had no objection at the time," he said, and they "solicited and received hundreds of documents for counsel's consideration," including some that were attached to the Supplemental Petition. However, there were two areas where the volunteers' work was not complete. One concerned potential juror misconduct, but the main area of unfinished investigation related to mitigation. On the one hand, Mr. Doyle acknowledged the potential importance of the unexplored mitigation, but on the other hand he implied that the family was to blame not only for earlier failures to investigate Mr. Lopez's life history but also for the present failure to complete the investigation. This is what he told the court:

> Every lawyer that counsel has spoken to has noted Petitioner's unusual family circumstance. Of the eight Lopez brothers, four of the five eldest have only minimal criminal histories; the three youngest brothers (Samuel, Jose, and George) have all been convicted of homicide. Over the years, attempts to contact and learn more from family members has [sic] met with resistance. No members of the family came forward to help attorney Joel Brown before sentencing in 1986. No members of the family offered evidence when attorney George Sterling conducted the second sentencing in 1990. In the past several months, volunteers have made contact with several of Mr. Lopez's brothers, his mother, and a close friend who was involved in this case. For the first time, these people have expressed willingness to discuss Mr. Lopez, his background, and his current situation with counsel. Unfortunately, as of the date of this motion, none of them are willing to commit to signing affidavits. Due to the unusual circumstances of the Lopez family, this information could be vitally important in finally understanding this situation. (Supplementary Petition, 2-3, May 3, 1994.)

56. I will discuss in detail the red flags that would have prompted reasonable attorneys at every stage of represesntation in state court to conduct additional investigation. Suffice it to say at this point, that despite the efforts of the volunteers who tried to assist him in the ninety days between February and May 1995, postconviction counsel simply failed to conduct a thorough

mitigation investigation and provided the court with no new reasons to spare Mr. Lopez's life. Mr. Doyle himself had done no investigation outside the trial record at all.

Red flags that should have prompted additional investigation

57. All of Mr. Lopez's lawyers in state court knew that two of his brothers had been convicted, yet none displayed any curiosity about his childhood and family background. Joel Brown was a staff attorney in the same public defender's office that represented Samuel Lopez's brother Jose. After his case was assigned to the same trial court that had sentenced his two brothers, Samuel Lopez asked his public defender to consider a Motion for Change of Judge. *See* Petition for Post-Conviction Relief at 4. A reasonable attorney would have immediately sought the presentence investigation reports on the two brothers to see what information they contained about their family background.

58. The Presentence Report for Jose and George Lopez were eventually obtained and attached to the Supplemental Petition for Post-Conviction Relief on May 3, 1995, as Exhibits 1 and 2. They were readily available at the time of Samuel Lopez's arrest. Jose Lopez, then twenty-one, was sentenced on April 2, 1986, following an *Alford* plea. (Presentence Report for Jose Lopez at 8.) He had been arrested on October 7 for a murder that occurred two days earlier. *Id.* at 2. The probation officer reported that Jose appeared to be "estranged from his family" and provided little background information. *Id.* at 7. Dysfunction, however, was evident: Jose and his codefendant brother George were described in the Presentence Report as transients "living at times out of a car and at other times in a graveyard." *Id.* George Lopez, then nineteen, was sentenced on April 25, 1986. (Presentence Report of George Lopez, face sheet.) The victim in

this case died from multiple stab wounds inflicted with a small knife ("one-half-inch wide knife blade, approximately three inches in length"). (Presentence Report of Jose Lopez at 1.) The probation officer in George Lopez's case concluded that "it was apparent from the condition of the victim's body and the wounds inflicted that force far in excess of what was necessary to accomplish their 'task' was used." (Presentence Report of George Lopez at 4.) Both brothers were in custody at the time of Samuel Lopez's arrest and could have easily been interviewed about their family background. The history of their cases is also informative about how quickly capital cases could go to trial before this judge and the likelihood of the court's finding that excessive force was sufficient to establish the "especially cruel, heinous, and depraved" aggravating factor.

59. The Presentence Reports and court files from Samuel Lopez's own prior cases should also have been routinely obtained by trial counsel. As the United States Supreme Court pointed out in *Rompilla v. Beard*, 545 U.S. 374, 387 (2005): "The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association's Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one . . ." (i.e., where, as here, the State intended to use a prior conviction in support of an aggravating factor). The particular prior conviction that the State alleged as involving use or threat of violence was a 1985 case in which Mr. Lopez pled to resisting arrest in a negotiated disposition. However, the underlying offense involved inhaling toxic substances (paint sniffing) – a red flag signaling the need to investigate his history of substance abuse. *See* Presentence Report of Samuel Lopez (1987) at 6.

60. Of course by the time of Samuel Lopez's resentencing in 1990, his own Presentence Report from 1987 was available to his new lawyer. (This Report is Exhibit 1 to the Petition for Post-Conviction Relief filed on December 19, 1994.) It contains his mother's name, address, and telephone number. *Id.* (face sheet). It contains Samuel's own Social Security number (useful for obtaining a Detailed Earnings Report from the Social Security Administration in order to investigate a client's employment history). *Id.* It identifies both parents by name (but, interestingly, not the same names identified in Jose Lopez's Presentence Report). *Id.* at 6; *cf.* Presentence Report of Jose Lopez at 7. The Report indicated that in 1983 a parole officer said Mr. Lopez was "having difficulty with his mother and she did not particularly want him staying with her." (Presentence Report of Samuel Lopez (1987) at 7.) However, the writer of the report did not speak with any family member and simply commented, "No one from the defendant's family has come forward to state an opinion. The defendant did not want me to contact anyone in particular. I have tried to telephone the defendant's mother but she has not been available for comment." *Id.* at 4.

61. Mr. Lopez's parents reportedly separated when he was four years old. *Id.* at 6. Even an absent father has contributed half of a client's DNA, so learning about the paternal lineage is a routine part of mitigation investigation. Two more brothers are identified by name, Steve (who reportedly served time in prison) and Frank (with whom Samuel reportedly worked in landscaping). Three of Samuel's employers are identified: Jessie Gonzalez, Phoenix Tent and Awning, and A & L Duct and Pumps. *Id.* at 6-7.

62. The Presentence Report indicates that Mr. Lopez left school after tenth grade and had juvenile arrests for curfew violations and running away, raising the question of what his home

life was like as a teenager. Was there structure and parental supervision? Was he running away from abuse? *Id.* at 4, 7. The Report simply notes, "In other presentence reports, the defendant did not mention any traumatic or serious events while he was growing up. He stated that the biggest problem within the family was financial. Juvenile records indicated that Ms. Lopez was unable to exercise control over her children." *Id.* at 7. Mr. Lopez first went to state prison as a short, slender nineteen-year-old. *Id.* at 5. The report alludes to minor rule infractions during Mr. Lopez's incarceration, but characterized his overall performance in prison as satisfactory. *Id.* at 6.

63. A brief Supplemental Report was prepared after the probation officer interviewed Mr. Lopez on May 22, 1987. Mr. Lopez was described as cooperative and "thorough in his completion of the presentence questionnaire." Mr. Lopez expressed regret over failing to complete his G.E.D. He identified three more employers: National Metals Company, Arizona Woodcraft Company, and Wise Guys Car Wash. Mr. Lopez confirmed substance abuse, but minimize its significance: "He denies that he has an alcohol or drug problem. He stated that he has used marijuana and inhaled toxic vapors in the past but did not consider himself to be a regular user nor 'hooked' on any drug. The defendant did not think that alcohol or drugs played a part in any of his prior offenses."

64. Resentencing counsel did offer Mr. Lopez's prison records, undigested, to the court and argued that they supported the view that Mr. Lopez was becoming an acceptable, model prisoner. *See* ¶ 48, *supra*.[8] The 1987 Presentence Report also indicates that Mr. Lopez had

[8]The record is ambiguous as to whether Mr. Sterling ever obtained them himself or simply received them from the Deputy County Attorney. He told the Court: "The last thing, Your Honor, I believe, do you want to – on that offer of proof do you want to offer the DOC

psychological evaluations in prison in 1981 and 1985, but neither these nor any other part of the prison file were provided to the psychiatrist on whom both sets of trial counsel – and state postconviction counsel – relied. Both the prison records and the Presentence Report document multiple incidents involving alcohol and other intoxicants. The failure to conduct a meaningful and thorough investigation of Mr. Lopez's history of substance use is glaring.

65. The Presentence Report prepared in 1990 (and attached to the Petition for Post-Conviction Relief as Exhibit 2) contained a great deal of new information relevant to social history investigation. Mr. Lopez's mother had moved by then, but a new address and telephone number appeared on the first page of the report. Contrary to the misleading impression that resentencing counsel conveyed to the Court that Mr. Lopez wanted to be on death row (*see* ¶¶ 48, 50, *supra*), Mr. Lopez clearly told the probation officer that he "is requesting that the Court sentence him to a term of imprisonment rather than the death penalty, as he is already serving consecutive time for the convictions on the other counts involved in this offense and he will, most likely, die in prison before his sentences are completed." (Presentence Report (1990) at 2) attached to Petition for Post-Conviction Relief as Exhibit 2.) According to this Report, Mr. Lopez's parents separated when he was eight years old (not four, as previously reported), and he has had no contact with his biological father since then. His mother raised all eight children "through various periods of employment" and the family "did suffer great financial hardship after the abandonment of the family by the defendant's natural father." *Id.* at 5-6. The schools that Mr. Lopez attended in Phoenix are identified (Murphy No. 3 for primary school and Carl Hayden

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records? Because we had kind of talked about this, Your Honor, when I was going to call Mr. Bailey [the classification counselor from the jail] they [that is, the prosecution] were going to offer DOC records in exchange." (Tr. 10, July 13, 1990, afternoon session.)

High School). Despite completing the tenth grade, Mr. Lopez was found to have a "reading ability above the sixth grade level" based on administration of a Word Recognition Aptitude Test. *Id.* at 6. Numerous records could have been obtained to prove the financial hardship of the large Lopez family, including Social Security Detailed Earnings Report for the single parent and any welfare benefits that were received, including school lunches for the children. Local school records could have been easily obtained to identify teachers and counselors who knew the family, and to review attendance, parental supervision and cooperation, academic functioning, etc. Earnings, social service, and school records would also have disclosed whether the household was geographically stable or subject to the frequent moves that commonly accompany low income. It is also widely recognized that it is essential to visit the neighborhoods where clients lived in their developmental years, since these communities can also have toxic social and/or environmental impacts.

66. The discussion of substance use in the 1990 Presentence Report shows that Mr. Lopez was cooperative, but minimizing and lacking insight, in response to questions in this area:

> The defendant indicated he drinks alcohol occasionally and that it "cools me down." He indicated he needs no professional help for alcohol abuse. Mr. Lopez also indicated that he has experimented with marijuana in the past and did use toxic vapors, including paint and glue, beginning in 1975 and lasting until his incarceration in 1986. According to the defendant, he would only inhale toxic vapors when he did not have money for beer or marijuana. Mr. Lopez indicated that his use of toxic substances was sporadic enough that he did not suffer long-lasting mental or physical impairments. The defendant further indicated that he has never been dependent on any drug. *Id.* at 6.

This history of paint and glue sniffing from age thirteen through the time of arrest on the capital offense would have prompted a reasonable attorney to consider the high risk of brain damage from the neurotoxins.

67. This history also cried out for an investigation into Mr. Lopez's childhood to understand how and when he was first exposed to alcohol and inhalants. Who provided these substances? Where was the parent or caretaker? What was the attitude of the parent toward alcohol and other intoxicants? What behaviors were modeled? Was the now absent father an alcoholic? Did the mother drink during pregnancy? Did the mother have other males in her life who abused alcohol or other substances? Was the primary caretaker neglectful – or corrupting? Was there a historical connection between the client's substance abuse and his exposure to trauma and/or manifestations of the signs of an untreated mental disorder?[9]

68. The cross-examination of Dr. Bendheim in 1990 and the rebuttal testimony of Dr. Dean (¶¶ 45-46, *supra*) put postconviction counsel on notice about the predisposing factors that would need to be investigated to support (or rule out) Dr. Bendheim's hypothesis of paradoxical intoxication, including brain damage, head trauma, and diseases like encephalitis. However, postconviction counsel did not attempt to obtain birth or childhood medical records for Mr. Lopez or to arrange a neuropsychological assessment to evaluate potential brain damage. Postconviction counsel did not provide Dr. Bendheim with any additional records, but merely furnished the testimony and interviews of the two young guilt-phase witnesses who had observed Mr. Lopez on the night of the capital offense. *See* Affidavit of Dr. Bendheim, appended to Petition for Post-Conviction Relief as Exhibit 3.

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[9]*See Cooper v. Secretary*, 646 F.3d 1328 (11th Cir. 2011) (counsel found ineffective for failing to investigate mitigation, including drug history). Mr. Cooper's sister testified that "she believed drugs were Cooper's escape from [his brother's] cruelty." 646 F.3d at 1345. A psychologist testified that Cooper began to use alcohol and marijuana at age eleven as "to some extent, a form of self-medication." Substance abuse escaled to brain-damaging volatile inhalants. *Id.* at 1346.

69. On May 2, 1995, the so-called "volunteer lawyers" from the nonprofit Arizona Capital Representation Project delivered the documents they had collected during the three months that they were attempting to assist state postconviction counsel. Mr. Doyle signed a receipt for documents pertaining to the trial, the client, and eight other members of his family (Concha Villegas Lopez; Arcadio Lopez, Jr.; Eddie Lopez; Frank Lopez; Steve Lopez, Jose Lopez; George Lopez; and Gloria Lopez). The Project had also drafted a proposed Motion for Extension of Time that was substantially different from the one that Mr. Doyle actually filed the following day. The draft outlined eleven areas of ongoing investigation requiring more time to provide support for potential claims. Three areas (denoted f, g, and h) related directly to the claim that trial counsel had failed to conduct a thorough mitigation investigation:

f. Trial counsel was ineffective for failing to investigate and present evidence of Mr. Lopez's deprived childhood, including but not limited to: a) possible malnutrition; b) overcrowded conditions, i.e., the Lopez family living with over fifteen children and three adults in the two-bedroom house of Mr. Lopez's aunt; c) loss of Mr. Lopez's father at an early age and the lack of a strong male role model in the home; d) physical and mental abuse suffered by Mr. Lopez as a child; and e) Mr. Lopez's exposure to pesticides while working as a field worker, along with other members of his family. Significant investigation remains to be done in documenting these factors. Moreover, a cultural expert should be appointed to examine the effects of Hispanic culture on the Lopez children.

g. Trial counsel was ineffective for failing to present evidence of organic brain dysfunction in Mr. Lopez. Investigation has uncovered evidence of prolonged paint sniffing and alcohol abuse by Mr. Lopez. Interviews with Mr. Lopez's siblings have revealed evidence of *petit mal* seizures that may have resulted from paint sniffing. In addition, Mr. Lopez has been characterized as having a severe alcohol problem in the months prior to the offense for which he was arrested. And, there is testimony at trial that Mr. Lopez was using other drugs. A neuropsychological examination of Mr. Lopez should be done to see if there are any verifiable organic effects of this serious abuse of inhalants and alcohol. Under *State v. Christensen*, these facts would have permitted a previously

uninvestigated impulsivity defense. More investigation remains to document these facts.

h. Trial counsel was ineffective for failing to investigate and present evidence of the rape of Mr. Lopez's mother in the years immediately preceding the offense for which he stands convicted. This offense was reported to the police but the perpetrator was never caught. More time is needed to obtain the affidavits and documents supporting these facts.

70. It is also my understanding that the family members interviewed by the Project were not "unwilling to commit to signing affidavits," as asserted by Mr. Doyle in the motion for continuance that he filed. *See* ¶ 55, *supra*. On the contrary, the Project had simply determined that it was premature to memorialize their information in affidavit form because the factual investigation had not been completed. In the three months that they had been investigating the case, they had made considerable progress, but, as indicated in ¶¶ 25-26, *supra*, mitigation investigation is a slow process because of the need to build rapport and trust with reticent witnesses in order to overcome the barriers to disclosure of sensitive information. For example, the rape of Mr. Lopez's mother by an unknown perpetrator is clearly a traumatic event that would require an unusual degree of rapport before she would be comfortable discussing it with people outside the family.

71. The pro bono lawyers from the Arizona Capital Representation Project had begun to respond to the very red flags that would have prompted any reasonable postconviction lawyer in 1995 to conduct further investigation. No reasonable lawyer at that time could engage in the wishful thinking of the appellate lawyer who had told the court that there was "no real hope of an execution" in this case. *See* ¶ 48, *supra*. Since the time of trial and resentencing, Arizona had executed three prisoners: Donald Harding, on April 6, 1992; John Brewer, on March 3, 1993; and

James Clark, on April 14, 1993. Although the courts had begun to erect new procedural barriers to postconviction relief (*see*, for example, *McCleskey v. Zant*, 499 U.S. 467 (1991) (curtailing successive habeas corpus petitions in federal court)), this was also a time frame in which relief was widely available even in highly aggravated cases when meritorious claims (including those involving ineffective counsel) were thoroughly investigated. *See* James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases* (June 2000), *reprinted in part in* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1852 (2000) (finding that 68 percent of death sentences in that period were overturned by higher courts, and 82 percent of the remanded cases resulted in different outcomes).

71. I have written about one such case in which I was personally involved in this time frame where the failure to conduct thorough mitigation investigation was the basis of relief after a meticulous, multigenerational investigation of the client's background demonstrated the well-corroborated mitigation that could have been presented at trial. Russell Stetler, *The Unknown Story of a Motherless Child*, 77 U.M.K.C. L. REV. 947 (2009), discussing *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995). Significantly, in *all* of the cases in which the United States Supreme Court found trial counsel ineffective for failure to conduct thorough investigation (*see* ¶ 18, *supra*), trial counsel did *more* mitigation investigation than Mr. Brown or Mr. Sterling (or, for that matter, Mr. Doyle) undertook on behalf of Mr. Lopez. In *Williams v. Taylor*, 529 U.S. 362, 368 (2000), the defense offered the testimony of his mother, two neighbors, and a taped excerpt from a psychiatrist. In *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), trial counsel consulted a psychologist and obtained presentence investigation report and Department of Social

Services records detailing physical and sexual abuse, an alcoholic mother, and placement in foster care. In *Rompilla v. Beard*, 545 U.S. 374, 381-382 (2005), trial counsel interviewed five members of the client's family and consulted three mental health experts. In *Porter v. McCollum*, 130 S. Ct. 447, 449 (2009), there was penalty phase testimony from Mr. Porter's ex-wife and an excerpt from a deposition. In *Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010), seven mitigation witnesses testified at the penalty phase. In Mr. Lopez's case, the sentencer never heard from anyone who actually knew Mr. Lopez personally and cared whether he lived or died – because trial counsel (and state postconviction counsel) had formed no relationship with anyone who knew him outside the jail.

72. After careful consideration of all the material I have reviewed, it is my considered professional opinion that the performance of trial counsel in 1987 and 1990 and state postconviction counsel in 1995 fell far below then prevailing norms in the area of mitigation preparation in a capital case. Common sense would have told any reasonable attorney that the red flags warranted further investigation, but none of the lawyers appointed by the state courts to represent Mr. Lopez responded at all. They failed to gather records; they failed to talk with family members, teachers, neighbors, friends, or anyone else who knew Mr. Lopez; and they collectively failed to provide their one mental health expert with the richly documented social history that is the cornerstone of a reliable assessment. In these extraordinary circumstances, the sentencer never had the opportunity to consider the evidence that is essential to a fair and morally just verdict.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746, and under the laws of the States of Arizona and California, that the foregoing is true and correct and that this affidavit was executed this 10th day of February 2012 in Oakland, California.

RUSSELL STETLER

Sworn to before me this

10 day of Feb 2012

KALI J. SNOWDEN
COMM. # 1921577
NOTARY PUBLIC • CALIFORNIA
ALAMEDA COUNTY
My Comm Expires Jan. 13, 2015

Notary Public

My commission expires 01/13/2015.

AFFIDAVIT OF JOEL BROWN

1. My name is Joel Brown. I am an attorney licensed to practice in the state of Arizona. I am currently employed at the Maricopa County Public Defenders Office in the Capital Unit.

2. As a young lawyer, I was assigned the case of *State v. Samuel Villegas Lopez*. Mr. Lopez's case was my first capital case. At the time I represented Mr. Lopez, I had never been trained on how to present a case in mitigation. Back then, we did not have trial teams or mitigation specialists like we do now. When I look back now on how we did things back, then it seems like we were in the dark ages.

3. Mr. Lopez was a quiet client. He was not demanding. He was not a difficult client.

4. I did not have an investigator assigned to the case. I was by myself. I had no concept of mitigation. I did not conduct a mitigation investigation. The evolution in capital work from then to now is unbelievable.

5. When Sam was convicted of first degree murder and the case was going to proceed to a sentencing phase, I asked some of the senior lawyers what to do. They told me to call some family members to be character witnesses. I did not even know that I had done anything wrong until Judge D'Angelo started to make a record about the fact that I did not present any mitigation.

6. Current counsel for Mr. Lopez has shared with me a number of declarations from family members and from a neuropsychiatrist who evaluated Mr. Lopez for federal court. I believe that the mitigation evidence in these declarations is very valuable mitigation. I wish I had presented it at Mr. Lopez's sentencing hearing.

7. I know Judge Robert Doyle. I do not remember ever speaking to him about Mr. Lopez's case.

Further affiant sayeth not.

Dated this 10 day of February, 2012 in Phoenix, Maricopa County, Arizona.

Joel Brown

Subscribed and sworn to before me this 10 day of February, 2012.

JEANNE M. HYLER
Notary Public - State of Arizona
MARICOPA COUNTY
My Commission Expires
July 14, 2015

Notary Public

AFFIDAVIT OF GEORGE WOODS, M.D.

1. My name is Dr. George Woods. I am a neuropsychiatrist. My curriculum vitae is attached to this affidavit as Exhibit A.

2. Federal habeas counsel for Samuel Villegas Lopez asked me to conduct an evaluation of their client for use in federal court proceedings relating to Mr. Lopez's capital conviction.

3. I summarized my report and conclusions in the attached Exhibit B, Declaration of Dr. George Woods.

4. The observations and conclusions drawn in my declaration are true and correct to the best of my information and belief. My conclusions were drawn to reasonable degree of medical certainty.

Further affiant sayeth not.

George Woods, M.D.

Subscribed and sworn to before me this 11 day of February, 2012.

Notary Public

ADRIENNE McDOWELL
COMM. #1894430
Notary Public · California
Alameda County
My Comm. Expires July 30, 2014

CALIFORNIA
JURAT CERTIFICATE

State of California

County of Alameda

Subscribed and sworn to (or affirmed) before me on this 11th day of Feb.
20 12, by George P. Woods

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

WITNESS MY HAND AND OFFICIAL SEAL.

Signature of Notary Public

ADRIENNE McDOWELL
COMM. #1894430
Notary Public - California
Alameda County
My Comm. Expires July 30, 2014

(Notary Seal)

OPTIONAL INFORMATION

The jurat contained within this document is in accordance with California law. Any affidavit subscribed and sworn to before a notary shall use the preceding wording or substantially similar wording pursuant to Civil Code sections 1189 and 8202. A jurat certificate cannot be affixed to a document sent by mail or otherwise delivered to a notary public, including electronic means, whereby the signer did not personally appear before the notary public, even if the signer is known by the notary public. The seal and signature cannot be affixed to a document without the correct notarial wording. As an additional option an affiant can produce an affidavit on the same document as the notarial certificate wording to eliminate the use of additional documentation.

DESCRIPTION OF ATTACHED DOCUMENT

AFFIDAVIT

(Title of document)

Number of Pages _____ (Including jurat)

Document Date _____

(Additional Information)

CAPACITY CLAIMED BY THE SIGNER

_____ Individual
_____ Corporate Officer
_____ Partner
_____ Attorney-In-Fact
_____ Trustee
_____ Other: _____

DECLARATION OF GEORGE W. WOODS, JR., M.D.

I, George W. Woods, Jr., M.D., declare as follows:

1. I received my bachelor's degree from Westminster College in Salt Lake City, Utah, in 1969. I received my medical degree from the University of Utah in 1977. In 1981, I completed my psychiatric residency at the Pacific Medical Center in San Francisco, California, and was a National Institute of Mental Health/American Psychiatric Association fellow in 1982. From 1989 to 1994, I was the Clinical Director of the New Beginnings Program, an inpatient, dual diagnosis (co-occurring) disorders, substance abuse detoxification and rehabilitation center at Doctors Hospital in Pinole, California. I was appointed Senior Consulting Addictionologist to the New Beginnings Programs at Doctors Hospital and San Ramon Regional Medical Center, San Ramon, California, in 1994 and served in that capacity through 1996.

2. I am Adjunct Professor at Morehouse School of Medicine, Atlanta, Georgia, where I teach Clinical Aspects of Forensic Psychiatry. I also am Adjunct Professor in the Department of Educational Leadership and Public Policy at the California State University, Sacramento.

3. I was Adjunct Professor at the University of California, Davis, Medical School, Department of Psychiatry, in the postgraduate Forensic Psychiatry Fellowship from 1996-2000. I also have served as Affiliate Professor at the University of Washington, Bothell campus, from 1998 to 2003. I have lectured both nationally and internationally on issues of trauma, chemical dependency, and criminal responsibility. I have served as technical advisor to the Kenyan and Tanzanian Medical Associations, helping these medical societies develop clinical and research responses to the August 7, 1998 Kenyan/Tanzanian U.S. Embassy bombings.

4. My clinical practice is based in Oakland, California. I have been qualified and testified as an expert in numerous civil and criminal cases in state and federal courts. A copy of my *curriculum vitae* is attached to this declaration.

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5. I have been asked by attorneys for Mr. Sammy Lopez to prepare a social history of Sammy and his family's background to determine what possible genetic, social and interpersonal factors affected his development, mental status, and psychological functioning. Such a history is necessary for mental health experts to review in order to establish a base line for Sammy's[1] cognitive functioning, to compare his cognitive and behavioral functioning when intoxicated to his base line functioning, to determine if intoxication exacerbated any underlying physiological conditions with psychiatric consequences or psychiatric disorders, to determine the presence and course of his addictive disease, to determine the likelihood of the presence, severity and effect of neurological deficits and the effects of intoxication on those deficits, and to determine any other factors that would have influenced or controlled his thought processes and behavior during the offense.

6. Mental health and medical experts also require social history information to weigh and assess lay witness reports of Sammy's behavior surrounding the offense, during interrogation by law enforcement, and during clinical interviews with Sammy. A properly documented social history also offers insight into factors and circumstances that affected Sammy's behavior over the course of his life and is relevant to the presence, significance, and weight of mitigating factors.

7. In reaching my professional opinion, I conducted interviews with Sammy at Arizona State Prison in Florence, interviewed his mother, several of his brothers, and family friends that knew Sammy. I also consulted with Dr. Dale Watson, who administered neuropsychological testing to Sammy. I have also reviewed documentary evidence concerning Sammy's educational, medical, psychological and psychiatric history and facts relevant to the legal proceedings against him. I have reviewed similar material regarding members of his family. The materials I reviewed are listed in the Appendix attached to this declaration. These

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[1] Since Sammy's family members share many of their last names, Mr. Lopez (Sammy) and they will be referred to by their first names.

are the kinds of materials routinely relied upon by experts in my field of psychology in reaching their professional opinions.

8. I met with Mr. Lopez on four occasions, January 19th and 20th, 2005, March 8th, 2005, and May 3, 2005. Mr. Lopez was crippled with anxiety about our first two meetings, since he was required to be heavily shackled, and to wear a stun belt. After the first two contact interviews, Mr. Lopez specifically asked that my next visit be behind glass. When I inquired why Mr. Lopez felt it necessary to be interviewed behind glass, he said that he felt more comfortable without the more personal contact afforded in a contact visit, although he could not be touched.

I. INTRODUCTION AND OVERVIEW

9. Sammy Lopez was an acutely impaired child who suffered from brain impairments. Sammy was born into a family with a history of mood disorders. Sammy was raised in a horrifically violent home where he was acutely traumatized and grew up without love or guidance in the most dangerous part of Phoenix. Sammy was taught to steal and use drugs by his only role models. This (and more) combined to make Sammy depressed, drug addicted and affectively disregulated. Sammy Lopez was the sixth of eight boys born into a volatile, chaotic, and unpredictable environment to cold, unaffectionate, abusive and distant caretakers who were ill-equipped to manage even their own lives. Sammy's father oscillated between controlling, brutal behaviors and depressed, abandoning ones. The profound grief and trauma Sammy's mother experienced, even before the brutality she experienced at the hands of Sammy's father, left her anxious, depressed and ill-equipped to raise eight boys. Sammy's upbringing left him vulnerable to a range of mental illnesses by disrupting important developmental experiences. Multigenerational trauma, substance abuse, anxiety, psychosis and mood disorders left Sammy and his family at an increased risk for developing similar disorders. These familial and genetically-derived disorders ensured that Sammy grew up in an environment where he did not receive the care-taking relationships necessary for healthy psychological and

neural development and thus, was unable to develop healthy coping mechanisms that might assuage the effects of mental illness.

10. Genetic heritage and acquired brain damage combined to leave Sammy with crippling mental impairments. As a pre-adolescent, Sammy exhibited clear diagnostic signs of acute trauma. This was not merely the product of neglect and mistreatment; it was also the effect of growing up in constant fear for his life and for the life of his mother. The chronic and horrific violence Sammy suffered, the physical and sexual assaults he witnessed against his mother, and endlessly repeated abandonments and ongoing neglect by his attachment figures left Sammy utterly unprotected from this recipe for developmental disaster. He has spent his entire life reaping the tragic seeds of his childhood.

11. After a brief stay in West Phoenix, Sammy's family moved to one of the most dangerous neighborhoods of Southwest Phoenix, where Sammy grew up. Southwest Phoenix is a racially segregated, crime-ridden, and violence plagued community reserved for the metal recycling industry, foundries, and populated almost exclusively by unspeakably impoverished Latino families. In this community, Sammy's family stood out as being extraordinarily poor.

12. Sammy's father, Arcadio was a cruel and vicious alcoholic who beat his wife and children regularly. As the years went on, Arcadio's violent and unpredictable rages worsened. Due to the constant danger and fear in his family life, Sammy's anticipatory stress response was activated nearly constantly burdening Sammy with all the attendant challenges of acute trauma: hyperarousal, hypervigilance, high anxiety, agitation, guardedness, paranoia, and sleeping difficulties. These symptoms became integral to Sammy's development and remain with him to this day. This fact is crucial to any effort to understand Sammy Lopez. Sammy's ability to respond appropriately to emotional and interpersonal stimuli was grossly impaired by the lack of modeling by his parents. This impairment, known as affective dysregulation, explains Sammy's inability to make and enact plans in the long term and sound decisions

spontaneously. Sammy Lopez was an acutely impaired child raised in fear, violence, and poverty.

13. Sammy's mother, Concha's, failure to protect her children and decision to stay with Arcadio in spite of the vicious attacks on her and their children sent the painful message to her children that their needs were unimportant and that somehow this is what they deserved, gives serious testament to her psychological imbalance. Sammy internalized the message that he was not worthy of his mother's love or protection, a message that destroyed his ability to make healthy everyday decisions.

14. As a young child, Sammy was plagued with fear and an inability to navigate his environment. This left him unable to regulate his responses or develop healthy coping mechanisms. A common symptom in traumatized children is night terrors. Night terrors occur when a child is startled from sleep, has agitated motor movements, is unresponsive and inconsolable, and shows signs of autonomic arousal such as rapid breathing, racing pulse, and sweating.[2] For many years, Sammy suffered from horrifying and intense night terrors; they became even worse after a particularly brutal beating from Arcadio. Often, Sammy's brothers and mother awoke in the middle of the night to find him crouched in the corner of the kitchen shaking with fear or bolting out the door running for his life. Sammy was difficult to reach in this state. When his family was able to awaken him and reintroduce him to reality, Sammy burst into tears.

15. Sammy and his family lived in profound conditions of neglect and poverty. When Sammy was seven years old it was noted that he suffered from frequent tooth pain, cavities, repetitive tonsillitis, and ear infections. Sammy's caretakers routinely failed to act on recommendations that he seek medical attention. In conversations today, Concha makes it clear that she lacked not only the financial resources to provide Sammy with the medical

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[2] Mash and Barkley (2003). Child Psychopathology. New York: The Guilford Press. 729.

attention he required; she also lacked the resources to recognize and meet all but the most basic needs of any of her eight sons.

16. When Sammy was seven years old, his mother gave birth to his sister Gloria, the first girl after nine boys. Sammy and his brothers adored their baby sister Gloria who was born with a birth defect. Sammy especially gravitated to his sister. He watched over her and attended to her as if she was the answer to all that was wrong with his family. Before her first birthday, Gloria died. A dark cloud hung over the family after the loss of Gloria. Not only had Sammy and his brothers lost their baby sister, they also lost their mother who fell into a deep, dark, depression. On top of this intense grief, Sammy's father took Gloria's death as an opportunity to abandon their family forever.

17. With Arcadio gone, Sammy and his brothers were still unable to relax. They had no way of knowing that Arcadio was gone for good. In Arcadio's absence, Sammy's eldest brother, Arcadio Jr. (Junior), became the man of the house. Learning from the only example he knew, Junior terrorized and beat his brothers as their father had done. Concha forced Junior to drop out of high school so he could help her raise the boys. Junior's frustration over this obligatory situation left him resentful and looking for someone to take it out on. Junior beat his brothers for minor infractions and reinforced the idea that home was not a safe place. Junior's terror only stopped when he married, moved out of the family home, and ultimately abandoned Sammy, too.

18. Within a year of Junior's marriage, Concha moved another man into the house, Pedro. Pedro was an insensitive and brutal alcoholic who never tried to be a father to Concha's boys except to beat them when something of his was missing. Pedro's abuse became sadistic when it came to Sammy whom he liked to terrorize with guns and threaten to kill.

19. Her own horrific childhood, multiple rapes, physical assaults, and coercive control by common law husbands left Sammy's mother uniquely unable to assume even the most basic responsibilities of parenthood and to care for Sammy in a manner that would have allowed

Sammy to confront his congenital and environmental misfortunes. To make matters worse, Sammy experienced difficulties in school. His frustration of not being able to keep up with his peers ultimately led to his withdrawal just after the ninth grade. Uneducated, unskilled, and traumatized, Sammy was left to fend for himself. Looking for a way to ease the pain Sammy felt he found relief in drugs and alcohol.

20. By age eighteen, Sammy was sniffing paint chronically and suffering severe consequences as a result. Sammy robbed neighborhood houses as a desperate attempt to obtain money for drugs. Sammy was homeless, living in cars, staying in the neighborhood park, and the local cemetery.

21. Sammy's friends and family have documented that he suffers a pathological response to alcohol, becoming unpredictable, irrational, agitated, and at times, psychotic. When Sammy drinks, even just a small amount of alcohol, he quickly and dramatically changes. Sammy's intoxication and addictive disease were the direct consequence of a devastating accumulation of risks that shaped his development and behavior. As a child, Sammy had to contend with multiple risks: family mental illness, abandonment, family addictive and neurological disease, poverty, and constant life- threatening danger at home and in his community. Each alone constituted a significant obstacle to healthy development, but in combination they resulted in devastating mental impairments.

22. The constant mortal terror in the Lopez home prevented Sammy from developing what many of us take for granted: the comforting certainty that the world is a safe and secure place and that our caretakers are ready, willing, and capable of providing us with safety and comfort. Emotions in Sammy's family were dangerous, erratic, and pathologically extreme. Like all children, Sammy and his brothers craved affection from their mother, which provides the sense of security needed for normal development. Suffering however, from her own severe psychological impairments, Concha could not provide her sons with the love and attention they so desperately needed.

II. BACKGROUND AND FAMILY HISTORY

Maternal Family

Concha's parents: Trauma, Poverty, and Isolation (Journey to the US)

23. Sammy's maternal grandmother was Concepcion Gonzalez. The story of her migration to the United States and her life in the United States shed light on Sammy's development because the pre and post migration stressors she survived molded the manner in which her daughter would rear Sammy. A true understanding of Sammy's development also requires an understanding of Concha's own abuse history, cultural beliefs, and genetic heritage and how they found expression in the manner in which she reared Sammy and his siblings. Her remarkably impoverished upbringing and her deep religious and cultural beliefs all shaped her responses to major stressors during the course of her life and are represented in her language, beliefs about family, and her self concepts. Concha's determination to keep her family together at all costs -- even when the price was chronic brutality at the hands of the children's father -- springs from her strong cultural understanding of a mother's role. It is important to note here that, due to her own trauma, neglect, and astonishingly humble expectations for her own life, Concha was unable to actualize those motherly obligations vis-à-vis her own children.

24. On his mother's side, Sammy is the progeny of a large extended Mexican American family who immigrated to the United States to escape the ravages of the Mexican Revolution. Sammy's mother, Concha (Corrina) Gonzales Villegas was born November 3, 1932, in Fabens, Texas to Conception [sic] Gonzales and Jose Villegas.[3] Concha's parents and siblings call her Corrina while Sammy and his siblings refer to their mother by her legal name, Concha. Concepcion (Sammy's maternal grandmother) was one of two children, Concepcion and her sister Cruz, who was seven years younger, born to Luis and Martina Gonzales, Sammy's

[3] Concha Villegas, Certificate of Birth, State of Texas, 11-3-32

maternal great grandparents.[4] Martina's mother Rose and her husband had at least two children, Diego and Martina.[5]

25. Concepcion's father (Sammy's maternal great grandfather) Luis Gonzales was killed around 1918 when Concepcion was just ten years old and Cruz was three years old.[6] Luis Gonzales owned a store in Torreón which is located in Central Mexico when he was snatched by Pancho Villa's bandits and shot and killed.[7] Luis' body was later discovered at the bottom of the river.[8] Luis' death filled his wife Martina with fear. Not knowing what else to do she fled her village and walked with her two daughters, Concepcion and Cruz, several hundred miles from Mexico to Texas.[9] Martina was not even cognizant of the dangers when she walked out of Mexico; she was just desperate to get somewhere safe.[10] The trip was extremely dangerous, especially for a lone woman and two small children and the timing of Martina's journey could not have been worse. Mexican revolutionaries, under the leadership of Pancho Villa, roamed northern Mexico attacking United States' border towns as well as Mexican communities. Twenty thousand United States Army troops were deployed under General Blackjack Pershing as "a punitive expeditionary force" into northern Mexico -- the exact area

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[4] Declaration of Angela Villegas Lopez, Signed 4-16-99

[5] Ibid

[6] Ibid

[7] Declaration of Luis Gonzales Villegas, Signed 4-8-99

[8] Declaration of Maria Villegas Estrada, Signed 4-16-99

[9] Declaration of Angela Villegas Lopez, Signed 4-16-99

[10] Declaration of Luis Gonzales Villegas, Signed 4-8-99

of Martina and her children's journey.[11] Another 100,000 National Guard troops were deployed along the border from Yuma to Brownsville. From 1916 to 1919, "several cross border raids in the West Texas Big Bend area were carried out by Mexicans associated with various factions of the Mexican Revolution."[12] The intense military effort to pacify the border led to violent retaliation, including the execution of fifteen Mexicans taken from a Texas village on the Rio Grande who were innocent bystanders.[13] This volatile and dangerous milieu offered the better, safer life to which Sammy's grandmother fled as a child. It was a harsh world in which survival was the most audacious dream possible. So Spartan was Concepcion's existence that it shaped the upbringing of Concepcion's posterity two generations down the road.

26. Martina and her daughters reached Fabens, Texas, exhausted, but alive. Fabens was a small border town filling quickly with other refugees from the turmoil of the Mexican Revolution. The final step in their journey, crossing the Rio Grande, was as perilous as hiding from troops and marauders. The woman and her two young daughters crossed the Rio Grande clinging only to a single wood.[14] Once they reached Fabens, Texas, Martina and Concepcion took any work they could find. Martina worked in a restaurant, washed clothes and cleaned for the farm workers, and worked in the cotton fields.[15] Although Concepcion was school age, survival demanded that she work instead of attending school.[16]

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[11] Dunn, Timothy J., The Militarization of the U.S. - Mexico Border 1978 - 1992. University of Texas at Austin, 1996, p. 10

[12] Ibid

[13] Dunn, Timothy J., The Militarization of the U.S. - Mexico Border 1978 - 1992. University of Texas at Austin, 1996

[14] Declaration of Angela Villegas Lopez, Signed 4-16-99

[15] Declaration of Luis Gonzales Villegas, Signed 4-8-99

[16] Ibid

27. Martina was eventually joined in Fabens by her mother Rosa (Sammy's great, great maternal grandmother), a traditional Mexican woman whose life reflected her deeply held religious beliefs. Rosa was a very conservative and devout Catholic woman who filled her house with religious shrines and went to church every day and prayed.[17] Martina was also extremely religious but because since she was forced to work she was unable to attend church as often as she would have liked.[18] Martina's demanding life took its toll on her and when she was only about fifty years old, she died.[19] Before her death, she saved her meager earnings and purchased a modest two room house near her daughter Concepcion's house.[20]

28. Concepcion met and married Jose Gonzales in Fabens at age sixteen; ; Jose was twenty-one years old.[21] Like Concepcion, Jose was a refugee from Mexico.They brought with them a culture in which work was tantamount to survival and the lowest job with the most meager pay was still an opportunity. Although Jose's father, Jesus was Spanish, he grew up in Cananea in the State of Senola, Mexico where he was raised by an Indian tribe.[22] Jose's mother, Maria, who was born blind, was a Mexican Indian. Jesus and Maria lived much of their married lives together in the "mountains of Chihuahua, Mexico."[23] Together, Jesus and Maria had at

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[17] Declaration of Angela Villegas Lopez, Signed 4-16-99

[18] Ibid

[19] Ibid

[20] Ibid

[21] Declaration of Luis Gonzales Villegas, Signed 4-8-99

[22] Ibid

[23] Ibid

least three children together: Jose, Maria, and Pablo.[24] Sammy's maternal aunt learned the family's paternal history as a small child:

> Jose Villegas was born in Mexico in 1902. His mother, Maria, was a blind Tarahumara Indian. He [Jose] was never able to go to school and he never learned to read or write. He signed his name with a triple X. He never learned to speak English though he lived in the United States for more than 75 years. He was taken from his family in Mexico by Pancho Villa when he was only 12 or 13 years old and forced to work as a cook for Villa's men. When he was older, he escaped from Pancho Villa and walked across the border into Texas.[25]

29. As a teenager, Jose was kidnaped by Pancho Villa's men. At age seventeen, Jose and another kidnaped boy narrowly escaped from the army of Pancho Villa and made it to the United States. The journey was arduous; they had no horses and could not start fires at night for fear they would be caught and executed by Pancho Villa's men. Eventually, Jose and his friend arrived safely in Texas.[26] Jose was one of many refugees from the Mexican Revolution who sought safety in Fabens. He found work near Fabens in the cotton fields where he met and married Concepcion.[27]

30. Jose and Concepcion's family had a sad and remarkably high rate of infant mortality, one-third of their children died at birth or during the first years of life. Two of Concepcion's pregnancies ended with stillborn infants and two survived birth only to die before their fifth birthday. Concepcion and her husband, Jose "raised a total of 17 children to adulthood: their 12 surviving children and three of their grandchildren, plus two of [Concha's] relatives,

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[24] ibid

[25] Declaration of Venancia Garcia, Signed, 4-8-99; page 2

[26] Declaration of Maria Villegas Estrada Signed 4-16-99

[27] Declaration of Angela Villegas Lopez, Signed 4-16-99

Jose and Stephen Vera."[28] Large families were essential for survival as smaller families struggled even more with fewer people to help earn money in the fields.[29]

31. For Jose and Concepcion every day was a battle to survive. Unable to make enough to live on working in the cotton fields of Texas, Jose and Concepcion had to join thousands of others in the migrant trail that moved west from Texas to California through Arizona. The young couple immediately had two sons between 1923 and 1924; one of their sons, Antonio, died when he was just two years old.

Concha's Childhood:

32. Sammy's mother, Concha, was the sixth child born to Jose and Concepcion Villegas. Concha was born with a twin sister, Julia, who died shortly after birth.[30] Like many children born of undernourished parents, Concha was born and grew up with severe physical challenges. A problem with her leg which kept her from walking until she was four years old. From the age of one to four years old, Concha moved by dragging her body across the floor with her arms and hands.[31] Their community was too poor to support a physician, nurse, or medical clinic, and, if medical services would have been available, the family was too poor to pay for medical care. Jose, Concha's father, relied on home remedies and Indian folk medicine to treat his daughter. Jose rubbed Concha's legs with the inside lining of egg shells and then covered her legs in the hot Texas sand; Jose believed this would make Concha's legs stronger.[32] Without the ability to walk, Concha was completely vulnerable and at the mercy of others. A

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[28] Declaration of Venancia Villegas Garcia, Signed, 4-8-99

[29] Declaration of Petra Villegas, Signed 4-8-99

[30] Declaration of Angela Villegas Lopez, Signed 4-16-99

[31] Declaration of Concha Villegas, Signed 2-11-06

[32] Ibid

testament to the dire consequences of this severe impairment came in Concha's toddlerhood, when she was attacked by a neighborhood dog[33]and lay down on the ground, helpless and unable flee or defend herself while the dog bit her. Concha still has the scars from this attack.[34]

33. Although Concha's family was impoverished, they informally adopted other children from their extended family, who were either abandoned or orphaned. When Concha was about three years old their grandmother took in two of their grandmother's cousins who were orphaned in Mexico, Jose and Stephen Vera.[35] Jose and Stephen Vera had no place else to go, so Concha's grandmother, Martina, allowed them to come and live with her around 1935; Jose was seven years old and Stephen was ten.[36] Jose and Stephen immediately became part of the family and grew up with Concha and her siblings. Eventually, the two boys moved in with Concha's family when Martina was no longer able to raise them.[37]

34. After the family returned to Fabens, Jose found work with the railroad in El Paso County where he ended up working for over thirty-five years before retiring.[38] By all accounts, Jose worked extremely hard and had a decent career with the railroad although he was never made a foreman because his race and his lack of education hindered his abilities to move up in the company.[39]

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[33] Ibid

[34] Ibid

[35] Declaration of Luis Gonzales Villegas

[36] Declaration of Angela Villegas Lopez, Signed 4-16-99

[37] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[38] Declaration of Petra Gonzales Villegas, Signed 4-8-99

[39] Ibid

35. The railroad company practiced segregation just as the rest of the country. They provided segregated housing for Mexican workers in a remote settlement of rough shoddy structures known as Sierra Blanca, located about forty miles from Fabens, Texas. The railroad section housing was barely habitable, and Sierra Blanca was not an actual town but instead just a name given to a work camp in an unincorporated area of El Paso County.[40] In selecting the site and building the housing for Mexican railroad families, the railroad made no provision for schools. Sierra Blanca did not have a school or school buses in which to transport children to the nearest school. During the school year, children in the Villegas family stayed in Fabens with their great grandmother Rosa so they could go to school.[41] The younger children stayed with their parents, Jose and Concepcion, in Sierra Blanca. On weekends they all came together and went to Fabens where their father worked to build a home for his family.[42]

36. Life in Sierra Blanca was stifling and it gave Concha her first exposure to a dynamic she would later replicate in her own family: isolation. Concha's sister, Angela, described how desolate their day to day experience was:

> There was nothing in the railroad section housing other than the flat-roofed buildings we lived in. There was not even a phone. Because there were no stores and nowhere else to buy or grow food, we had to stock up with food from Fabens on weekends or go hungry during the week. We could only get a ride to Fabens on the weekends, so it was hard to get fresh vegetables and we ate mostly canned vegetables like peas, corn and beans.[43]

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[40] Declaration of Angela Villegas Lopez, Signed 4-16-99

[41] Ibid

[42] Ibid

[43] Ibid, Page 5

37. Company housing was crowded, unsanitary, and afforded little privacy. The railroad company assigned rooms based on how many people were in each worker's family.[44] The building where Concha's family lived was equipped with eight rooms. Two of the rooms were given to Luis, Concepcion, Luis Jr., Angela, Alfredo, Josephina, Concha and the youngest baby Maria. The buildings had no water inside, and Concha's family had to use water brought by a train and then stored in a well.[45] Only one outhouse was provided for the entire community of workers and their families, and often people had to go into the woods.[46] Section housing did not have any electricity so the family tried to keep "ice in a chest that doubled as a table. But the ice did not last very long in the heat, and trains only brought ice every two or three weeks to the section housing."[47] Concepcion tried to keep her children warm in the cold desert winters by burning wood in a wash tub filled with sand. When the sand was warm with hot ashes, Concepcion brought the tub inside. Unfortunately the heat lasted for just a short while.[48]

38. Concha and her family lived in the railroad section housing until about 1939, when Concha was seven years old.[49] The family was transferred to another town because the unsanitary conditions of section housing nearly killed Concha's father.[50] Jose had to be hospitalized because of a bad case of food poisoning and when he was released from the

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[44] Ibid

[45] Ibid

[46] Ibid

[47] Ibid

[48] Ibid

[49] Ibid

[50] Ibid

hospital, the railroad company transferred him to Fabens where the family was able to move into the house Jose built.[51]

39. Although a vast improvement over Sierra Blanca, their home in Fabens was very modest and typical for poor families in Fabens. The major difference in their new home was that they had running water, although they still did not have an indoor bathroom. Years later the family would get gas and electricity but Concha's mother feared high bills and so never used their fan or their gas stove.[52]

40. Fabens was a barren town filled with people living in poverty. The majority of the town worked in the cotton fields, others worked on farms, and a few were lucky enough to work for the railroad.[53] Life was full of hard work and struggle and there was no time or reason to celebrate or relax. The Villegas family did not celebrate any of the holidays or any of their birthdays as there was no time or money for such frivolous things like presents or parties.[54]

41. The routine of daily life did not change much after the family moved to Fabens. The entire family, Jose, Concepcion, Concha, and all of Concha's siblings, continued to work hard as field laborers in order to sustain themselves. Work and survival came first, before education or any other consideration. Concha and her siblings were forced to work in the fields full time after they quit school. Work in the fields was hard and everyone in the family was expected to contribute:

> All my brothers and sisters and I picked cotton after school when we lived in Fabens. My mother picked cotton all day. She brought my brothers and sisters too young for school with her to the fields. They picked some, and they napped

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[51] Ibid

[52] Ibid

[53] Ibid

[54] Ibid

> beside the field. Those of us children in school came to the field right after we got out of class and picked cotton for a couple of hours until we all went home together for dinner. In the summer time, we all picked cotton all day. We chopped the cotton and weeded the rows with hoes. We chopped cotton May through September and picked cotton September through December. We wore big baggy clothing to protect us from the cotton and the sun and the bug spray. Little bi-planes sprayed the cotton fields for bugs. They flew early in the morning and in the evening when the wind was low.[55]

Concha hated working in the fields but she had no choice:

> It was always hard for my family to stay alive. I started working and going to school around the same time. Every day, me and my brothers and sisters went home right after school to change into our work clothes. Then we went to the fields, and we picked cotton until the sun went down. The work was hard, hot, dirty, and it hurt. We tried to hide ourselves from the sun and the heat by wearing rags and hats, but it didn't work. It was just too hot in the fields. We wrapped our hands and arms in rags and sometimes gloves so the cotton plants didn't cut us. That didn't work either. Our legs, arms, and hands were always cut and scarred from the cotton plants. If we forgot our gloves or something to cover our head, my mother pulled our ears and yelled at us.[56]

42. Agricultural workers were not provided with any type of protection from the hazards they faced. Pesticides were freely sprayed from the air on workers below without regard for health consequences. Petra, Concha's youngest sister, described the dangerous working conditions:

> We could see small planes dropping pesticides on the fields beside us as we worked, and we drank water from the big open barrels set out by the owners of the field. I often wonder how much our health has been affected by drinking that water that had been freely exposed to the pesticide sprays. Still, the extra money we made was important to the family, so we had to do it. When were little, we stopped and took naps on the side of the fields. My mother tied empty bean bags around our waists for us to stuff the cotton into. When we were very small, she

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[55] Declaration of Angela Villegas Lopez, Signed 4-16-99, Page 7

[56] Declaration of Concha Villegas, Signed 2-11-06, Page 6-7

had to make smaller bags for us so we were able to carry them.[57]

43. Later, when Concha was forced to move to Phoenix she desperately tried to find a good job but found nothing but work in the agricultural fields where she was further exposed to dangerous neurotoxins. [58] Pesticides covered plants and left them with a dry residue that showered her and other workers whenever they picked or disturbed the crops. Some pickers and field workers wore bandannas over their mouths, in order to avoid breathing the poisonous residue. The extreme heat of working under Arizona's sun discouraged most workers from covering their mouths. Concha resigned herself to inhaling the foreign substances that killed bees, spiders, mosquitoes, flies, birds, snakes, and ground animals that were exposed. By the time Concha was in Phoenix and pregnant with Sammy and his brothers, work at the risk of health was an easy choice and one that was validated by her childhood experience.

44. The Fabens' school system was inadequate by any definition and its policy of segregation restricted Latino children's ability to learn and closed the door to opportunity. Schools were segregated and Concha and her siblings were forced to attend a Mexican-only school. Even the few black children in town were required to attend their own school to keep them separated from the white children.[59] School was especially difficult for Concha because she did not understand English. To make matters even worse, her teacher only spoke English in the classroom.[60] Since Concha's family spoke only Spanish at home, it was a long time before Concha understood what her teachers were saying.[61] When Concha eventually learned some

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[57] Declaration of Petra Gonzales Villegas, Signed 4-8-99, Page 3-4

[58] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[59] Declaration of Concha Villegas, Signed 2-11-06

[60] Ibid

[61] Ibid

English, she was not allowed to speak it at home because it sent Concha's mother into a rage and she didn't want to be hit.[62] Afraid of what might come out of her mouth, Concha tried not to speak at all.

45. Concha's older sister Angela dropped out of school after the fourth grade and went to work in the field full time. Even though Angela was allowed to attend school, field work made her too exhausted and unable to keep up with her school work.[63] Luis, Concha's oldest brother, also withdrew from school because of work and even though he made it to the fourth grade, he "never learned to read or write in English or Spanish."[64]

46. On a few occasions, Concha's father was able to set aside enough money to return home to the mountains of Mexico to visit his family.[65] The trip was a long and strenuous excursion that required travel by train and horseback which made it difficult for children to travel.[66] Committed to seeing his family, Jose took some of his children with him on a few occasions.[67]

47. Concha's paternal grandmother Maria was a Tarahumara Indian who was born blind.[68] Concha and her sisters were fascinated by the Indian village of their grandmother, the new language people in the village spoke that the sisters could not understand, and the

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[62] Ibid

[63] Declaration of Angela Villegas Lopez, Signed 4-16-99

[64] Declaration of Luis Gonzales Villegas, Singed 4-8-99

[65] Declaration of Petra Gonzales Villegas, Signed 4-8-99

[66] Declaration of Angela Villegas Lopez, Signed 4-16-99

[67] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[68] Declaration of Maria Villegas Estrada, Signed 4-16-99

different kind of dress men and women wore. Maria supported herself by trading the blankets and baskets she made.[69]

48. Unlike Concepcion, Jose was a warm, affectionate, and emotional man who did the best he could to ensure his children had their basic needs met.[70] While Jose appreciated and enjoyed spending time with his children, he did nothing to protect them from their mother's unrelenting abuse.[71]

49. Concha's mother, Concepcion, on the other hand, created a rigid, controlled environment where children were unable to thrive. Concepcion was the authoritarian of the household and unlike Jose, she was harsh, unloving, and, at times, cruel. Life was bleak for Concha and her siblings and the future offered little relief. Because Concepcion was emotionally disabled, she kept Concha and her siblings isolated from the other children in the community. This alienation did not allow Concha to develop healthy relationships and instilled in her the notion that she was alone and unwanted.

50. Concepcion beat her children just about every day and when the children turned to their father Jose for protection, he offered them none.[72] Concepcion imposed painful ritualistic kinds of punishment. She punished her sons by forcing them to kneel on the floor and hold bricks in the air. If they dropped the brick, Concepcion hit them.[73] Concepcion did not allow her child to engage in any normal childhood comfort-seeking behaviors like sucking their thumbs. If Concepcion caught a child sucking their thumb she clamped a clothes pin on their

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[69] Ibid

[70] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[71] Ibid

[72] Ibid

[73] Declaration of Angela Villegas Lopez, Signed 4-16-99

lips.[74] Indeed, some of her punishments were sadistic and life-threatening. Concepcion made her children stand outside during the blazing hot Texas summers with no water for hours at a time.[75] During one of these ritualistic punishments, a neighbor witnessed Concha and her sister standing outside and noticed that Concha's nose was bleeding from the heat. The neighbor tried to intervene by telling Concepcion that she was going to give her girls sunstroke; Concepcion ignored the neighbor's concerns and warned her to stay out of her affairs.[76]

51. Concepcion punished the children for unintentional acts, such as dropping a dish. When a dish was broken, Concepcion used her hand or a belt to hit the child and then forced them to finish their dinner off the broken dishes with complete disregard for their safety.[77] Concepcion's violent temper flared if she felt her children expressed any kind of perceived weakness.[78] She enforced an impossible code of conduct and the children felt as if they were in the military. Concepcion demanded perfection and did not tolerate mistakes from her children. She checked each chore that the children performed and if it wasn't done to her liking, she whipped them with a belt.[79] Concepcion also required neatness in her children's appearance and if anything was out of place, the children were beaten with either or a belt or a stick (whichever Concepcion could get her hands on first) until they were red all over from the marks she left.[80]

Venancia described some of their mother's impractical rules:

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[74] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[75] Declaration of Angela Villegas Lopez, Signed 4-16-99

[76] Declaration of Maria Villegas Estrada, Signed 4-16-99

[77] Declaration of Angela Villegas Lopez, Signed 4-16-99

[78] Ibid

[79] Declaration of Concha Villegas, Signed 2-11-06

[80] Declaration of Venancia Villegas Garcia, Signed 4-8-99

> One of her rules was be very neat. The girls had to curl their hair and we all had to shine our shoes every night. Each day before we left the house, we had to stand in line for inspection. If one of us had a tear in our clothing, if our socks needed darning or if our shoes were not shined, she hit us. My sister Augustina switched socks with me or one of our other sisters a couple of times, so we would get the beating instead of her.[81]

52. Concha and her siblings were also punished for wrong-doing by their siblings because Concepcion believed that they were all responsible for each others actions.[82] When one of the younger children did anything wrong, Concepcion punished the older siblings too.[83] Older children learned to model their mother's behavior and punished their younger siblings in hopes of keeping everyone out of trouble.[84]

53. Concepcion was a severely unhappy and unaffectionate woman who did not provide her children with any love or positive attention. Never once did she hug or kiss her children or say "I love you."[85] Concepcion's total lack of affection was pathological and adversely affected her children who, as they grew older, recognized they themselves had no idea how to show love or affection.[86] Concepcion never learned to change her behavior and remained a cold woman who could not even provide her grandchildren and great-grandchildren any kind of love.[87]

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[81] Declaration of Venancia Villegas Garcia, Signed, 4-8-99, Page 4

[82] Declaration of Maria Villegas Estrada, Signed 4-16-99

[83] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[84] Declaration of Maria Villegas Estrada, Signed 4-16-99

[85] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[86] Declaration of Maria Villegas Estrada, Signed 4-16-99

[87] Ibid

54. Because Concha's home environment was so unnaturally restrictive and limited, Concha was not provided the opportunity to learn to think for herself or to learn how to solve problems effectively. These limitations would become even more apparent when Concha was faced with rearing her own children years later. Concha's childhood development was dictated by events over which she had no control. Inequalities existed in all spheres of life for Mexican children in rural Texas where she was born and raised. Denial of fundamental civil rights guaranteed poverty, substandard education, inadequate medical care, and high infant mortality -- all realities of Concha's life. The harshness of the environment outside her home was compounded by the cruelties within her home. The lessons Concha learned in her formative years shaped the way she reared her own children. Concha responded to the absolute control her mother exercised over her by withdrawing and becoming a shy child who barely spoke.[88]

Concha's Rape and Exile

55. In Concha's family, threats of interpersonal violence created an environment in which there was no protection for the physical or psychological integrity of the children. Adult perpetrators were permitted to act impulsively and with impunity in assaulting and threatening the children with annihilation.

56. Mexican culture defined Concha's concepts of the world in which she lived. Her daily routine reflected her unquestioning acceptance of traditional beliefs about a distinct family system, the roles of each family member, the roles of women, and the relationships with extended family. When Concha was just seventeen years old she was raped by a close family friend who was considered part of the family. Her response to this traumatic event was shaped by her cultural beliefs. As devastating and threatening as rape is for any person, it was especially traumatic to Concha because of her belief system.

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[88] Declaration of Angela Villegas Lopez, Signed 4-16-99

57. At the tender age of seventeen, Concha, who was a virgin at the time, was raped by Jesus Vasquez and became pregnant. Jesus Vasquez and his family were exceptionally close with Concha's family. Concha described the way Jesus lured her from school:

> He was like an uncle to me. He was about thirty-five years old at the time, and he came to my high school one day. He told the school people that I had to go home right away because my mother had been hurt. I went with Jesus in his car, but he didn't drive to my house. When I asked Jesus where he was taking me, he yelled at me and told me to shut up. He took me out to the cemetery. Then he tied me up like an animal and raped me. I was a very young girl and a virgin, and I didn't know about sex when Jesus Vasquez violated me in this horrible way.[89]

58. Concha was mortified by the experience; she felt ashamed and humiliated and wondered what she had done to cause such a thing.[90] With no one to confide in, Concha internalized what happened to her as being her fault. Compounding the traumatic event, Concha's body started to change and she experienced morning sickness. Not knowing anything about sex, Concha did not think it was possible to get pregnant without being married. When Concha's mother recognized the symptoms of pregnancy, she became enraged.[91] Concepcion believed that Concha dishonored the family and, as Concha recalls, "she hit me over and over with a belt. She said I was a stupid, selfish girl, and that I would bring God's punishment to our family."[92]

59. Concha's sister Angela provided more insight into how deeply shamed and enraged Concepcion was at Concha for being raped:

> After [Concha], Maria, and my father returned from Mexico, I came home one day to find my mother hitting [Concha]. Mother was really angry, and I asked her

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[89] Declaration of Concha Villegas, Signed 2-11-06, Page 7-8

[90] Declaration of Concha Villegas, Signed 2-11-06

[91] Ibid

[92] Ibid

> why. She said that [Concha] was pregnant. After that, my mother made [Concha] stay home so that no one would see that she was pregnant. I felt so bad for [Concha], she was so scared and unhappy. She told Jesus Vasquez that she was pregnant. He denied the baby was his, and he never gave [Concha] or his son a penny.[93]

60. Concha believed she had to marry Jesus because of the pregnancy but Concha's mother refused to allow this to happen — not because Jesus raped her, but because he was too closely related to the family. Concha's mother told her God and Church would not condone such an incestuous union. Once Concha started showing, Concepcion forced her to quit school and banished her to the back room of the house all day so no one could see her.[94]

61. Soon after Concha had her baby, she was exiled from the home by her mother. Jose and Concepcion forbade Concha to take her baby Roberto with her and forced her to leave her child with them. Concepcion raised Roberto as if he were her own and even breastfed him along with her own daughter, Petra.[95] Concha experienced profound sadness at the loss of her son, Roberto. Roberto grew up believing that his grandparents were really his parents and that his mother was his sister.[96] It wasn't until Concha came to visit when Roberto was about ten years old that Roberto learned that Concha was really his mother. Roberto was shocked by this admission and for a long time remained confused and disturbed.[97] With nowhere else to go, Concha went to Phoenix, where her aunt lived, in search of work. Concha's

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[93] Declaration of Angela Villegas Lopez, Signed 4-16-99, Page 12-13

[94] Declaration of Luis Gonzales Villegas, Signed 4-8-99

[95] Declaration of Venancia Villegas Garcia, Page 9; Roberto Villegas Birth Certificate, 11-9-50

[96] Declaration of Luis Gonzales Villegas, 4-8-99

[97] Ibid

exile from the family separated her from her family to this day. It would be years before the family would see Concha again.[98]

62. The trauma of the rape alone was a life-altering experience for Concha. Combined with pregnancy, the loss of her first born, and exile from her family, the rape and its aftermath were devastating for Concha. Forced to leave her family home in Fabens, she lost her sense of control, connection, and meaning. The rape left Concha fearful, anxious, and helpless. Concepcion's brutal response to Concha's traumatic event allowed Concha to further internalize the belief that somehow she was to blame, that the rape was her fault which filled Concha with feelings of shame. Shame can attack a person's perception of not only their actions but for individuals with mental illness, their entire self. The effects of shame can be quite debilitating as a person interprets everything about themselves in a negative light.[99] Concha did not have any of the support mechanisms or adaptive coping skills in place to allow herself to heal. Concha's sense of connection to her family was destroyed and she never again relied on them to help her survive any crisis, regardless how life-threatening it was.

Paternal Family

63. Because Sammy's father played a critical role in his life as a genetic contributor, caretaker, attachment figure, and role model, it is important to understand the patterns of behavior that Sammy learned from his father's relationships not just with Sammy but with all members of the family. Sammy's father created an environment filled with unrelenting and unpredictable chaos, mood swings, and stressful events that placed his children at risk for developing clinically significant mental illness and possibly alterations in brain function.

64. As is often the case in mentally ill and severely dysfunctional people, his family history is shrouded in secrecy and thus little is known about Arcadio. Arcadio was a

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[98] Ibid

[99] Lewis, H.B. (1971). *Shame and guilt in neurosis.* New York: International University Press.

secretive man who refused to disclose any information about his family of origin or his background. Children in the family knew nothing about Arcadio.[100] The oldest son, Junior, asked his mother about his father's family once but Concha could not provide any information.[101] The little that is known has come from records obtained since his death.

65. Sammy's father, Arcadio Verdugo Lopez, was born on January 12th, 1927 in Tombstone, Arizona.[102] Concha met Arcadio working in the fields in Arizona. Although she and Arcadio were never married, they had eight sons and one daughter.[103] It is believed that Arcadio never married Concha because he was already married to a woman in Mexico.[104] Ultimately, Arcadio abandoned Concha and their children with nothing, just as he had done to his wife in Mexico.[105]

66. After Arcadio Lopez finally abandoned his family for good, he moved to Tulare County, California, where he lived for at least ten years. Arcadio was alcoholic who ultimately drank himself to death. As discussed later in this declaration, Arcadio was picked up numerous times for public drunkenness in Tulare County. In June 1983, at the age of fifty-six, Arcadio was found dead from liver failure due to cirrhosis, lying in a field

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[100] Declaration of Arcardio Lopez, Signed 6-17-99

[101] Ibid

[102] Coroner's Autopsy Report re: Arcadio Verdugo Lopez. Tulare County Coroner Case No. 83-6-414-58. (1983)

[103] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[104] Declaration of Luis Gonzales Villegas, Signed 4-8-99

[105] Ibid

surrounded by empty beer and wine bottles.[106] His family had not heard from him in more than a decade.[107]

Extended Family: Mental Illness and Addictive Disease

67. The prevalence of alcoholism and drug addiction in Sammy's immediate and extended family is remarkable and widespread. Alcoholism contributed to the chronic and pervasive interpersonal violence, poverty, chaos, and rejection that characterized Sammy's early life and potentiated other stressors he faced.

68. There is strong presumptive evidence that certain mental disorders such as schizophrenia, affective mood disorders, and addictive diseases have a genetic component. "The inherited factor in a disease such as depression may be a vulnerability to depression, which might in turn require other influences, such as environmental factors, to allow expression of the disorder."[108] In Sammy's family, his father, mother, many of his brothers, and numerous maternal relatives display symptoms of depression, alcoholism, and post traumatic stress disorder that have significantly impaired their ability to function.

69. Jose Vera, Sammy's maternal adoptive uncle, suffered from a mental disorder and displayed symptoms as early as childhood. Jose was described as a "strange child" who was socially withdrawn and quiet.[109] As a child Jose appeared to dissociate as he sat at the window for long periods of time as if he was "in some kind of trance, like he was in another world."[110] Concha's brother Luis remembered that Jose always seemed depressed. When Jose was little,

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[106] Coroner's Autopsy Report re: Arcadio Verdugo Lopez. Tulare County Coroner Case No. 83-6-414-58. (1983)

[107] Ibid

[108] Sophia Vinogradov, Editor, Treating Schizophrenia, San Francisco: Jossey-Bass Publishers, p. 13

[109] Declaration of Angela Gonzales Villegas Lopez, Signed 4-16-99

[110] Declaration of Petra Villegas, Signed 4-8-99

Luis blamed his odd behavior and depression on losing his parents at such a young age. Jose's depression and mental illness became more pronounced as he grew older.[111] As an adult Jose began exhibiting paranoid behaviors, like hiding "all his money in a suitcase."[112] Police picked him up in Waco, Texas and ended up committing him to a mental institution. Eventually, Jose was hospitalized in Sacramento, California.[113] Jose was delusional and paranoid and could not even trust his own adoptive sister Venancia with whom he had grown up, or anyone at the social service agency who were trying to help him. Jose did not believe that Venancia was who she said, a disorder called Capgras Syndrome. In an attempt to alleviate his suspicions, Venancia, showed Jose her identification, but still Jose did not believe her. Venancia was later contacted by social services and was asked to serve as Jose's guardian but she declined, explaining that she "wanted to help Jose, but he was too far gone" for her to deal with.[114] Sammy's maternal aunt, Maria, led what appeared to be the most stable life of any of her family. Maria never set foot out of Fabens and appeared to lead a happy life.[115] To everyone's shock, Maria later suffered a "nervous breakdown."[116]

70. The relationship between chronic exposure to trauma, early childhood neglect, and alcoholism is clearly demonstrated in Concha's family. Several of Sammy's maternal uncles, aunts, cousins, as well as his brothers, have histories of alcoholism, and their intoxication is frequently accompanied by bizarre changes in their behavior.

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[111] Declaration of Luis Gonzales Villegas, Signed 4-8-99

[112] Ibid

[113] Ibid

[114] Declaration of Angela Villegas Lopez, Signed 4-16-99

[115] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[116] Ibid

71. Sammy's half-brother Roberto, who was taken from his mother and reared by his mother's parents as their own, suffered from mental illness and alcoholism. Venancia described Roberto's behavior:

> As for Roberto, [Concha's] son who grew up in our home in Fabens, he and his family have many psychological problems. He became a heavy drinker, too, and is uncontrollable and violent when he drinks. He married Agustina Cortez, and they had two children, Roberto, Jr. and Emily. Roberto beat his wife so badly when he drank she eventually left him. While drinking, Roberto once beat up my husband Henry and another time beat my son Harvey so bad he had to go to the hospital. Roberto raped his daughter Emily and went to prison for it.[117]

72. Sammy's maternal uncle, Jose Gonzales, was an unpredictable alcoholic who turned into a different person when he drank.[118] Sammy's cousin, Ruben, is an alcoholic who drinks to help him to deal with pressure.[119] Ruben's brother, Florencio, has also suffered with alcoholism and both have been convicted of drunk driving.[120] Another cousin, Stephen who is Petra's oldest son, has a temperament changes when he drinks; he becomes loud and his violent temper flares.[121] Maria's oldest son, Bobby, has also struggled with alcoholism. [122]

73. Concha's brother, Ricardo, was an alcoholic who was a nice decent man when he wasn't drinking, but when he was drunk, he turned crazy.[123] He became suspicious and

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[117] Ibid

[118] Declaration of Petra Gonzales Villegas, Signed 4-8-99

[119] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[120] Declaration of Angela Villegas Lopez, Signed 4-16-99

[121] Declaration of Venancia Villegas Garcia, Signed 4-8-99

[122] Declaration of Petra Gonzales Villegas, Signed 4-8-99

[123] Declaration of Venancia Villegas Garcia, Signed 4-8-99

paranoid and worried that people were out to hurt him. Ricardo confided in his sister that he "heard voices when he drank."[124] Once, one of Ricardo's sisters, Maria, heard odd noises coming from the bathroom and realized it was Ricardo. He sounded "like someone shivering and breathing really hard because they are very, very cold."[125] Maria convinced Ricardo to let her into the bathroom. She described what she saw:

> When he opened the door he was shaking all over. He said he really needed a beer, and I realized that he was going through withdrawal. The last time I saw Ricardo he was in his 30s. This was in the mid 1970s. He was still drinking even though it was making him throw up blood. It was not long after that Ricardo was shot and killed in a bar in California.[126]

74. Although alcoholism is significantly less frequent in Latino women than in other ethnic groups of women, at least two of Sammy's maternal aunts have addictive diseases. Sammy's aunt Maria and her friends and neighbors have witnessed their sister, Augustina, purchasing drugs on many occasions. Despite the fact that Augustina has been arrested for being drunk in public, she is still unable to stop using drugs.[127] Sammy's aunt, Josephina, suffered from liver disease and died as a result. Venancia did not think Josephina was a heavy drinker in comparison to the rest of her family.[128]

75. Mental impairments in the family increased the likelihood of addictive disease, and many family members attempted to self-medicate with alcohol and drugs. Efforts

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[124] Ibid; Declaration of Luis Gonzales Villegas, Signed 4-8-99

[125] Declaration of Maria Villegas Estrada, Signed 4-16-99

[126] Ibid

[127] Ibid

[128] Declaration of Venancia Gonzales Villegas Garcia, Signed 4-8-99

to self medicate were obfuscated by Latino cultural beliefs about drinking. Concha's sister described community attitudes about alcohol use:

> All the men were expected to drink. The men all drank a lot, too. I think that was a machismo thing. The men in Fabens either worked in the fields or for the railroad. They depended on their physical strength to support themselves and their families. No man wanted to seem too weak to drink as much as everyone else.[129]

76. Although culture plays an important role in the family's use of alcohol, it by no means accounts for the degree and severity of addiction demonstrated in many of Sammy's family members. Most members of the family are tolerant of drinking to some extent, but recognize the destructive role that alcoholism has played in many of their relatives' lives.

Immediate Family

77. Sammy Lopez was born on June 30th, 1962, in Peoria, Arizona; he was the seventh child born to Concha Villegas[130] and the sixth child born to Concha Villegas and Arcadio Lopez. Concha was a thirty-one year old housewife and Arcadio a thirty-four year old farm laborer.[131] As I stated above, Arcadio and Concha were not married and had met nine years earlier while working in the fields.

78. Concha was one of many farm workers Arcadio shuttled back and forth for their employer to agricultural fields surrounding Phoenix. One day, while driving her home from the fields, Arcadio, offered to drop Concha off at her door.[132] Concha thought his offer was strange because he did not take anyone else all the way home. Concha was not comfortable with

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[129] Declaration of Maria Gonzales Villegas Estrada, Signed 4-16-99

[130] Concha Villegas's first son, Roberto Villegas, had a different father than Arcadio Lopez. Robert Villegas Vital Records, Birth Certificate, 11-9-50.

[131] Sammy Lopez, Vital Records, Certificate of Birth, State of Arizona, 6-30-62.

[132] Declaration of Concha Villegas, Signed 2-11-06

a strange man knowing where she lived but she also did not know how to say no. Arcadio continued to take Concha directly to her building every day.[133]

79. One day, out of the blue, Arcadio showed up at her doorstep with all his belongings and announced that he was going to be staying with her. Concha did not want Arcadio anywhere near her but she felt powerless against the demands of a man and again was unable to say no. Frustrated, Concha could not comprehend how Arcadio could just move into her apartment without an invitation. But the profound trauma Concha had experienced throughout her life left her unable to protect herself from Arcadio's unwanted presence.[134]

80. Life with Arcadio was forceful, violent, and chaotic. Immediately after Arcadio moved into Concha's home, he began to rape her and continued to rape her at will during their entire relationship.[135] When Concha tried to fend Arcadio off, Arcadio beat her until she could not fight anymore.[136] The earlier rape Concha suffered contributed to her intense desire to avoid sexual activity and compounded the feelings of powerlessness and helplessness she felt under Arcadio's control.

81. Concha became pregnant quickly and was overwhelmed with despair, but again was unable to take any independent action, either for herself or later, for her children. "When I found out I was going to have [Arcadio's] baby, I just wanted to cry. I felt so hopeless. It hurt to know I was going to have a child from another man who forced me and took advantage of me."[137] Concha grew despondent when she began to realize that that as long as Arcadio lived

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[133] Ibid

[134] Ibid

[135] Ibid

[136] Ibid

[137] Declaration of Concha Villegas, Signed 2-11-06, Page 12

with her, she would be raped and continue to have more children.[138] Concha had nine children with Arcadio, one after the next without adequate time to recover physically or mentally from the toll of rape, pregnancy and childbirth: Arcardio, Jr., (Junior), born 8/30/54;[139] Eddie, born 11/25/55;[140] Frank, born 8/22/57;[141] Esteve (Steve), born 10/24/58;[142] Jimmy, born in 1960;[143] Sammy, born 6/30/62;[144] Jose (Joe), born 1/6/65;[145] George, born 6/16/66;[146] and Gloria, born 12/9/70.[147] Concha and Arcadio's relationship ended only when Arcadio finally abandoned the family for good sixteen years after they met.

III. EMOTIONAL/ SOCIAL/PSYCHOLOGICAL DEVELOPMENT

Life in Phoenix: Poverty, Isolation, and Racism

82. In the early years of their union, Concha, Arcadio, and their children lived in a tiny shack at Arena Ranch in Tolleson where Concha and Arcadio worked. Their house had

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[138] Declaration of Concha Villegas, Signed 2-11-06

[139] Declaration of Arcadio Lopez, Signed 6-17-99

[140] Eddie Lopez, Employment Records, National Metals Company, Page 161

[141] Declaration of Frank Lopez, Signed 2-11-06

[142] Esteve Villegas Lopez, Vital Records, Certificate of Birth, 10-24-58.

[143] Declaration of Jimmy Lopez, Signed 2-10-06

[144] Sammy Lopez, Vital Records, Certificate of Birth, State of Arizona, 6-30-62

[145] Jose Lopez, Vital Records, Certificate of Birth, State of Arizona, 1-6-65

[146] George Lopez, Vital Records, Certificate of Birth, State of Arizona, 6-16-66

[147] Gloria Villegas, Vital Records, Certificate of Birth, State of Arizona, 12-9-70

no bathrooms or running water, and Concha had to cook all their meals outside.[148] The worst part of living at the ranch was dealing with the scorpions. The family slept on the floor and in the mornings they woke to find scorpions crawling all over.[149] After the ranch, the family moved to Glendale for a short while, and then eventually ended up in Southwest Phoenix.

83. Sammy's family lived in the section of Phoenix that was reserved for the metal recycling industry, foundries, and impoverished Latino families. Housing codes were not enforced, and thousands of poor Latino families crowded into inexpensive, unsafe housing that merely provided some protection from the elements. Sammy was unable to participate in normal childhood activities that teach children fundamental lessons about themselves, their world, and relationships with others. Even though Sammy lived in an impoverished neighborhood, his family's extreme poverty set them apart from other children in the neighborhood and left him and his family isolated.

84. Early and chronic poverty has the worst effects on child development. Chronic poverty is dehumanizing as it damages parents' capacities for maintaining any kind of hope. These feelings tend to undermine a parent's sense of their lives as economic constraints limit choices about where they can live, how to feed and clothe themselves and their children. The poverty and disadvantages the Lopez family experienced led to inadequate nutrition, inadequate housing and homelessness, inadequate child care, higher exposure to environmental toxins, such as the industrial and gas/diesel pollutants that surrounded their neighborhood, exposure to community violence, and lack of access to health care.

85. Latino families living in Southwest Phoenix experienced pervasive racism and segregation. Poverty, drugs, and crime plagued the community and destroyed dreams of a

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[148] Declaration of Concha Villegas, Signed 2-11-06

[149] Ibid

better future.[150] With no one pointing you in the right direction, it was easy to get lost and caught up in the dangers of the neighborhood.[151] The police who patrolled Sammy's neighborhood offered little help and instead reinforced the racism and tension in this economically depressed community by terrorizing "anyone who looked poor and Mexican."[152] Community schools offered no safety from the intense racial tensions. One of Sammy's brothers stated in his school records that the "racial tension between the blacks and Chicanos at school is unbearable and that he does not feel that he can complete school there."[153]

86. The Lopez family frequently moved because of their inability to pay the rent. Once, when the family was evicted with no time to find another place to live, they found themselves out on the streets.[154] Concha described how she and her sons searched for shelter:

> I told the boys to grab our stuff, and we carried it with us, out onto the streets looking for somewhere to sleep. It broke my heart to hear my boys crying and afraid. Sammy was the most afraid. He kept asking me where we were going to sleep and what was going to happen. I didn't have any answers. We carried our stuff to a park nearby to sleep there for the night.[155]

87. The family's frequent moves disrupted Sammy's childhood development, interfered with academic performance, and made it harder for him to make friends. Poverty

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[150] Declaration of Jose Cortez, Signed 9-12-03

[151] Declaration of Manuel Servin, Signed 4-3-04

[152] Declaration of Jose Cortez, Signed 9-12-03

[153] Esteve Lopez, Court Records, Maricopa County Juvenile Court Center Case J-75658. Probation officers' disposition summaries (1973-75) following juvenile burglary charge. Disposition Summary, 5/17/73

[154] Declaration of Concha Villegas, Signed 2-11-06

[155] Declaration of Concha Villegas, Signed 2-11-96, Page 19

influenced every aspect of their lives and one of Sammy's brothers told his juvenile court evaluator that because of his extreme poverty, he was not able to go to high school.[156] The impact of the constant moving prevented the children from building and keeping relationships. The children did not understand why they had to move so much and why they could not at least have some warning so they could say their goodbyes to their friends.[157]

88. The apartments the Lopez family could afford were ill-equipped to support them. The plumbing did not work, windows were broken or missing, and vermin were uncontrolled. Sammy's brother Jose described the housing:

> All the places were run down, cheap, and dirty. Mother did her best to clean the places up, but some places were in such bad shape it should have been illegal to rent them. They had one or two rooms each. Our parents slept in one room and my brothers and I split the other bedroom and the living room. We shared bunk beds, the couch, and sometimes the floor. There was no privacy, no quiet and no place to be alone and safe in our crowded apartments. For as long as I can remember I used to take off on my bike or skateboard to get away from all the people, to have some peace for myself.[158]

89. With little or no help from Arcadio, Concha did what she could to keep her family intact, but with so many boys and no assistance it was an impossible task.[159] Concha was forced to work two jobs so she could keep a roof over their heads. She worked almost the entire day through with just a few hours for sleep.[160] Yearly earning statements of Concha reveal just

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[156] Esteve Lopez, Court Records, Maricopa County Superior Court Case CR 101939. State of Arizona v. Lopez, Servin & Servin 1978. Presentence Investigation.

[157] Declaration of Jose Villegas Lopez, Signed 6-15-99, Page 1

[158] Ibid, Page 2

[159] Ibid

[160] Ibid

how much the family struggled. Concha made significantly less than $10,000 a year from 1971 until 1981 when she earned just slightly more. Before 1971, Concha did not have any reported income except for the years1961 and 1963, when she earned a couple of hundred dollars.[161]

90. Concha's meager wages did not afford Sammy and his brothers any of the material things like toys and bikes that other children had.[162] The Lopez boys missed out on school and church events, and playing organized sports.[163] Birthdays were not celebrated because they had no money. Sammy's brother Jose's poignant dismissal of birthdays reveals how hopeless and isolated the children felt: ;"Birthdays are really just reminders that you come into this world alone and you go out alone."[164]

91. Concha's sister. Maria. visited Concha around 1979, when Maria and her family moved to Oakland. She described how impoverished Concha and her family were:

> [Concha] and her family were always very poor. She was a hard worker, but she could not make enough money to support her eight sons. Arcadio drank too much wine to be able to make very much money in the fields, and he spent much of the little money he did make on cheap wine. [Concha] had to get state agency help and welfare. When we visited on our way to Oakland, she and her children were living mostly on government food. My husband Rudy drove [Concha] to a warehouse where she stood in line for hours to get Army surplus food in dark green cans. Some of the cans had black markings, but some were blank. I asked [Concha] how she knew what was in the cans, and she said she didn't. [Concha] and her kids ate whatever happened to be in the cans she opened that day. [Concha] and all her children lived in run down tiny apartments where the rent was due weekly. She passed the clothes from one son to the next until they were too thread bare for anyone to wear, and then she sewed the pieces together to

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[161] Concha Villegas, SSI Records, Department of Health and Human Services, SSA, Yearly Earnings, 1-17-93, Page 40.

[162] Declaration of Jose Villegas Lopez, Signed 6-15-99

[163] Declaration of Jose Villegas Lopez, Signed 6-15-99

[164] Ibid

make blankets.[165]

92. Poverty and despair were constant companions of Sammy and his family. Even among Concha's family members, her impoverished living conditions stood out. Concha's sister Petra recalled that Concha's family had nothing and lived in small rundown apartments. Concha's conditions even got to her frugal mother who once bought her groceries.[166]

Infancy and Childhood

Profound Family Stress: Domestic Violence, Alcoholism, and Physical Abuse

93. The grinding poverty of Sammy's life was punctuated by the terror of Sammy's father, Arcadio's, unpredictable violence. Arcadio's alcoholism and violence disrupted Sammy's chance of normal development and placed him at risk for emotional, physical, and mental health problems. Arcadio often disappeared for days, weeks, and sometimes even months at a time and Sammy and his brothers never knew when Arcadio would come home drunk, looking for a fight.[167] Sammy could not relax like his brothers when Arcadio was gone. Instead, Sammy remained anxious and apprehensive about when Arcadio would come back.[168]

94. Arcadio suffered from severe depression and dramatic mood swings that erupted into unpredictable, except for their chronicity, and unprovoked assaults on his wife and

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[165] Declaration of Maria Villegas Estrada, Signed 4-16-99, Page 12-13

[166] Declaration of Petra Gonzales Villegas, Signed 4-8-99

[167] Declaration of Concha Villegas, Signed 2-11-06

[168] Ibid

children. Arcadio never provided for Concha and their children.[169] Instead, he became a vicious alcoholic, and Concha was deeply ashamed of him. Concha's sister Maria reported that the meager money Arcadio was able to earn was all spent on alcohol.[170] On rare visits from her family, Concha was noticeably embarrassed by Arcadio and made it clear that she did not want to talk about him.[171]

95. Arcadio's drinking was most likely his response, or self-medication, to the severe depression that afflicted him. His depression worsened to the point that he attempted suicide numerous times. Arcadio drank from a bottle of bleach, cut his wrists, and several times he laid on the railroad tracks waiting for a train to come and end his life.[172] One of Sammy's brothers vividly recalled Arcadio slashing his wrists right in front of him.[173] In another incident, when Concha was pregnant with Sammy, Arcadio was drunk and piled all of the children in their car and drove into an irrigation ditch. Water filled the car, and neighbors had to pull the children out to save them from drowning.[174] The multiple traumatic stressors in the children's lives set the stage for profound traumatic stress.

96. With the passage of time, Arcadio's behavior became progressively more bizarre and his violent outbursts increased. Arcadio was delusional at times and accused Concha of having an affair with a milkman they did not even have.[175] Other times Arcadio suffered from

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[169] Declaration of Angela Villegas Lopez, Signed 4-16-99

[170] Declaration of Maria Villegas Estrada, Signed 4-16-99

[171] Declaration of Angela Villegas Lopez, Signed 4-16-99

[172] Declaration of Arcadio Lopez, Signed, 6-17-99

[173] Declaration of Jimmy Lopez, Signed 2-10-06

[174] Declaration of Arcadio Lopez, Signed, 6-17-99

[175] Declaration of Concha Villegas, Signed 2-11-06

visual hallucinations; his children and wife recalled that he often "saw things that weren't there."[176] Arcadio often disappeared from the home for days at a time. When Arcadio was home, he beat Concha with his hands or fists.[177] When Arcadio hurt himself while administering his beatings, he did not try to treat his wounds but instead, "just stopped hitting us, sat there, and watched himself bleed."[178]

97. Arcadio drank until he was stupefied and unable to control his bodily functions. "Sometimes he got so drunk he peed and threw up on himself. Sometimes he even soiled his own pants."[179] Often he drank until he passed out in public in broad daylight in his own vomit and urine. Arcadio was a binge drinker, and on occasion wouldn't drink for an entire day but then went on a bender staying drunk for weeks straight.[180] One of his sons, Joe, remembered Arcadio usually smelled of alcohol and vomit.[181] Sammy's brother, Steve recalled Arcadio frequently arrived home "dirty and bloody after drinking."[182] Steve tried to say away from Arcadio when he was drinking as that was when he was most violent. But Arcadio made that nearly impossible since he was drunk most of the time.[183]

98. Concha despised Arcadio's drinking and when she found alcohol in the house she threw it out. Of course, this only angered Arcadio and increased the likelihood of a

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[176] Declaration of Frank Villegas Lopez, Signed 2-11-06

[177] Declaration of Arcadio Lopez, Signed, 6-17-99

[178] Declaration of Concha Villegas, Signed 2-11-06

[179] Ibid

[180] Ibid

[181] Declaration of Jose Villegas Lopez, Signed 6-15-99

[182] Declaration of Esteve Lopez, Signed 6-16-99

[183] Declaration of Esteve Lopez, Signed 6-16-99

beating.[184] Arcadio began by yelling at Concha but he usually ended up attacking her.[185] Arcadio did not try and hide the fact that he beat their mother and openly beat her right "in front of" the children.[186] Many times, Arcadio came home late after drinking and began yelling at Concha, and beating her with his fists.[187]

99. Arcardio humiliated, degraded, and terrorized Concha and his children. Arcadio cheated on Concha with other women and made no effort to conceal it from her or the children.[188] When Arcadio came home in the middle of the night, he forced Concha to wake up and cook for him without any concern for the fact that she had to go to work the next morning.[189] If Concha did not respond quickly enough or made any kind of remark, Arcadio beat her.[190] Arcadio had complete control over Concha and treated her as if she was something he owned.

100. Arcadio's violence was not softened or interspersed with displays of affection, acceptance of responsibility, or concern for Sammy's development. Sammy's brother, Joe, reported that Arcardio "never loved anyone and only showed us how to live in fear and terror."[191] Arcadio rarely even spoke to his sons. Arcadio's only real contact with Sammy and his brothers was when he was beating them.[192] Steve reported that Arcadio seemed different

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[184] Ibid

[185] Ibid

[186] Declaration of Arcadio Lopez, Signed 6-17-99

[187] Ibid

[188] Ibid

[189] Declaration of Esteve Lopez, Signed 6-16-99

[190] Declaration of Arcadio Lopez, Signed 6-17-99

[191] Declaration of Jose Villegas Lopez, Signed 6-15-99

[192] Declaration of Jose Villegas Lopez, Signed 6-15-99

than other neighborhood fathers and never once helped Steve or any of his brothers "with homework, took [them] to a park to play ball or tried to teach [them] something about cars or anything else."[193]

101. Arcadio terrorized the family and threatened to kill Concha and the boys for minor infractions. Sammy took Arcadio's threats seriously and believed that he would kill them all.[194] Arcadio beat his children with anything he could get his hands on and once attacked Sammy's brother, Steve, with a two-by-four board.[195] Arcadio intentionally hurt the children without provocation and he beat them for no reason.[196] His assaults bewildered the children who could not understand why they were beaten.[197] Concha described the time Arcadio burned his four year old son:

> One night Junior grabbed at [Arcadio's] leg while [Arcadio] was boiling some water over a fire outside. [Arcadio] didn't say a word. He just poured the boiling water on Junior. Junior had burns all over his body.[198]

102. Although Concha's family was well aware of Arcadio's assaultive behavior, they did nothing to protect her or the children. Concha's sister Venancia knew Arcadia beat her because she overheard her mother talking about it.[199] Concha's mother did nothing to intervene

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[193] Declaration of Esteve Lopez, Signed 6-16-99

[194] Declaration of Concha Villegas, Singed 2-11-06

[195] Declaration of Esteve Lopez, Signed 6-16-99

[196] Ibid

[197] Ibid

[198] Declaration of Concha Villegas, Signed 2-11-06, Page 15

[199] Declaration of Venancia Villegas Garcia, Signed 4-8-99

and thought it was better for Concha to stay and endure the violence than leave the man who fathered her children.[200]

103. Graphic images of Arcadio's assaults on their mother were indelibly stamped on Sammy and his brother's minds. Concha was "a small woman and the image of him hurting her will be with me all my life. He pushed her down on the floor and kicked her, threw her into the wall, and hit her all over with his fists."[201] Witnessing Arcadio's life-threatening assaults on their mother compounded the children's feeling of guilt because they were too small to protect her.[202]

104. Sammy and his brothers lived in constant fear that their father would eventually kill their mother. The children learned to flee as soon as they saw their father and could not understand why their mother didn't run and hide with them.[203] After a beating from Arcadio, the children worried that she was dead if she took a long time to get up.[204] Arcadio carried a ten-inch work knife around with him and used it to initiate fear in Concha.[205] Concha learned to pay special attention to whether Arcadio was carrying his knife and was "ready to run whenever he reached for it." Usually his fists were all Arcadio needed.[206]

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[200] Declaration of Venancia Garcia, Signed 4-8-99

[201] Declaration of Esteve Lopez, Signed 6-16-99

[202] Ibid

[203] Declaration of Jose Villegas Lopez Signed 6-15-99

[204] Ibid

[205] Declaration of Concha Villegas, Signed 2-11-06

[206] Ibid

105. Arcadio's attacks on his family were severe enough to bring the attention of neighbors and law enforcement.[207] During one particular brutal beating Arcadio, was arrested and sent to jail:

> Once while we were still living in Glendale, [Arcadio] was beating me up real badly. He kept hitting me with his fists, and he wouldn't stop. He was yelling at me, calling me names, and saying he was going to kill me. I believed him. I hit him with a stick to protect myself, and fortunately the police came and arrested him. They made a report called a Peace Bond, and then they put [Arcadio] in jail for six months. Putting [Arcadio] in jail didn't help the boys or me. Things were always the same as soon as he came back.[208]

Arcadio returned home and continued to batter and torment his family. Concha did not leave him. She had no family support and no will to overcome the power he exercised over her. Concha's personal strength had been eroded by years of abuse.

106. Arcadio often disappeared and was gone for days without informing anyone.[209] Every once in a while, Concha received a call from Arcadio telling her he was in California or Oregon and needed money.[210] The children were confused by Arcadio's stranglehold on Concha and could not comprehend why she allowed him to come back.[211] Because of the coercive control Arcadio excised over Concha, she did whatever he asked.

107. After the death of their sister Gloria, Arcadio left the family for good. He moved to California where his drinking continued to consume him. Despite all the disastrous

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[207] Ibid

[208] Ibid, Page 16

[209] Declaration of Esteve Lopez, Signed 6-16-99

[210] Declaration of Concha Villegas, Signed 2-11-06

[211] Declaration of Esteve Lopez, Signed 6-16-99

consequences, Arcadio could not stop drinking and was picked up repeatedly for public drunkenness:

> - October 20, 1978: Arrested in Porterville for public intoxication and sent to jail for three days. His address is "transient" and he is unemployed. Served three days jail time.[212]
>
> - September 11, 1979: Arrested in Porterville, CA, for public intoxication. Marital status I "divorced in Arozona [sic]." "No address" is listed. Occupation is "N/A."[213]
>
> - January 12, 1982: Arrested on a warrant in Porterville (Tulare County), California. He served a month jail time.[214]
>
> - July 12, 1982: Arrested on a warrant (#18936) at 10:30 in the morning in Porterville (Tulare County), California for a violation of Penal Code § 647f (Public intoxication per Deering's CA Penal Codes 1982.) Arcadio is an unemployed farm laborer. His possessions at the time of his arrest are a small book, a pen, a comb and a clue vest in "poor" condition. He has lived in the county for 10 years and in California for 11 years. The

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[212] Arcadio Verdugo Lopez, Tulare County (CA) Arrest Reports

[213] Ibid

[214] Arrest record for Arcadio Verdugo Lopez re: Porterville, CA warrant # 18936, 7-12-82

arrest record states that Arcadio has eight children and a sixth grade education. His bail is set at $150.[215]

- July 30, 1982: Arrested in Porterville, CA, for public intoxication. At the time Arcadio was living under bridges in Porterville area. Arcadio admitted to drinking wine, his attitude was "cooperative"; he was staggering and unsteady and his clothing was disarranged and soiled. Arcadio's speech was incoherent and blurred. It is noted that his breath smelled of alcohol and that he was unable to care for self. Arcadio was employed. He was released the same day.[216]

108. Concha's choice of Arcadio over her own children points to her own maladaptive upbringing as she signaled to her children, and especially Sammy, who was most sensitive to the abuse, that not only were their needs unimportant– a message that profoundly affects the development of a child's psyche – but also that the abuse they suffered was somehow deserved. Concha's inability to leave this volatile relationship is directly related to the years of abuse and coercive control she experienced. Concha became a survivor with little sense of her own will or any ability to act independently from those who exploited and controlled her. By the time Arcadio met her in the fields surrounding Phoenix, she was easy prey. Concha came to believe that neither resistance nor escape was possible when confronted with life-threatening actions and as a result, went into a state of surrender. Her system of self defense shut down entirely and she escaped from her circumstances not by action in the real world, but by altering

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[215] Ibid

[216] Arcadio Verdugo Lopez, Tulare County (CA) Arrest Reports

her state of consciousness. This alteration of consciousness is the core of Post Traumatic Stress Disorder.

Middle Childhood

Medical and Emotional Neglect

109. Due to her own severe mental and emotional impairments, Sammy's mother was unable to understand and meet her childrearing responsibilities. She was the victim of overwhelming trauma that included chronic childhood abuse, multiple rapes by a close family friend, a stranger, and her common law husband; and physical and psychological abuse by her common law husband. She exhibited psychological reactions to the trauma she survived that included depression, insomnia, startle responses, dissociation, numbing, and intrusive thoughts. She was socially isolated, depressed, and unable to attend to daily tasks associated with protecting herself and her children from harm.

110. Sammy and his brothers not only suffered physical and emotional abuse, they also suffered profound neglect. Neglect, in particular, has some of the longest term and most destructive effects of all childhood traumas. Since children are not born with a fully developed brain, experiences can alter its development and function. Sammy did not have positive care-taking or attachment experiences that were critical for him to develop normally. Neglectful families typically do not have any routines for a child to rely on: sleeping, eating, bathing, schoolwork. These activities are not monitored and lack of monitoring can affect a child's psychological and physical well being. This lack of structure and routine is another facet of the unpredictable nature of an insecure environment that encourages chronic hypervigilance. Childhood maltreatment is thought to have more damaging effects than trauma experienced in adulthood because of the potential to severely hinder development.[217]

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[217] Mash and Barkley (2003). Child Psychopathology. Page 632-684

111. Concha did not know how to communicate with her children and made decisions that affected their lives without telling them the underlying reasons or even giving notice about life-altering events. For example, Concha took her son Joe to Texas for what he thought was a visit. Once there, however, Concha informed Joe that she was leaving him. Joe described his bewilderment by her abandonment:

> I thought we were all going just to visit, but once we were there my mother told me it would be better if I stayed behind in Texas for a while after she and the rest of my brothers returned to Phoenix. I was hurt Mother did not tell me this before we left Phoenix. I was nervous and scared about suddenly living with people that I did not know and without any of my brothers, and I was afraid she would not come back for me. I wondered what I had done wrong to be left behind.[218]

112. Concha offered her children no explanation of major life events, such as their father's abandonment, her decision to allow another man to move into their home, or any circumstances surrounding her first child's relationship to her other children. When Joe learned he had a step- brother named Roberto at a family gathering. he later asked his mother about him. Joe described the interaction with Concha:

> I was really surprised to find out that my brothers and I have a half-brother named Roberto whom my mother never told us about. He was raised by our mother's parents in Fabens. I did not even know Roberto existed until he came up to me at the wedding party, gave me a big hug and said, "I love you, brother." Roberto was crying, and I did not know what to think. I don't know if I was more shocked by all the attention and emotion, especially by a guy, or by the fact that he was saying he was my brother. I asked Mother if it was true that Roberto is my brother and she simply said yes. She did not tell me anything more about Roberto and she never spoke of him to me ever again.[219]

Similarly, after Sammy's father, Arcadio, left the family, Concha did not mention his name again. The children knew their mother would not provide them the answers they needed so they

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[218] Declaration of Jose Villegas Lopez, Signed 6-15-99, Page 3

[219] Ibid, Page 3-4

never asked about him.[220]

113. Concha suffered from severe depression and anxiety over the years but culture and money kept her from seeking any kind of treatment. In 1979, while at a doctor's appointment for a shoulder injury, Concha told the doctor that she had been "very nervous" lately. She began crying as she related that her son had been picked up for robbery and sexual assault.[221] Later, in 1987, when Concha was admitted to the hospital with chest pains, her records noted that she is a fifty-seven year old female with a history of "nerves."[222]

114. Years later, when Concha applied for Social Security benefits, she disclosed that in addition to her physical inability to continue work she also suffered from mental illness. She wrote that she is a sixty-one year old "woman suffering from chronic depression and nervousness. I cannot lift heavy objects. I cannot sleep or eat well. I have lost a lot of weight."[223] On another application, Concha wrote that her illness has worsened, her "nerves have been worse. I've lost a lot of weight & can't sleep. Suffer from anxiety & depression." Concha listed her additional illness, "depression – nervous condition, anxiety." Concha explained the changes that occurred in her daily activities since her original application: "Motivation gone. More depressed. Lost much weight. Always depressed. Sleep more often and longer during the day."[224] Concha was denied disability for her

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[220] Ibid

[221] Concha Villegas, Medical Records, Maricopa General Hospital, 7-2-79

[222] Concha Villegas, Medical Records, Phoenix Memorial Hospital, 6-24-87

[223] Concha Villegas, SSI Records, Department of Health and Human Services, Request for Reconsideration, 7-15-94, Page 5

[224] Concha Villegas, SSI Records, Department of Health and Human Services, Reconsideration Disability Report, 2-15-94, Page 56-59

psychiatric issues because she was unable to provide medical records regarding her treatment. [225]

115. Sammy and his siblings were not taught how to show affection, problem-solve within the family, or communicate with one another. They were surprised by other families who had more open and expressive relationships within the family unit and could not help but wonder about their own family.[226]

116. Concha's children voice very similar descriptions of the absence of love in their household as Concha and her siblings offered about their mother Concepcion. Junior acknowledged that Concha did not show affection. "She is not the type to say 'I love you' or to hug or kiss her children."[227] Joe now realizes that families are supposed to have and show love and affection, unlike his own experience.[228] Sammy's brother Steve agreed that they "never acted like a family. Each of us boys was on his own from the time we were small until we left home. We could never count on each other for support or protection."[229]

117. Concha is an emotionally shut-down person who made it hard for others to get to know her. Her former apartment manager and friend, Margaret, stated that she had known Concha for more than twenty-five years but "still don't really know much about what's inside her head." Concha is not the type of person to open up and share her feelings; instead she is a closed, sad, and unaffectionate woman.[230] A longtime neighbor felt the same

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[225] Concha Villegas, SSI Records, Department of Health and Human Services, Disability Determination Rationale, No reporter name, no reported dated. Page 19

[226] Declaration of Jose Villegas Lopez, Signed 6-15-99

[227] Declaration of Arcadio Lopez, Signed 6-17-99

[228] Declaration of Jose Villegas Lopez, Signed 6-15-99

[229] Declaration of Esteve Lopez, Signed 6-16-99

[230] Declaration of Margaret Escobar, Signed 4-2-04

way about Concha. After knowing Concha for many years, she could not say that she knew Concha that well. Concha is unable to process her feelings or talk to friends about things that happened to her in the past.[231]

118. Concha was too busy struggling to make ends meet to have any time to be any kind of mother to her boys, and as a result Sammy and his brothers were lost and lacking self-confidence. Sammy was affected most of all, which was why he was so starved for attention.[232] Sammy's sister-in-law, Joanna, felt that Concha did not provide her boys with the necessary skills to survive. Concha did not understand that it took more than telling your boys to stay out of trouble to keep them away from harm:

> Frank's mother never gave those kids any of the things a mother gives her children. Frank and his brothers basically raised themselves without any affection, the time, the guidance, caring, tenderness, or even love that a mother is supposed to give her kids. Those poor boys grew up on their own without any parents at all. Some people say that Frank and his brothers' problems aren't his mother's fault because she did her best. I don't think that is true. Frank's mother did things to her sons that no normal mother would do. She scarred all the kids, especially Sammy.[233]

Sammy's Early Traumatic Responses

119. Lack of parental support and mediation of stressors leaves children to cope on their own. The younger the child is the less likely he will be able to manage by himself and the more likely he will develop maladaptive patterns of coping in response to stress. The trauma Sammy endured by witnessing the domestic violence between his mother and father, and the violence he was subjected to left him with the impossible task of mastering the trauma without

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[231] Declaration of Donitilia Servin, Signed 4-4-04

[232] Declaration of Manuel Servin, Signed 4-3-04

[233] Declaration of Joanna Lopez, Signed 9-16-03, Page 1

any help from his mother, who was unable to provide either emotional support or explanations to Sammy. Because Sammy's mother did not buffer him from stress, he was unable to learn necessary adaptive coping mechanisms, leaving Sammy more vulnerable to future stressors and psychopathology. Sammy developed emergency-based coping mechanisms such as psychic numbing.

120. Sammy was a quiet, sad child who mostly kept to himself.[234] Sammy's maternal aunt, Petra, described him as a "shy little boy" who she witnessed "hiding behind a chair at" home.[235] On one of the rare visits Concha and her children received from Concha's family, her sister Maria observed the children. She reported their withdrawn, frightened behavior:

> When we drove up there were a bunch of kids in the yard who stopped whatever they were doing and watched us. When it was clear that we were stopping at their house and actually getting out of the car, they all ran and hid. They stayed outside until [Concha] called them in and then they hid behind the furniture.[236]

121. Sammy lacked self-confidence and was on the lookout to receive love and attention from anyone who could provide it. But his low self-esteem kept him from spending time at neighbors' houses like his brother did.[237] Sammy's desperate need for a place to fit in led Sammy astray. Years later, in 1979, this is illuminated when Sammy was evaluated at juvenile hall by a clinical psychologist, David Beigen. Dr. Beigen found:

> The real issues seem to be those beneath his behavioral air of bravado and masculine pseudo-adequacy. Namely, this is a boy who is very unsure of his own sense of masculinity and identity, and a boy who feels very inadequate and small. Further,

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[234] Declaration of Margaret Escobar, Signed 4-2-04

[235] Declaration of Petra Gonzales Villegas, Signed 4-8-99

[236] Declaration of Maria Villegas Estrada, Signed 4-16-99, Page 12

[237] Declaration of Margaret Escobar, Signed 4-2-04

there is a very basic and subtle mistrust, not only of himself and his own motives, but also of others as well.

Dr. Beigen continued:

> I see Sammy as acting out emotional handicap, and while I do not see him as a delinquently-oriented youth, I see the propensity for his involvement in delinquent activities as part of his search for self-esteem from peers and their acknowledgement and approval.[238]

122. Arcadio's violence affected Sammy the most and he responded to the chronic abuse by living in a constant state of hypervigilance and hyperarousal, ever on the lookout for his father's assaults.[239] When Sammy saw Arcadio coming, he ran crying to his mother, yelling for her to run away:

> Of all my boys, Sammy was the most afraid of [Arcadio]. Sammy was always by the window looking out for [Arcadio]. He sat there waiting, even when [Arcadio] was gone for days. And when [Arcadio] came, Sammy jumped up, started crying, and told me to run. He said, "Run, mama! Go to the neighbors! The man is coming! Run now, mama!" Sammy was the only one of my boys who was so afraid like this.[240]

123. Sammy's helplessness, fear, and extreme stress led to sleepless nights filled with night terrors. Post Traumatic Stress Disorder symptoms such as night terrors are normative responses to severe stressors:

> Sammy was so afraid that he couldn't sleep like the other boys. He yelled and screamed in his sleep. Sammy sleepwalked a lot too. I tried to check him at night. A lot of times he wasn't in bed. I found him rolled up like a little ball in the corner of the kitchen, sweating, and shaking. His eyes were open, but he didn't say anything back when I talked to him. Sometimes in the middle of the night, Sammy got up and

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[238] Sammy Lopez, Court Records, Presentence probation report by Neal Nicolay dated 11-15-85 citing psychological evaluation by Dr. David Biegen, 9-20-79

[239] Declaration of Frank Lopez, Signed 2-11-06

[240] Declaration of Concha Villegas, Signed 2-11-06, Page 13

ran out the door like someone was chasing him. His brothers had to run after him and carry him home. Sammy never remembered this the next day. None of my other boys did this. [241]

124. Sammy's brother Frank also recalled that Sammy was the most sensitive to their father's attacks and for many years was plagued with night terrors. Sammy "woke up in the middle of the night, crying, screaming, and sweating with shakes so bad you could see him twitching."[242] Sammy's brothers worried about him and tried to watch over him as he went to bed:

> When Sammy didn't wake up screaming, he sleepwalked. Sammy often got up in the middle of the night like he was going to the kitchen for a glass of water. When he didn't go back to bed, we checked on him to see what was wrong. We found him crouching down in a corner of the kitchen shaking as if he was hiding and really scared. Sometimes Sammy stayed there sweating and shivering in the corner for an hour or more. We couldn't get through to Sammy when this happened. It was like he couldn't even hear us.[243]
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> Other times, when Sammy got up and went to the kitchen, he grabbed a table knife and gripped it really hard in his hand like he was scared and had to defend himself from someone who wasn't there. We knew Sammy wouldn't hurt us with the knife, but we were afraid he might hurt himself. He held the knife in front of him and backed himself up against a wall or a cabinet. We told him: "Sammy, put the knife down. You're sleepwalking again. Put the knife down." But Sammy didn't answer. His mind was in some other place. He just held the knife and stood there shivering in the kitchen.[244]

125. Sammy's brothers tried to comfort him and assure him that he was okay and was just sleepwalking, but Sammy remained unresponsive:

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[241] Ibid, page 14

[242] Declaration of Frank Lopez, Signed 2-11-06

[243] Declaration of Frank Lopez, Signed 2-11-06, Page 5

[244] Ibid, Page 5

> Only my mom could get him to respond. She walked up to him slowly and took the knife away. Then she put him back to bed. If he really woke up when he was sleep walking like this, he just looked at you and started shaking and crying out loud. If you put a hand on him, you could feel his whole body shaking and sweating.[245]

126. Concha did not know what was wrong with Sammy. Not knowing where else to turn, Concha took him to a "curandera", a neighborhood healer.[246] The healer could not help Sammy and advised that Concha take Sammy to a priest and have him blessed. But after he was blessed by the priest, Sammy's nightmares continued. Concha also asked the neighborhood healer how to stop the frequent nosebleeds that afflicted Sammy. She gave Concha a cure but Sammy continued to get nosebleeds.[247]

127. Feeling powerless and helpless, Sammy adopted maladaptive coping mechanisms to deal with stress. One of the ways in which Sammy felt a sense of control was by developing certain behaviors, like keeping his belongings in perfect order. Consistent with obsessive compulsive spectrum disorder, Sammy had a certain place for his papers, book, and pens and when someone disturbed his order, Sammy immediately knew and had to put it back the way it had been.[248] It was difficult for the rest of the family to understand why this was so important to Sammy because they lived in such as small space and it wasn't practical for Sammy to spend so much time arranging his items:

> Sammy used to clean his shoes every day with water and soap and salt and a toothbrush. He couldn't stand having even a spot on his shoes. He spent a lot of

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[245] Ibid, Page

[246] Declaration of Concha Villegas, Signed 2-11-06

[247] Ibid

[248] Ibid

> time, putting his laces in his sneakers. He couldn't stand it if a lace got twisted. The laces all had to be perfectly flat or he did them over. Sammy also had to wash and clean and iron his own clothes because no one else could do it exactly the way he wanted. I didn't care about these things. I just threw my clothes in a pile, but Sammy washed his clothes, got out every single spot, and ironed them so the creases were exactly the way he wanted them. He didn't like to fold his t-shirts or his pants because he was afraid they might get a line where they were folded. Instead he put newspapers, towels, and handkerchiefs over the wire hangers and then hung his clothes over that. To me, it was a lot of trouble just to keep the hangers from putting a crease in his clothes.[249]

128. These obsessive behaviors are consistent with Sammy's attempts to control his overwhelming anxiety secondary to his traumatic stress. When these mechanisms or his self-medicating was not successful, Sammy's affective dysregulation would take over, and chaotic behavior would ensue.

Death of Sister Gloria

129. The last child born to Concha, Gloria, brought even more sadness to the Lopez household. Gloria was a fatally malformed infant who died at ten months of age.[250] Gloria was born with a giant hemangioma (abnormal dense collections of dilated small blood vessels (capillaries) that may occur in the skin or internal organs[251]) down the right side of her body, her right arm was malformed, and she had webbed hands. The hospital referred Sammy's mother to social services for assistance with her baby Gloria and a subsequent infant home evaluation report stated that Concha's home was not prepared for the infant: "home not warm;

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[249] Declaration of Frank Lopez, Signed 2-11-06, Page 7

[250] Gloria Villegas, Vital Records, Certificate of Death, State of Arizona, 10-14-71

[251] Retrieved from the World Wide Web on January 31, 2006 at: http://www.nlm.nih.gov/medlineplus/ency/article/001459.htm

water froze last night."[252] Despite these significant problems, social services let Concha keep the baby in inhabitable conditions without any further follow-up.

130. During her short life, Gloria was chronically ill and required multiple hospitalizations. Gloria was hospitalized for treatment of the hemangioma as well as septicemia (blood poisoning caused by the spread of microorganisms and their toxins). Concha, who had to work, was unable to stay with her infant in the hospital, but desperately tried to spend as time with her as she could. When Concha's family heard about the badly deformed child, they made a rare visit to Concha and her family:

> In 1971, Petra, Tina, our mother and I went to visit [Concha] and see her baby girl, Gloria. Gloria was less than a year old. She was a beautiful baby with curly eyelashes and very white skin, but she was sickly. She had been born with a strange illness that caused her to have a big sack of flesh between her arm and her body. [Concha] had to drape dresses over Gloria because she was not able to put Gloria's left arm through the armhole of a dress or shirt. Gloria died after an operation to remove part of the thing on her body.[253]

131. Gloria was hospitalized for the last time in September of 1971. Gloria remained in the hospital until she died on October 14, 1971 from hemorrhagic shock after the hemangioma was surgically removed.[254] The death of Gloria was a profound loss to all the children in the family and to Concha. As time passed, they began to attribute their turmoil and unhappiness to her absence. One brother joined Concha in asserting that his family might have

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[252] Gloria Villegas, Medical Records, Maricopa County General Hospital, 1970-1971.

[253] Declaration of Venancia Villegas Garcia, Signed 4-8-99, Page 10

[254] Gloria Villegas, Medical Records, Maricopa County General Hospital, 1970-1971; Gloria Villegas, Vital Records, Certificate of Death, State of Arizona, 10-14-71

been different if Gloria had lived.[255] Concha and her boys were devastated by the loss of their baby sister:

> It was a shock when Gloria died. My boys loved her so much. They just couldn't believe their little baby sister was gone. I think life might have been different for all my boys if Gloria had lived. Having her really changed all the boys, and it hurt them to lose her. That little baby girl was like magic to us. When we lost her we knew that nothing good could ever happen for us. We were never the same after Gloria died.[256]

132. Concha's depression worsened after Gloria's death. Concha became even more distant, and for a long period of time Concha barely spoke to her children.[257]

Father's Abandonment

133. Arcadio deserted the family forever after Gloria died. A measure of his cruelty is found in the total lack of regret his children and their mother expressed about his departure. Not one family member voiced any sadness over his leaving the family. With Arcadio gone, Concha had to rely on her oldest son, Arcadia Jr. (Junior) to assume adult responsibilities in the home when he was still a young teenager.

134. Even though Arcadio contributed next to nothing, Sammy's family fell even deeper into poverty without Arcadio. Concha's sisters felt sorry for her as they knew just how

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[255] Declaration of Jose Villegas Lopez, Signed 6-15-99

[256] Declaration of Concha Villegas, Signed 2-11-99, Page 20

[257] Declaration of Jose Villegas Lopez, Signed 6-15-99

difficult it was for Concha to raise eight boys on her own.[258] She worked herself to the bone but was still unable to provide her children with economic security. [259]

135. Arcadio's disappearance also destroyed his oldest son's dream of getting an education. Junior explained how he had to give up his dream of graduating high school in order to help the family:

> Some of my brothers and I went with our father to pick cotton when I was about 10 or 12 years old. I remember being shocked by how low the pay was for each bag of cotton and how back-breaking the work was. I decided then to stay in school and make real money. I would have stayed in school, too, if our father had not deserted our family. I had to quit school after the first three months of my freshman year at Carl Hayden High School to help support our family. Our mother received ADC, but it was not enough really to feed and clothe all of us.[260]

Mother's Trauma: Stranger Rape of Concha

136. Sammy and his family were further traumatized shortly after Arcadio's departure when a stranger sexually assaulted Concha on her way home from the grocery store. After the brutal rape, Concha ran home and entered their apartment practically naked with her sons standing there wondering what happened to their mother. Concha was crying so hard it was difficult to understand her. The family didn't have a phone so Concha had to go to their neighbor's house to call the police. The neighbor took Concha to the hospital. Concha who was already suffering from depression and anxiety became even more despondent.[261]

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[258] Declaration of Angela Villegas Lopez, Signed 4-16-99

[259] Ibid

[260] Declaration of Arcadio Lopez, Signed 6-17-99, Page 4

[261] Declaration of Jose Villegas Lopez, Signed 6-15-99

137. The witnessing of sexual assaults and abuse of loved ones can often be more devastating for children than if they were actually sexually assaulted and abused themselves. For Sammy, the consequences of seeing his mother victimized and unprotected were multiplied each time she was re-victimized by her common law husband, the stranger who raped her, and her paramour. As a child, Sammy was powerless to protect her, his siblings, or himself. Sammy's perception of the world and his role in it were forged by these traumatic, terrifying events.

Junior: Paternal Role and Abandonment

138. Abandonment by their father at a critical age in their development left the Lopez children under the care of the oldest brother, Junior, who was just a teenager and too young and immature to accept the responsibilities of parenting. Junior was forced to quit school in the ninth grade so he could help raise his younger brothers.[262] Although Junior was young, he was violent and instilled fear in Sammy and his brothers. Junior appeared bigger than life and scared the boys when he grabbed them.[263] Concha was unfazed with what tactics Junior used to make his brothers behave, and acknowledged that her sons feared him and called him "Wolf" because he was so mean.[264] Junior punished his younger brothers for normal childhood activity such as getting dirty or for minor infractions like taking too long to return home from school.

139. Although it was unrealistic to expect a child to take over the role of a parent, Concha invested in Junior the authority to punish the children as he saw fit.[265] Junior felt that

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[262] Declaration of Angela Villegas Lopez, Signed 4-16-99

[263] Declaration of Jose Villegas Lopez, Signed 6-15-99

[264] Declaration of Concha Villegas, Signed 2-11-06

[265] Ibid

he did what he could to keep his brothers away from danger but he was "too young and inexperienced to be a substitute father."[266] Little more than a child himself, Junior did not know how to temper discipline with love, and his younger brothers remembered that he never offered any kind of praise.[267] Junior called his younger brothers names like "stupid" when they received bad grades, but said nothing if they passed a class.[268] Sammy tried to protect his younger brothers from attacks by Junior, but was too small to challenge his older brother. Joe described one such incident:

> Once when Junior grabbed me by my shirt and pushed me up against the wall with my feet dangling, Sammy tried to protect me. He told Junior to put me down. Sammy accused Junior of being as mean as our father, and Junior snapped. He dropped me and started beating Sammy. He knocked Sammy to the floor and hit him over and over in the face and head with both his fists. I think Junior even scared himself that time because he suddenly stopped and just ran out the door.[269]

140. Concha was too preoccupied and exhausted from her responsibilities as breadwinner to monitor Junior. When she saw bruises on Sammy from an assault by Junior, she simply told Sammy to stop fighting or she would send Junior to punish him.[270] Sammy and his brothers were confused by their brother's actions and desperate to make sense out of Junior's brutal attacks on them.[271]

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[266] Declaration of Arcadio Lopez, Signed 6-17-99

[267] Declaration of Jose Villegas Lopez, Signed 6-15-99

[268] Declaration of Jose Villegas Lopez, Signed 6-15-99

[269] Ibid, Page 9

[270] Ibid

[271] Ibid

141. Concha's relationship with Junior was distorted by her years of abuse at the hands of her mother, husband, and strangers. She treated Junior like her abusive common law husband and acted as if she feared him and the oldest boys.

> Our mother seemed to be afraid of our older brothers, too. They respected that she was their mother, but they had no respect for her as a person. They didn't respect her because she had no control over them. They came and went when they wanted regardless of whether she said they could. Our mother is little and could not make them do or not do anything.[272]

142. Junior appears to be the only child in the family who has been able to hold a steady, responsible job, rear his family, and maintain a healthy relationship with his children. Junior attributes his ability to overcome many of the barriers faced by him and his brothers to the presence of a powerful and consistent force in his life, a caring male figure. Junior explained that unlike his brothers, he had a male role model in his life who became a father figure to him. Sam Ogul was able to help Junior in all sorts of ways, including getting him a job at the *Arizona Republic* where he still works today.[273]

143. Sammy and his brothers endured another devastating abandonment when Junior married and moved away. Junior left the family in worse financial straits when he stopped helping Concha with the bills.[274] In spite of Junior's cruelty, he was still the only father figure Sammy and his brothers knew. Sammy and his brothers wondered what they might have

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[272] Ibid, Page 9

[273] Declaration of Arcadio Lopez, Signed 6-17-99

[274] Declaration of Jose Villegas Lopez, Signed 6-15-99

done to make Junior just forget about them.[275] Desperate for an explanation, the children reasoned that Junior must have been embarrassed by how poor their family was.[276]

144. After Junior started his own family, he rarely visited his mother and brothers and according to Junior, the family fell apart. With no one looking out for them, the younger boys started running into trouble.[277] Concha, prone to be reclusive and afraid to interact with others, "grew even more isolated from the community."[278] Junior was aware that his brothers were hanging around kids who took advantage of them, but did nothing to help them after he moved away. [279] Concha cried to her sister when Junior left the family as she feared her sons would be lost forever without him.[280]

Pedro: Physical Abuse, Scapegoating, and Rejection

145. Within a year after Junior left the house, another man, Pedro Santibenez moved into Sammy's home.[281] Sammy was around ten years old at the time.[282] Pedro was an undocumented worker from Mexico. He was an alcoholic, who threatened to kill the children and who denied any responsibility for the well-being of Sammy or his siblings. Life

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[275] Ibid

[276] Ibid

[277] Declaration of Arcadio Lopez, Signed 6-17-99

[278] Ibid

[279] Ibid

[280] Declaration of Angela Villegas Lopez, Signed 4-16-99

[281] Declaration of Jimmy Lopez, Signed 2-10-06

[282] Declaration of Concha Villegas, Signed 2-11-06

became even more chaotic after Pedro moved into the Lopez home, and Concha directed what little time and attention she had to Pedro instead of her boys.[283] Again, Sammy and his brothers felt unwanted and unloved as their mother chose another abusive man over them. Joe recognized that his mother "always seemed to let people who were in worse shape" than the family move in with them, and described the impact of living with strangers:[284]

> Two of her boyfriend Pedro's children, Antonio and another boy three or four years younger than me, came to live with us for about a year on Melvin Street. A couple of times, friends of Pedro stayed with us, too. They usually came one at a time and stayed less than a year. I remember a man staying with us when we lived in a house near 11th and Roosevelt Streets and a different man staying with us when we lived on Melvin Street. They were from Mexico and looking for work. For as long as I can remember I used to take off on my bike or skateboard to get away from all the people, to have some peace for myself. [285]

146. The children viewed Pedro as an outsider who did nothing to improve the Lopez household. Pedro was a violent drunk who was difficult to get along with.[286] Pedro never tried to be a friend or a father to any of Concha's sons.[287] Pedro lacked any interest in parenting, and was more like having another child in the house than an adult who could watch over the boys. Pedro did not concern himself with any of their problems and didn't seem to care what they did or what happened to them.[288]

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[283] Declaration of Margaret Escobar, Signed 4-2-04

[284] Declaration of Jose Villegas Lopez, Signed 6-15-99

[285] Ibid, Page 2

[286] Declaration of Jimmy Lopez, Signed 2-10-06

[287] Declaration of Jose Villegas Lopez, Signed 6-15-99

[288] Declaration of Jose Villegas Lopez, Signed 6-15-99

147. For some reason, Pedro did not like Sammy and used him as a scapegoat for all his problems.[289] Pedro terrorized Sammy with the guns Pedro kept in the home.[290] When Pedro drank, he liked to shoot the house up.[291] One time when Pedro was drunk he wrongfully accused Sammy of stealing one of his guns, and told Sammy he would shoot him if he did not give his gun back. But Sammy did not take the gun.[292] Joe remembered one particularly violent attack on Sammy:

> Sammy tried to stand up for our mother when she and Pedro were arguing and Pedro really started hitting Sammy. Sammy tried to protect himself but he was just a kid. The only reason Pedro stopped hitting Sammy is because Sammy fled the house.[293]

148. Sammy's brother Jimmy recalled a critical incident with Pedro where Concha chose Pedro over her own children:

> When I was about sixteen, I came home one day and learned that Pedro whipped Sammy, punched him in the face, and threatened to kill him. I confronted Pedro about beating Sammy up. When I did, he punched me too. I didn't want to get into a fist fight with Pedro, so I left. When I came back home, I couldn't believe what I saw: my mom had packed up all my clothes and other belongings and put them out in front of the house. I asked what was going on, and she told me she was kicking me out of the house.[294]

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[289] Declaration of Esteve Lopez, Signed 6-16-99

[290] Ibid

[291] Declaration of Jose Villegas Lopez, Signed 6-15-99

[292] Ibid; Declaration of Esteve Lopez, Signed 6-16-99

[293] Declaration of Jose Villegas Lopez, Signed 6-15-99, Page 7-8

[294] Declaration of Jimmy Lopez, Signed 2-10-06, Page 11

Sammy's Difficulties in School

149. Neuropsychological tests reveal that Sammy has significant brain damage that no doubt contributed to his academic difficulties. His brain damage, chaotic home life, and pervasive fear of his father made it impossible for him to learn and keep pace with his peers in school, and his academic record should be considered against the backdrop of his family life. He required, but did not receive, intensive intervention for his medical, psychological, and educational needs. He tried his best to succeed in school, made a solid effort to attend all classes and followed his teacher's instructions. He was not a problem student, was not suspended, and did not harass teachers or other students. Although he was not able to learn classroom material, he was socially promoted from one class to the next because he was a well-mannered child who caused no problems.[295]

150. Throughout his childhood Sammy's intense fears that he, his brothers, or his mother would be killed by, first, his father and, then, his mother's paramour preoccupied his thoughts. Whether he was home or at school, his first thought was for safety of his family. He learned to stay alert and aroused and to be on the look out for any sign of danger or threat. This hypervigilance interfered with his ability to concentrate, pay attention, and learn in a classroom setting. Despite his best efforts, intrusive memories of traumatic events in his young life disrupted his learning academic lessons as well as basic lessons of socialization, and Sammy could not keep pace with his peers at school. At home, Sammy received no help or encouragement.

151. School was difficult for Sammy and almost all of his brothers. Joe described his frustrations with school:

> School was always hard for me and I was never able to learn my lessons like other kids. It seemed like the harder I tried, the further behind I fell. Other kids who were smarter than me hung out together and did not want to have anything to

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[295] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77

do with me. I withdrew from school as soon as Mother let me.[296]

152. School records show that Sammy did not attend kindergarten and did not enroll in the first grade until he was seven years old.[297] The records provide some insight into the conditions of poverty, isolation, and inadequate medical care that Sammy and his family faced. In 1969, when Sammy was in the first grade, Concha did not list anyone to call in case of an emergency. Instead, she wrote "Just me I don[']t have no friend."[298] In April 1969, school medical exams for Sammy reveal cavities and enlarged tonsils and indicate he needs to see a dentist and surgeon.[299] Sammy did not receive the recommended medical and dental care. The same conditions persist in Sammy's April, 14th 1970 examination, along with frequent toothaches, cavities, repeat ear infections, frequent epistaxis (nosebleeds), and a punctured right ear drum.[300] His punctured ear drum could well be the result of assaults by his caretakers. Contact forms for the Lopez children repeatedly show no phone access at their home until 1973, and confirm their addresses in an impoverished section of Phoenix.[301]

153. Sammy's difficulty in school prompted teachers to recommend remedial reading classes for him in the second semester of the seventh grade. Sammy scored well below average in comprehension skills and word meanings.[302] Sammy's reading tests placed him at

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[296] Declaration of Jose Villegas Lopez, Signed 6-15-99, Page 3-4

[297] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77

[298] Ibid

[299] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77, Health Records, 4-12-69

[300] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77, Nurses Notes, 4-14-70

[301] Ibid

[302] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77, Competency Tests, 1976

the third grade level at the beginning of the remedial course, and the teacher noted "[h]e tried very hard to do his best."[303] Sammy felt he was "behind the rest of his peers in reading" and acknowledged a desire to want to learn to read better.[304] Sammy attended tutoring sessions bi-weekly.[305] Sammy's tutor noted that Sammy was able to work independently at the third grade level, was instructional, at the fourth and fifth grade levels, meaning, with instruction from the teacher Sammy could grasp fourth and fifth grade level concepts, but frustrated at the fifth and sixth grade levels. She noted that Sammy tried hard to do his best and that he likes reading but acknowledged that he is well behind his peers.[306] Understandably, Sammy got frustrated as he watched his peers advance.[307] Sammy's tutor noted that "with a little persuasion, Sammy seemed to enjoy talking about what he read" and that Sammy needed prompting before he was able to provide direct answers.[308] Despite Sammy's desire and best effort, his reading level remained at the third grade level at the end of the semester. Sammy's lack of improvement is not surprising when understood with the fact that no one was at home to help or guide him. Neuropsychological testing documents impairment in Sammy's left temporal lobe. This area of the brain is the seat of academic accomplishment, including language skills.

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[303] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77Final Diagnostic Report,4/16/76

[304] Ibid

[305] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77, Enrollment forms, health exams, and diagnostic reports, 1969-76, Tutor Pam Hancock

[306] Sammy Lopez, School Records, Enrollment forms, health exams, and diagnostic reports, 1969-76, Tutor Pam Hancock

[307] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77, Enrollment forms, health exams, and diagnostic reports, Tutor Pam Hancock

[308] Ibid

154. Sammy graduated from eighth grade on June 8, 1977, at age fourteen and enrolled in the ninth grade in September, 1977.[309] But before completing his first year of high school, Sammy dropped out.[310]

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[309] Sammy Lopez, School Records, Murphy School District, Grades 1-7, 9-12-69 to 6-8-77

[310] Sammy Lopez, School Records, Carl Hayden High School, 1977

Adolescence

Siblings: Trauma and Addictive Diseases

155. In an effort to quell the anxiety and fear they faced daily, all the Lopez brothers, with the exception of Junior, began drinking and inhaling organic solvents while still children, some as early as age seven or eight. Surviving chronic childhood abuse often contributes to the presence and severity of substance abuse and/or alcoholism. Sammy's brothers who shared his exposure to chronic, life threatening trauma have a remarkably similar history of addictive disease.

156. The three youngest boys -- Sammy, George, and Joe -- started drinking before they were in their teens.[311] Sammy's brother, Joe, explained that "[d]rinking and taking drugs was the only way [they] knew to bury all the bad feelings that were too much for a kid to handle."[312]

157. The Lopez brothers' intoxication from alcohol and other substances also contributed to numerous encounters with law enforcement. One of Sammy's older brothers, Eddie, has encountered numerous problems in life due to his substance abuse and psychological issues. Eddie knocked down an Arizona Public Service light pole in 1973, during the first of his four arrests for Driving While Intoxicated (DWI) in the span of two years.[313] Eddie's boss at National Metals, where several Lopez brothers worked, noted that Eddie was "not a malicious

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[311] Declaration of Jose Lopez, Signed 6-15-99

[312] Ibid

[313] Eddie Lopez Court Records, Presentence Investigation Report by Probation Officer Michael A. Jones. Maricopa Superior Court Case No. 87325. Arizona v. Eddie Villegas Lopez. (1975)

individual, but is not very intelligent."[314] He also stated that while Eddie was a "good worker," he knew Eddie was drunk on the weekends.[315] Joe described Eddie's alcoholism:

> My very first memory of Eddie was of Eddie in trouble for something to do with alcohol. We were out of school for the summer. He has a bad drinking problem, but he won't admit it. When Sammy and I were still in school, Eddie got four DWIs in just a couple of years. He was almost decapitated four or five years ago when he got into an accident while drinking and driving. Eddie had to live with our mother for a long time after that. The last I heard Eddie is homeless in Phoenix somewhere.[316]

Eddie left the home when "he was only in the eighth grade."[317] Sammy's brother Jimmy described Eddie's depressing situation:

> He's even been homeless. Right now, he's got a construction job and the boss lets him live in a beat up, little trailer on the job site, but every day after work, Eddie drinks until he can't even walk or talk. Eddie's mind is so messed up by all the drugs and alcohol he has used he can't even walk or talk. Eddie's mind is so messed up by all the drugs and alcohol he has used he can't even have a normal conversation anymore. The worst part is that this is the most stable Eddie has ever been. Besides keeping himself high and drunk for the last forty years, Eddie hasn't accomplished a thing in his life.[318]

158. Sammy's brother Jimmy was never in any legal trouble but according to his brother Joe, he suffered from a serious drinking problem.[319] Jimmy changes when he drinks, "he becomes much louder and more outgoing. He can be good or he can be bad, but

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[314] Ibid

[315] Ibid)

[316] Declaration of Jose Villegas Lopez, Signed 6-15-99, Page 11

[317] Declaration of Jose Villegas Lopez, Signed 6-15-99

[318] Declaration of Jimmy Lopez, Signed 2-10-09, Page 3-4

[319] Declaration of Jose Villegas Lopez, Signed 6-15-99

he is always more open and talkative when he drinks."[320] Jimmy admitted to his own problems with alcohol and drugs:

> I've had my problems too. For several years, I couldn't get by without using cocaine and crack every day. I nearly lost my wife and daughters because of my drug problem. Luckily, I got the help I needed, went into rehab, saw a therapist, and learned how to handle my moods better. Now I just drink enough to wind down every day. If I don't drink my beers at night I'm awake until three of four in the morning.[321]

159. Joe believes that alcohol directly caused his brother, Steve, to be the first of the Lopez boys to become involved with the police: "he has the heart to do the right thing, but somehow he always messes things up."[322] Sammy's older brother, Steve, also became addicted to inhaling organic solvents, alcohol, and other illicit drugs in an effort to escape from his daily problems.[323] At age ten, Steve started stealing his father's alcohol so he could drink.[324] Steve also began sniffing paint until he passed out.[325] The effects of chronic stress and trauma were evident when Steve got into legal trouble as juvenile. A juvenile report found that Steve "probably imagines himself lost and not worth the effort which is not correct, to this officer's way of thinking. But Steve will drift for what is likely most of his life; he is not interested in family, society, or self; almost nonentity."[326] The officer concluded that "Steve does not care

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[320] Ibid

[321] Declaration of Jimmy Lopez, Signed 2-10-06, Page 4

[322] Declaration of Jose Villegas Lopez, Signed 6-15-99

[323] Declaration of Esteve Lopez, Signed 6-16-99

[324] Declaration of Esteve Lopez, Signed 6-16-99

[325] Ibid

[326] Esteve Villegas Lopez, Maricopa County Juvenile Court Center Case J-75658. Disposition Summary, 6/27/75. page 27q.

about himself in relation to society" and that Steve's family home is "poor in resources and structure."[327]

160. In 1978, after Sammy's brother Steve was arrested for armed robbery, he was examined by Dr. Otto Bendheim (the same doctor who would later evaluate Sammy for his present crime) because his defense counsel requested the doctor answer questions regarding Steve's "capacity to make decisions of voluntariness and of informed consent" at the time of his police statements. Dr. Bendheim reported that on or about April 24, 1978, Steve said he was "quite high. We were getting high, me and my girlfriend, all night. I must have had ten joints of pot, a six pack of beer, and two pills of speed, and on the day before, a Saturday, I must have had two more pills of speed. I was so high that I don't remember much."

161. Dr. Bendheim concluded that Steve did not recall much of the arrest and that he only remembered the police interrogation vaguely.[328] Bendheim reported that Steve dropped out of school at age thirteen because of "poverty" and that "at age 14 or 15, he began to smoke pot, began to drink beer, and sniffed a little paint and took some uppers. Since that age he has taken a lot of speed, not every day, but perhaps twice a month; a lot of pot; and quite a lot of beer, the latter every weekend." [329] Bendheim concluded that Steve suffered from a "long history of drug abuse, alcohol, amphetamines, marijuana" and while he has "no history of true addiction" there is the "possibility of acute brain syndrome at time of heavy intoxication."[330] Steve told the police that although he drinks alcohol and has used

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[327] Esteve Villegas Lopez, Maricopa County Juvenile Court Center Case J-75658. Disposition Summary, 6/27/75.

[328] Esteve Lopez, Court Records, Maricopa County Superior Court Case CR 101939. State of Arizona v. Lopez, Servin & Servin 1978. Presentence Investigation, Otto Bendheim, MD (Expert) Letter to Judge, 7-13-78. Page 1.

[329] Esteve Lopez, Court Records, Maricopa County Superior Court Case CR 101939. State of Arizona v. Lopez, Servin & Servin 1978. Presentence Investigation, Otto Bendheim, MD (Expert) Letter to Judge, 7-13-78. Page 3.

[330] Ibid

marijuana, barbiturates, amphetamines, and darvon, he did not think he had a problem with addiction. The interviewing officer believed that there was a possibility of paint sniffing in Steve's history.[331] While Steve was incarcerated in the Arizona Department of Corrections, a psychological assessment of Steve found that he endorsed "mild anxiety, depressive affect ruminating thoughts and feelings of reference. The total is one of neurotic debility."[332]

162. Sammy's brother, Frank, has also struggled with alcoholism. Frank has suffered from many personal problems including the loss of his family numerous times directly caused by his drinking:

> Frank drinks so much that he's been in trouble with the law and he's even lost his family a bunch of times. I don't know how many times his wife has divorced him. Right now, his driver's license is suspended for driving drunk and he's just barely keeping his family together.[333]

Sammy's Substance Abuse

163. Like many traumatized individuals Sammy sought relief from the isolation, rejection, and pain he felt by using drugs and alcohol. Sammy's sister-in-law Joanna noted that Sammy smoked marijuana when he was just a child, "still in grammar school."[334] Sammy's self-defeating behaviors and high risk behaviors illuminate his extremely poor judgment which frequently resulted in adverse consequences including legal and financial difficulties.[335]

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[331] Esteve Lopez, Court Records, Maricopa County Superior Court Case CR 101939. State of Arizona v. Lopez, Servin & Servin 1978. Presentence Investigation

[332] Esteve Lopez, Medical Records, Arizona Department of Corrections, Psychological Report, 9-5-79.

[333] Declaration of Jimmy Lopez, Signed 2-10-06, Page 4

[334] Declaration of Joanna Lopez, Signed 9-16-03

[335] Declaration of Jose Villegas Lopez, Signed 6-15-99

164. Sammy was looking for a place to fit, a place where he was loved and respected, and naturally he gravitated to his older brothers and their friends. Unfortunately, Sammy's brothers were not in the position to be good role models. Like Sammy, they were severely traumatized, lost and confused and also looking for a way to ease their pain; they found it with drugs and alcohol. Sammy started running around with his older brother Steve and his friend Manuel Servin. Manuel and Steve took advantage of Sammy's age and eagerness and manipulated him into stealing things for them around the neighborhood. They used the money to get high and sniff paint. It never dawned on Steve or Manuel that they might be negatively influencing Sammy; all they knew about life was the desperate way they lived with no hope for the future.[336] Soon Sammy was getting drunk and high everyday:

> I knew that he had started drinking by the time he was about twelve, but it was shocking to see my little fifteen-year-old brother totally drunk whenever I stopped by for a visit. Sammy was also spending his time at Willow Park, a place where kids sniffed paint and did drugs. Many, many times, when I came by for a visit, I ran into Sammy on his way to or from the park, and he was completely intoxicated. He talked in slow motion, he slurred his words, and he had gold paint on his lips.[337]

165. Steve acknowledged that he gave Sammy alcohol to drink when Sammy was just nine years old and witnessed Sammy inhaling paint at age ten:[338]

> Sammy was sitting alone behind the house where we were living. I thought he was sick at first because he was slumped over and did not answer me when I called to him. I walked over to him and he looked up at me with this strange sleepy daze as though he did not recognize me. Then I saw the paint can and rag beside him, and I realized he was just passed out from the paint.[339]

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[336] Declaration of Manuel Servin, Signed 4-3-04

[337] Declaration of Jimmy Lopez, Signed 2-10-06, Page 12

[338] Declaration of Esteve Lopez, Signed 6-16-99

[339] Declaration of Esteve Lopez, Signed 6-16-99, Page 8

166. Sammy's use quickly escalated and exceeded that of the other children. Sammy used paint so much that people called him "paint hype."[340] Sammy loved the effect sniffing paint gave him because he felt like he was somewhere else. Sammy's good friend Chapo vividly recalled to me how Sammy acted after huffing:

> When he sniffed paint, Sammy seemed like he was on another planet. I can still see his eyes and his head rolling around like he couldn't control them, and I can hear him saying in a slow, dazed voice, "Whoa. I'm on the stars." Sammy hit the paint too often for his own good, but none of us who partied with him ever said anything about it to him. The whole reason we went to the park was to get high and try to escape from the reality of where we lived.[341]

167. His brother Joe noted that Sammy huffed paint and sniffed glue much more than he did. Sammy taught his brother how to get the best high.[342] Joe described how they inhaled the dangerous toxins:

> We sprayed the inside of a bag with paint until it was wet, squeezed the opening almost closed and then inhaled from the opening. Sammy taught me to use a plastic bag instead of paper because the paper disintegrates too quickly from the wet paint. After I quit sniffing paint, Sammy gave up using bags all together and started using cans because they last even longer than plastic bags. Sammy also showed me that gold aerosol gives the strongest high. Ten good breaths of paint would make us out of it for 20 or 30 minutes. We could make a can of aerosol paint can [sic] last all day if we spaced out our use. Inhaling the paint made us hallucinate. I often thought I heard helicopters coming after us. One time I thought a tree was bending down to grab me with its branches. Sammy also liked to sniff the glue used for PVC pipe fittings, but he also sniffed model glue. We sniffed glue by lining the bottom of a plastic bag with some glue, putting a hole in the side of the bag and closing the bag opening tightly. The weight of the glue pulled the bottom of the bag down. We pushed the bottom of the bag up toward our faces forcing the fumes into our mouths and noses. Sammy also sniffed

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[340] Declaration of Cipriano Chayrez, Signed 9-13-02

[341] Ibid, Page 3

[342] Declaration of Jose Villegas Lopez, Signed 6-15-99

gasoline fumes.[343]

168. Sammy continued using inhalants long after his brothers quit.[344] Intoxication from inhalants caused painful side effects, including intense headaches and even vomiting. Joe couldn't understand how Sammy could keep going given how awful the come-down was. but Sammy said "it took his mind off things."[345] Sammy was so desperate for relief from his overwhelming emotions that he accepted the consequences.

169. Sammy quickly became addicted to sniffing paint, glue, and gasoline and continued to inhale these highly toxic substances into his adulthood despite their disastrous consequences.[346] Inhalants enter the blood supply within seconds to produce intoxication. Effects of inhalants can cause an intoxicating effect resembling alcohol. The effects produce a decrease in inhibition, loss of control, mood swings, violence, speech and coordination problems, hallucinations, and delirium. The recovery time varies from user to user; some can require hours to come down, others do not come down at all.[347] The damage caused by inhaling organic solvents was only increased by Sammy's ingestion of alcohol.

170. Sammy, George, and Joe were heavy drinkers by the time they were teenagers.[348] In the beginning, Sammy only drank enough to feel good, but that quickly changed

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[343] Declaration of Jose Villegas Lopez, Signed 6-15-99, Page 13

[344] Declaration of Jose Villegas Lopez, Signed 6-15-99

[345] Ibid

[346] Sammy Lopez, Arrest Records: 10/17/80 arrest for disorderly conduct; 5/23/84 arrest for open liquor in public park; 12/15/84 arrest for disorderly conduct; 8/24/85 arrest for inhaling toxic substances

[347] Rutgers University Center of Alcohol Studies—Online Facts: Inhalants. Retrieved from the World Wide Web on January 21, 2006 at: http://alcoholstudies.rutgers.edu/onlinefacts/inhalants.html

[348] Declaration of Jose Villegas Lopez, Signed 6-15-99

and he drank until he became so drunk that he passed out.[349] Sammy also used marijuana, PCP, and sherm.[350] Sammy and his brothers got high and drank in the nearby park and cemetery.[351]

171. When Sammy drank alcohol, it caused dramatic personality changes. Sammy's brothers noticed that drinking gave Sammy a strange surge of energy. After a few drinks, Sammy was off doing something; it was as if he had to be moving.[352] Sometimes he went to the park to play basketball; other times he started manically doing chores around the house.[353] Like his father, Sammy also experienced visual hallucinations while drinking and often saw ghosts.[354]

172. Sammy was like a completely different person when he was drunk. Sammy suffered from impaired organization when he was drinking. When Sammy was sober he was a sweet boy who could be relied upon but when Sammy was drunk, he thought nothing of his obligations.[355] Sammy did not want to be asked to do anything when he was drinking.[356]

173. Many of Sammy's brothers did not want to be around him when he was drinking, even when they were young.[357] Sammy just wanted to be left alone when he was drinking. Drinking was an escape for him, and Sammy went off into his own world and did not

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[349] Declaration of Jose Villegas Lopez, Signed 6-15-99

[350] Ibid

[351] Ibid

[352] Declaration of Jimmy Lopez, Signed 2-10-06; Declaration of Frank Lopez, Signed 2-11-06

[353] Declaration of Frank Lopez, Signed 2-11-06

[354] Ibid

[355] Declaration of Jimmy Lopez, Signed 2-10-06

[356] Declaration of Jose Villegas Lopez, Signed 6-15-99

[357] Ibid

want to be bothered. He could not stand people joking or messing around with him when he was drunk.[358]

174. As Sammy's symptoms of trauma and depression went untreated, his alcohol, drug, and solvent addiction increased and his behavior grew more and more bizarre and paranoid. On January 3, 1980, when Sammy was almost eighteen years old, he was admitted to Memorial Hospital after he was hit in the head with a bottle while at the park. He suffered a one-inch laceration on his scalp.[359] The treating physician noted that Sammy's "[b]reath smells like model airplane glue," and that Sammy was lethargic. Sammy was unable to tell the medical personal if he had lost consciousness.[360]

175. Years later, in 1984, Sammy went to the hospital after a freak accident where he got his left hand caught in a lawnmower and sliced some of his fingers.[361] At first, Sammy was a "cooperative and compliant" patient.[362] Then suddenly, Sammy became paranoid and delusional. The nurse who attended to Sammy noted that his mood quickly changed, he "became apprehensive and got up quickly" and asked the nurse what she was doing. Sammy did not know where he was and asked the nurse if he was really in a hospital and if the nurse could prove that she was actually an employee of the hospital.[363] Sammy went on to say that "he did not 'trust' hospitals" and then began walking around the hospital. [364] The nurse asked him to

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[358] Ibid

[359] Sammy Lopez, Hospital Records, Memorial Hospital, 1/3/80

[360] Ibid

[361] Declaration of Frank Lopez, Signed 2-11-06; Sammy Lopez, Medical Records, Memorial Hospital, 9/16/84

[362] Sammy Lopez, Medical Records, Memorial Hospital, 9/16/84

[363] Ibid

[364] Ibid

remain in his own area, but just moments later Sammy was found "wandering around again." Then Sammy completely disappeared from the emergency room.[365] This behavior is consistent with a drug-induced paranoia, particularly since he was not oriented to place. He was unclear how he got there, and eventually left the hospital entirely.

IV. YOUNG ADULTHOOD

Arrests, Employment, and Incarceration

176. Sammy's trauma-derived anxiety and depression increased significantly after he left school and was unable to find steady employment. He saw his brothers fail in their attempts to find meaningful roles in the community, and watched helplessly as they were arrested and convicted of serious offenses. Sammy's brother, Steve, was arrested for armed robbery; he reported "that the reason he did it was because he was intoxicated and in need of money."[366] Records indicate that Steve was arrested for between ten and fifteen burglaries as a juvenile.[367] The Lopez brothers' criminal history must be understood within the context of their extreme poverty, neglect, and severe traumatic stress.

177. Uneducated, cognitively impaired, and unskilled, Sammy was left on his own. With no one to watch over him, and with Pedro at home terrorizing him, Sammy took to the streets. On March 21, 1979, at age seventeen, Sammy was arrested for the first time. He was charged with two counts of curfew violation and placed on probation.[368] Just nine days later,

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[365] Ibid

[366] Esteve Lopez, Court Records, Maricopa County Superior Court Case CR 101939, State of Arizona v. Lopez, Servin & Servin 1978.

[367] Ibid

[368] Sammy Lopez, Probation Records, 4-12-90 Presentence probation report by David Wilcox citing Robert Cherkos 5-20-87 Report citing Maricopa County Juvenile Court Center records; Offense dated 5-21-79

Sammy was arrested again for three counts of running away.[369] Just weeks after that, Sammy was arrested yet again for curfew violation. He was released with a warning.[370]

178. Sammy eventually held a series of jobs as a manual laborer for metal recycling shops near his home and also returned to agricultural work as a farm laborer.[371] Finally, in late 1980, Sammy found what could have proved to be steady minimum wage work as a laborer at National Metals Company in the metals department. But Sammy's drinking and drug use got in the way and Sammy was fired for "excessive absenteeism -- absent more than 3 days in a row without notification" on December 3, 1980.[372] Sammy was re-hired three days later only to be terminated again for "excessive absenteeism" on January 8, 1981.[373] During his employment with National Metals, Sammy was exposed daily to toxic fumes from melting, scraping, cleaning, and stacking metals. Sammy's brother Steve described the excessive exposure they faced each day of work:

> I was the first from our family to work at National Metals, a metal recycling plant in the neighborhood where our family lived for many years. I sorted and separated metal pieces. I also melted aluminum with a torch and poured it into star molds, the trademark of National Metals. I melted zinc with acid. It is important that aluminum and zinc are not mixed because they react to another and can explode. I also used chemicals to clean out containers used to melt and pour metals. I was laid off because of a work slow down. Eddie later got a job at National Metals, and eventually Sammy did, too. Sammy worked with metals at

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[369] Sammy Lopez, Probation Records, 4-12-90 Presentence probation report by David Wilcox citing Robert Cherkos 5-20-87 Report citing Maricopa County Juvenile Court Center records; Offense dated 5-30-79

[370] Sammy Lopez, Probation Records, 4-12-90 Presentence probation report by David Wilcox citing Robert Cherkos 5-20-87 Report citing Maricopa County Juvenile Court Center records; Offense dated 6-18-79

[371] Sammy Lopez, Employment Records, National Metals Company, Job application, 9-4-80

[372] Sammy Lopez, Employment Records, National Metals Company, Employment History Record 9-4-80 through 1-8-81

[373] Ibid

the company.[374]

179. Within a few weeks of losing his job at National Metals Company, Sammy was arrested and later indicted for five residential burglaries. He pleaded guilty to the offenses and was sentenced to 3.75 years in the Arizona Department of Corrections (ADOC). On November 16, 1981, Sammy was received at Arizona State Prison.[375] Probation officer Amanda C. Newman in her presentence investigation noted that Sammy came "from a less than stable family environment, has interrupted his educational experience, and appears to have been drifting with his life."[376] Sammy stated that he committed the burglaries because he was unemployed, could not find a job and "needed money." [377] Officer Newman contacted a police officer who knew Sammy to gather more information. Office C. Gregory relayed that "he has known the defendant for many years through community relations for offenses involving police." He felt that Sammy "succumbed to peer pressure and has aligned himself with negative influences" and was "manipulated by Anthony Randolph." Officer Gregory concluded that while he felt Sammy should receive some kind of punishment, a prison term was not needed.[378]

Years before Arrest: Homelessness, Joblessness, Decompensation

180. Sammy was released from prison on December, 8, 1983, and returned to his

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[374] Declaration of Esteve Lopez, Signed 6-16-99, Page 8-9

[375] Sammy Lopez, Prison Records, ADOC-File I, through 6-8-84, Admission receipt; also 6-18-84 Arizona Department of Corrections Parole Report of Correctional Program Officer Robert J. Stout

[376] Sammy Lopez, Prison Records, Probation Department Presentence Report by Amanda C. Newman, 11-2-81, Case No. 121406

[377] Ibid

[378] Sammy Lopez, Prison Records, Probation Department Presentence Report by Amanda C. Newman, 11-2-81, Case No. 121406

mother's home for a short stay.[379] Less than a week after Sammy's release, Sammy's parole officer noted that Sammy was unable to find any kind of steady work and his mother was already sick of supporting him.[380] Without work or support from his family, Sammy became homeless and lived in a nearby park, a cemetery, stayed at friends' homes when he could, and slept in the car of a friend, Chapo.

181. After Sammy's sister-in-law, Joanna, learned that Sammy and his two younger brothers, Joe and George, had been kicked out of the house by their mother, she found them sleeping in a big graveyard in the neighborhood. Joanna was shocked to see the state Sammy and his two brothers were in:

> When I found them in the graveyard, the poor kids were scared, abandoned, and they had nothing but the dirty, worn out clothes on their back. They had no way to even feed themselves. I brought them home with me, and then I went to the store and bought them shirts, pants, shoes, and underwear.[381]

182. Unable to stop his drug use, Sammy was arrested and jailed on a paint sniffing and resisting arrest charge on August 24, 1985.[382] In October, 1985, while Sammy was in the county jail awaiting sentencing, his two closest brothers, George and Joe were arrested for murder.[383] On November, 27, 1985, Sammy was sentenced to 1.5 years and sent to prison

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[379] Sammy Lopez, Prison Records, ADOC -File I. Through 6-8-84, Departure and Arrival Report

[380] Sammy Lopez, Prison Records, ADOC-File I. Parole Report, 9-18-86, Parole Officer Larry Spurgeon

[381] Declaration of Joanna Lopez, Signed 9-16-03, Page 5

[382] Sammy Lopez, Prison Records, Presentence probation report by Neal Nicolay, 11-15-85

[383] Sammy Lopez Prison Records, 4-12-90 resentencing recommendation and probation report by David Wilcox, both summarizing Phoenix Police Department, Maricopa County Sheriff's Office, Arizona Department of Corrections, Arizona Adult Probation Department, FBI and "standard LEJIS" records

for a second time.[384] Sammy never fully recovered from the devastating loss of his brothers. He cried all the time, and confided in his brother Frank that he felt completely unwanted. Sammy was profoundly lost and depressed and wondered who he was without his brothers.[385] Sammy felt that he let his brothers down because he was not there for them.[386]

183. Sammy's good friend, Chapo, also noticed the drastic change in Sammy after he was released from prison on May 27, 1986.[387] Without his two younger brothers, Sammy was a different person, vulnerable and confused.[388] Chapo felt sorry for his sad friend and offered to let Sammy sleep in his car that was parked outside of his house.[389] At night, Sammy slept in the back of Chapo's car and in the morning, he washed up in the park.[390] Just months before Sammy's arrest, Sammy's brother Frank saw Sammy at the park, in a disoriented state:

> In the months before he was arrested the last time, Sammy was so lost it broke my heart. He was sleeping in Willow Park. I told him to come and stay with me and my wife and my son. I also offered to talk to my mom so she would let Sammy move back in with her. But Sammy said he didn't want to be a problem. He came to my house a lot, but never stayed for more than a day. I didn't know how to help him, but I knew that he needed help. Sammy was so lost that you could feel it just by sitting next to him. I told him I wanted him to stay and that he could live with us until he got his head straight. I just wanted him to get better and decide what he wanted to

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[384] Sammy Lopez, Prison Records, Arizona Department of Corrections, Date Received, 11-27-85

[385] Declaration of Frank Lopez, Signed 2-11-06

[386] Declaration of Jimmy Lopez, Signed 2-10-06

[387] Sammy Lopez, Prison Records, Arizona Department of Corrections, Departure and Arrival Report, 5-27-86

[388] Declaration of Cipriano Chayrez, Signed 9-13-02

[389] Sammy Lopez, Police Records, Phoenix Police Department Reports, 1981 & 1986, DR# 86-144-475, Interview with Cipriano Chayrez

[390] Declaration of Cipriano Chayrez, Signed 9-13-02

> do with his life, but Sammy was so messed up that he couldn't make a plan to change his life. [391]

184. Once preoccupied with obsessive neatness and order, Sammy no longer cared about they way he dressed or looked, and the breakdown of his obsessive symptoms lent themselves to his cognitive disorganization. He had completely given up trying to take care of himself and became disheveled and unkempt. Sammy's sister-in-law, Joanna was shocked at how horrible Sammy looked just weeks before he was arrested:

> In the weeks before Sammy got arrested, he looked bad. He had stopped staying with us, and he wasn't staying with his mother either. He said that he had a friend who lived by the park and let him sleep in his car. I knew that he was spending all of his time getting drugs and using them. He wasn't taking care of himself at all. He looked very thin, and I could tell he wasn't sleeping. When he came over to visit, he actually ate like he hadn't had food in days, and then he passed out and slept all night. He also had stopped cleaning himself. He smelled so bad that I used to make him go take a shower. I hated to hurt his feelings but his odor was so bad, I couldn't stand it. I told him, "Sammy, you're not sitting on my couch smelling like that."[392]

185. After Sammy was released in 1986, Chapo recalled that he spent just about every day "partying" with Sammy in the park. They smoked marijuana, drank until they didn't have any more money, and Sammy sniffed paint. Chapo acknowledged that he partied too much back in those days, but still his partying was nowhere near the level of Sammy's:

> One time, right before he got arrested, Sammy came up to me with the craziest look in his eyes. I knew Sammy, and I could tell that he was out of his mind on drugs. He looked like a crazy person, and he was trying to give me money for letting him stay in my car. I just wanted to get away from him because he didn't seem like himself, so I told him to keep his money and get away from me until he sobered up a little.[393]

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[391] Declaration of Frank Lopez, Signed 2-11-06, Page 10-11.

[392] Declaration of Joanna Lopez, Signed 9-16-03, Page 7

[393] Declaration of Cipriano Chayrez, Signed 9-13-02, Page 5

Arrest for Estefana Holmes Murder

186. On November 3, 1986, Sammy was arrested for the murder of Estefana Holmes that occurred on October 29, 1986. When the officers arrived at Ms. Holmes's residence they found the front door unlocked and the window by the front door broken. Ms. Holmes's body was found on a sofa bed on the living room. She was lying on her back with multiple stab wounds to her upper left chest area. A white cloth was stuffed in her mouth and her pajama bottoms had been tied around her eyes.[394]

187. Although little is known about the events on the night of the murder, witnesses told police and later testified that they saw Sammy acting bizarre and believed that he was high. Pauline Rodriquez, who knew Sammy from the neighborhood, told the police that when she saw Sammy on the night of the murder he "was high or drunk and tried to push his way into her apartment."[395] In a police statement, Raymond Hernandez said that he also saw Sammy trying to get into his wife Pauline's apartment. Mr. Hernandez concluded that Sammy was drunk: when "Sammy is drunk, he is a very mean guy. When he is not drinking, he is mild and meek and won't even talk to you."[396]

188. At Sammy's 1987 trial, Yodilia Sabori testified that she lived with Pauline Rodriguez at the time of the murder and knew Sammy from the neighborhood. The night of the murder Yodilia saw Sammy at Willow Park. Sammy bought some beer and they hung out at the park for a few hours. After Yodilia went home, Sammy and another man, Angel, appeared at her door. Sammy told Yodilia that he and Angel had been drinking and Sammy appeared drunk. Sammy offered to get Yodilia high. When Yodilia refused, Sammy went around the corner by

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[394] Sammy Lopez, Police Records, Phoenix Police Department Reports, 1986, DR# 86-144475

[395] Sammy Lopez, Police Records, Phoenix Police Department Reports, DR# 86-144475, Det. J. Thomas, 11-8-86

[396] Sammy Lopez, Police Records, Phoenix Police Department Reports, DR# 86-144475, Det. Butler, 11-12-86

himself and returned within five minutes. When Sammy returned, "he was different, he was shaking, like shaking, and he was – he acted like he was mad, like everything bothered him. He just couldn't stand still. He was just – he had to hold himself on the wall, stand on the wall, just stand on the pole."[397] Yodilia also noticed that Sammy's hands were shaking.[398] Pauline Rodriguez testified that she also saw Sammy that night and although she didn't know for sure if he was drunk, she knew that "he was not himself."[399] Pauline knew what Sammy was like when he was sober and he was definitely not sober, "I can't say it was beers but he was loaded on something...He was acting strange, he was in a real bad mood."[400]

V. NEUROPSYCHOLOGICAL TESTING

189. Dr. Dale Watson conducted a battery of neuropsychological tests on Sammy during on January 4th and January 5th, 2006. One of the first tests administered was the Test of Memory Malingering of the TOMM. The results illustrated a straightforward testing approach by Sammy, with no evidence of malingering.

190. Dr. Watson's tests revealed significant neurological impairments including frontal lobe impairments. The frontal lobe of the brain controls executive functioning. Executive functions include the inhibition of movement and behavior, planning, judgment, weighing and deliberating options and consequences, sequencing behaviors, decision-making,

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[397] Sammy Lopez, State v. Lopez, No. CR 163419, Maricopa County Superior Court, 1987 Trial, Yodilia Sabori testimony: R.T. 4-21-87, pp. 74

[398] Ibid, pp. 65-78

[399] Sammy Lopez, State v. Lopez, No. CR 163419, Maricopa County Superior Court, 1987 Trial, Pauline Rodriguez testimony: R.T. 4-21-87, pp. 79-88

[400] Ibid

language processing, as well as intentionality. Executive functions are the ways in which a person understands and interacts with the world.

191. Sammy's frontal lobe impairment results in his inability to understand or explain abstract consequences, think logically, incorporate new information (and adjust his thinking based on this new information), or understand the consequences of his actions. Additionally, Sammy's frontal lobe deficits impaired his ability to shift mental states. This leads to his preservation, a condition in which a person repeatedly and inappropriately returns to a single idea or theme despite evidence or information that would typically cause an unimpaired person to move to another idea.

192. Sammy also manifested impairments in his temporal lobes, the seat of academic prowess. These temporal lobe findings were consistent with Sammy's history of academic underachievement.

193. Most prominent in Dr. Watson's testing was Sammy's impaired cognitive ability to inhibit his behavior once that behavior has started as well as his inability to effectively weigh and deliberate, particularly in a fast changing, chaotic environment.

194. Sammy's IQ was in the low average range. His neuropsychological impairments were greater than one would infer from his IQ scores. Sammy's brain impairment creates a vulnerability to atypical drug responses.

195. Sammy's impaired cognitive functioning means that he is unable to appropriately comprehend the fast flow of information, has a diminished ability to understand and process information, to communicate, to learn from experience, to engage in logical reasoning and to understand the reactions of others around him. Sammy does not have a wealth

of commonly understood information about the world to rely upon and is easily led to conclusions which an unimpaired person could easily see as inaccurate when weighed against other information.

196. Sammy's impaired cognitive functioning ensures that he will struggle with language tasks. The testing shows that he is unable to effectively translate what he hears into thought or action leaving him unable to effectively use language to solve problems. Sammy's cognitive impairments are manifested by his inability to organize. He acts impulsively, has mental inflexibility (concrete thinking), and perseverates. Sammy's inability to organize only augments his overwhelming traumatic-induced stress. It is important to understand Sammy's cognitive impairment and frontal lobe deficits are also compounded by his serious psychiatric illness.

VI. CONCLUSION

197. Sammy Lopez lived much of his live as a feral child. Born with cognitive impairments in language, ability to effectively organize, plan, and implement, Sammy's neurological deficits were augmented by bone-and soul-crushing beatings, paranoia, poverty, neglect, and, finally, self-medication with mind-destroying drugs. The chaos of the crime scene is consistent with a poorly planned, chaotic event with scores of knife wounds that reveal a lack of planning rather than a well thought-out act. To this day, Sammy does not remember the event, consistent with a dulling of his cognition. His level of intoxication at the time of the offense, in my professional opinion, impaired even his ability to weigh and deliberate, sequence his

behavior, and change mental direction even more greatly than could have been predicted from his cognitive deficits.

198. Sammy's family reflects the impact of profound alcoholism, cultural deprivation, extreme trauma, and severe neglect. Sammy's mother was so traumatized by her own family experiences that she was unable to provide the nurturing her children needed for healthy neural development. Neither parent could provide or protect from the abuse and neglect Sammy suffered. One parent could not provide what the other was lacking and in the end, Sammy and his brothers received nothing. Concha was unable to make sense of Arcadio's abuse of Sammy and comfort him. Sammy grew up a sterile and traumatized child, unable to form any healthy ego boundaries.

199. Sammy suffered a childhood of life-threatening trauma, first at the hands of his father, then under the fist of his older brother, and finally under the threats to kill, repeated physical assaults, degradation, and humiliation by his mother's paramour. Traumatic events obliterate the internal and external coping mechanisms that give people a sense of control, connection and meaning. The beatings, neglect, isolation, and fear disrupted his normal development and prevented him from learning vital lessons of life that are, ostensibly, taught by parents to their children. Sammy responded to the trauma in a manner seen only in children who have faced daily annihilation at the hands of their caretakers. He became hypervigilant, ever alert to minimal or unpredictable danger, and stayed in a constant state of arousal. He became despondent and depressed, and believed he was helpless to change his circumstances. Intrusive thoughts and memories of his abuse, and the abuse of his siblings and mother overwhelmed him, and he learned to use drugs, alcohol, and organic solvents to quell these frightening emotions. The constellations of symptoms, seeing his mother beaten regularly,

being beaten regularly himself, not knowing where he was to eat or sleep, extreme paranoia, intrusive nightmares, hypervigilance, and chronic, destructive self-medication Sammy displayed in response to childhood trauma is diagnostic of Post Traumatic Stress Disorder.

200. Sammy and his brothers, modeled by their parents, were taught that everyone in the family was left on their own and each sibling had to fend for himself. The older Lopez brothers got out as soon as they could, leaving the younger brothers to suffer on their own. Sammy had no one to model safe, loving, protective behavior for him within his home and no outside environmental supports. Sammy's profound cognitive impairments left him effectively limited in his ability to weigh or deliberate choices early on in his life. Sammy was rendered helpless and hopeless because he was unable to develop problem solving strategies. Sammy's neglect and abuse also left him vulnerable and unable to modulate his emotions.

201. Sammy long-standing mental disorder is characterized by paranoia, confusion, suspiciousness, loss of contact with reality and disordered thinking. Sammy is cognitively concrete and measures his interactions with others against his paranoidbelief system that others will harm him. He holds onto this belief regardless of evidence to the contrary. This disorder affects all aspects of his life, including written and verbal communications with others, the safety of meals he is provided, special meanings of words that only he understands, and strict, but secret, rules that must be followed in interpersonal relationships. Sammy displayed signs of a thought disturbance at times present in his speech patterns. He perseverates, displays impoverished speech, and has a limited range of affect.

202. Sammy's neurological deficits augment problems associated with Post Traumatic Stress Disorder. His impairments are the result of the interplay of a brain damage and the early onset of drug and alcohol abuse. Sammy has significant neurological impairments that

could be the result of blows to his head and central nervous system, congenital factors such as his mother's malnutrition and lack of medical care during her pregnancy with him, exposure to neurotoxins in substandard housing in a heavily industrialized neighborhood, or ingestion of brain-damaging agents, such as organic solvents (glue, paint, gasoline), alcohol, and illicit drugs during his critical developmental years. Although it is impossible to know with certainty the precise etiology of Sammy's brain damage, its severity and effect on his cognitive functioning has been established through the results of a battery of tests that are consistent with his behavior and functioning over time.

203. Sammy began using organic solvents, alcohol, and drugs as a child in an effort to self- medicate the overwhelming emotional responses he experienced as a result of life threatening trauma and became addicted to these substances by the time he reached his teen years. The likelihood of Sammy's addiction increased dramatically because of his family's economic conditions, cultural traditions, formal and informal social controls, and the companionship, approval and encouragement of other drug, alcohol, and organic solvent users. Drugs, alcohol, and organic solvents were made available to him at an early age in sufficient amounts to cause addiction by those who should have protected him from harm.

204. Sammy's use of and dependency on organic solvents continued into his adulthood. Sammy's chronic use of organic solvents acted synergistically to increase his brain impairments. Organic solvents are powerful neurotoxins that destroy brain tissue and lining, permanently altering brain function. Sammy's chronic inhalation of nearly fatal quantities of florescent paint caused long-lasting changes in his brain, found in Dr. Watson's testing that contributed to and exacerbated the effects of alcohol and other drugs. His repeated use of organic

solvents, alcohol, and drugs changed the structure and activity of his brain cells in pervasive and persistent ways.

205. Intoxication by alcohol and other mind altering substances such as organic solvents has a particularly disinhibiting effect on Sammy's behavior and increases his sense of threat and perception of danger. He has demonstrated a history of irrational behavior during periods of intoxication that is greater than his base line state of suspicion and paranoia. His history of irrational and pathologic behavior during intoxication is similar to that demonstrated by multi-generations of his family members, including his father, uncles, siblings, and cousins.

206. Unfortunately for Sammy, there was no one there to intervene in his stressful, traumatic, and disordered family situation. As a result his symptoms of mental illness and clear patterns of disturbed behavior went undetected and therefore untreated.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and was executed on April 5, 2006.

George W. Woods, Jr., M.D.

Appendix

1. Raymond Hernandez Police Interview
2. Transcript of Dr. Otto Bendheim Deposition
3. Declaration of Dr. George Woods
4. Report Regarding Cecelia Rodriguez
5. Birth Certificate Concha Villegas
6. Declaration of Angela Villegas Lopez
7. Declaration of Luis Gonzales Villegas
8. Declaration of Maria Villegas Estrada
9. Declaration of Venancia Garcia
10. Declaration of Petra Villegas
11. Declaration of Concha Villegas
12. Declaration of Concepcion Villegas
13. Declaration of Arcadio Lopez
14. Coroner's Autopsy Report Re: Arcadio Verdugo Lopez
15. Birth Certificate Robert Villegas
16. Birth Certificate Sammy Lopez
17. Eddie Lopez National Metals Employment Records
18. Declaration of Frank Lopez
19. Birth Certificate Esteve Villegas Lopez
20. Declaration of Jimmy Lopez
21. Birth Certificate Jose Lopez
22. George Lopez Brith Certificate
23. Birth Certificate Gloria Villegas
24. Declaration of Jose Cortez
25. Declaration of Manuel Servin
26. Esteve Lopez Court Records, Maricopa County Juvenile Court, J-75658
27. Esteve Lopez Court Records Maricopa County Superior Court, CR101939, Presentence Investigation
28. Concha Villegas, SSI Records, Department of Health and Human Services, SSA, Yearly Earnings
29. Arcadio Verdugo Lopez, Tulare County Arrest Records
30. Arcadio Verdugo Lopez Arrest Record, Porterville CA Warrant #18936
31. Concha Villegas, Medical Records, Maricopa General Hospital
32. Concha Villegas, Medical Records, Phoenix Memorial Hospital
33. Declaration of Margaret Escobar
34. Declaration of Donitilia Servin
35. Declaration of Joanna Lopez
36. Sammy Lopez, Court Records, Presentence Probation Report by Neal Nicolay
37. Gloria Villegas, Certificate of Death
38. Gloria Villegas Medical Records, Maricopa County General Hospital
39. Sammy Lopez School Records, Murphy School District Grades 1-7
40. Sammy Lopez School Records, Murphy School District Grades 1-7, Health Records
41. Sammy Lopez, School Records, Murphy School District Grades 1-7, Nurse Notes

42. Sammy Lopez, School Records, Murphy School District, Grades 1-7, Competency Tests
43. Sammy Lopez, School Records, Murphy School District, Grades 1-7, Final Diagnostic Report
44. Sammy Lopez, School Records, Murphy School District, Grades 1-7, Enrollment Forms, health exams, and diagnostic reports
45. Sammy Lopez, School Records, Carl Hayden High School
46. Eddie Lopez, Court Records, Presentence Investigation Report by Probation Officer Michael A. Jones, Maricopa Superior Court, 97325
47. Esteve Lopez, Court Records, Maricopa County Superior Court, CR 101939, Presentence Investigation Otto Bendheim, MD Letter to Judge
48. Esteve Lopez, Medical Records, Arizona Department of Corrections, Psychological Report
49. Declaration of Cipriano Chayrez
50. Sammy Lopez, Arrest Records
51. Sammy Lopez, Hospital Records, Memorial Hospital, 1/3/80
52. Sammy Lopez, Hospital Records, Memorial Hospital, 9/16/84
53. Sammy Lopez, Probation Records, Presentence Probation Report by David Wilcox
54. Sammy Lopez, Employment Records, National Metals Company Job Application
55. Sammy Lopez, Employment Records, National Metals Company Employment History
56. Sammy Lopez, Prison Records, ADOC-File I
57. Sammy Lopez, Prison Records, Probation Department Presentence Report by Amanda C. Newman Case No. 121406
58. Sammy Lopez, Prison Records, Arizona Department of Corrections, Departure and Arrival Report
59. Sammy Lopez, Police Records, Phoenix Police Department Reports, DR#86-144-475, Interview with Cipriano Chayrez
60. Sammy Lopez, State v. Lopez No. CR 163419

CURRICULUM VITA

George W. Woods, Jr., M.D.

4200 Park Boulevard, #545
Oakland, California 94602

57 Executive Park South, #360
Atlanta, Georgia 30326
United States of America

EDUCATION

1981-1982: American Psychiatric Association/National Institute of Mental Health Fellowship Pacific Medical Center
San Francisco, California (Jeanne Spurlock, M.D., Chair)

1981: Residency- Psychiatric - Pacific Medical Center
San Francisco, California (Allen Enelow, M.D., Chair)

1977-1978: Internship—Medical/Surgical, Highland Hospital
Oakland, California

1977: MD, University of Utah
Salt Lake City, Utah

1969: BA, Westminster College
Salt Lake City, Utah

LICENSES & CERTIFICATIONS

2009: Secretary General, International Academy of Law and Mental Health

2008: Certified Mediation Specialist, California State University, Sacramento, California

2004-2005: Interim License, Zanzibar Revolutionary Government

2004: Fellow: American Psychiatric Association

1992: Certified by the American Board of Psychiatry and Neurology

1979: Licensed Physician in California

CLINICAL EXPERIENCE & CONSULTATION
2011: San Francisco Police Department Crisis Intervention Training (CIT): Suicide

Assessment, Mood disorders, thought disorders, and personality disorders.

2010: Task Force on Mental Retardation and the Death Penalty, American Association for Individuals with Intellectual Disabilities.

2006-2009: Projects Among African Americans Explore Risks for Schizophrenia (PAARTNERS), Consensus Diagnosis Group, Minority Mental Health Research Group, Department of Psychiatry and Behavioral Sciences, Morehouse School of Medicine, Atlanta, Georgia

1996-present: Individual Private Practice, Oakland, California

2006: National Consortium on Disaster Response for the Poor and Underserved, Developmental Task Force for the Minority Mental Health Professions Foundation, Atlanta, Georgia

2006: Georgia Congressional Representative Cynthia McKinney's Post-Katrina Working Task Force

1998-2004: Consultant-the Board of Directors, Crestwood Behavioral Health Systems, Stockton, California

1996: Individual Private Practice, San Francisco, California

1994-1996: Senior Consulting Addictionologist, New Beginnings Programs, San Ramon and Pinole, California

1988-1996: Individual Private Practice, Pinole, California

1994-1995: Chemical Dependency Consultant, Physicians' Advisory Committee, Alameda Contra Costa Medical Association

1990-1995: Consultant, Insomnia Division of the Sleep Disorders Center, Doctors Hospital, Pinole, California

1992-1994: Qualified Medical Examiner, Industrial Medical Council, State of California

1990-1994: Medical Director, Pain Management Program, Doctors Hospital, Pinole, California

1991-1993: Psychiatric/Pharmacologic Consultant, Triumph Over Pain (TOP Program), Kentfield Rehabilitation Hospital, Kentfield, California

1991-1993: Psychiatric Consultation, NeuroCare Corporation, Concord, California

1989-1994: Clinical Director, New Beginnings Chemical Dependency Program, Doctors

Hospital, Pinole, California

1988-1993: Private Practice, Comprehensive Psychiatric Services, Walnut Creek

1983-1990: Staff Psychiatrist, Crestwood Manor, Vallejo, California

1982-1983: Medical Director, Westside Geriatric Services of Family Service Agency of San Francisco

1982-1983: Staff Psychiatrist, Villa Fairmount Psychiatric Facility, San Leandro, California

1981-1982: Assistant Director of the Inpatient Center, Director of Geriatric Services, Pacific Medical Center, San Francisco, California

1980-1981: Medical Director, Clinica De La Raza, Blythe, California

1979-1981: Emergency Room Physician, Medical Emergency Services, Fairmount Hospital, San Leandro, California

INTERNATIONAL CLINICAL EXPERIENCE & CONSULTATIONS

2006-2008: Adjunct Professor, Makerere University, Department of Psychiatry, Kampala, Uganda

2006-present: Human Rights Committee, International Academy of Law and Mental Health, Montreal, Quebec, Canada

2006: Visiting Staff Psychiatrist, Butabika National Hospital, Kampala, Uganda

2004: Clinical Consultant, Kidongo Chekundu Mental Hospital, Zanzibar, Tanzania

2004: Scientific Committee, International Academy of Law and Mental Health

1998-2004: Technical Advisor, Documentation Committee, Operation Recovery, Kenya Medical Association

1999-2003: Advisor - the Jomo Kenyatta National Hospital, PTSD Project, Nairobi, Kenya

1998-2003: Technical Advisor- Recovery Services, Ministry of Health, United Republic of Tanzania

ADVISORY BOARDS

2006-present: Executive Committee, International Academy of Law and Mental Health

2004-2007: Advisory Board, Health Law Institute, DePaul University, College of Law

2004-present: Advisory Board, Human Dignity and Humiliation Studies, University of Trondheim, Norway

2004-present: Board of Directors, The Center for African Peace and Conflict Resolution, College of Health and Human Services, California State University, Sacramento

2003-present: International Board of Directors, International Academy of Law and Mental Health

FACULTY AND PROFFESIONAL APPOINTMENTS

2008: Secretary, American Psychiatric Association's Africa Action Committee

2003-present: Adjunct Professor, California State University, Sacramento, Department of Educational Leadership and Public Policy, Sacramento, California

2002-present: Adjunct Professor, Morehouse College School of Medicine, Atlanta, Georgia

1999-2004: Affiliate Professor, University of Washington, Bothell Campus, Interdisciplinary Arts and Sciences

1986-2002: Adjunct Professor, University of Nebraska, Omaha, College of Public Affairs

1996-2000: Adjunct Professor, University of California, Davis, Department of Psychiatry, Forensic Fellowship

1992: Summer Faculty, North Central Educational Research Laboratory, Northeastern University

CLINICAL LECTURES

2011: Mood and Thought Disorders in Crisis Intervention: San Francisco County Sheriff's Crisis Intervention Training, San Francisco, California.

2011: Fetal Alcohol Spectrum Disorders and the Criminal Justice System, National Press Club, Washington, DC.

2011: The Epidemiology of Medicalization of Prisoners in the United States, International Academy of Law and Mental Health, Berlin, Germany

2011: Intellectual Disability and Fetal Alcohol Spectrum Disorder: International Academy of Law and Mental Health, Berlin, Germany

2011: Neuronal Plasticity: **Cognitive Skills Retraining for students with acquired brain**

injuries or learning disabilities. College of Alameda, Alameda, California

2011: "The Neurobiology of Trauma In Children: Lessons About Early Childhood; Families First, Atlanta, Georgia

2010: From the Plantations/Asylums to the Prisons: The Relationship between Humiliation, Stigma, Economics and Correctional Care for the Mentally Ill: 2010 Workshop on Transforming Humiliation and Violent Conflict*
representing the
16th Annual Human DHS Conference
and the Seventh Workshop on Humiliation and Violent Conflict

Columbia University, Teachers College, New York

2010: Applying the Institute of Medicine Quality Chasm Framework to Improving Health Care for Mental and Substance Use Conditions; Morehouse School of Medicine, Department of Psychiatry, Journal Club

2010: Psychiatric Manifestations of Physical Disease. Morehouse School of Medicine, Department of Family Practice, Atlanta, Georgia.

2009: Sleep Disorders in Psychiatric Practice: Morehouse School of Medicine, Department of Psychiatry, Atlanta, Georgia

2008: Moderator: The Impact of Mental Health Issues on Aging, Particularly as it Relates to Alzheimer, Dementia, and Parkinson Disease, National Medical Association, Atlanta, Georgia

2008: Aging and Mental Health: What is Wellness and What is Pathology? National Medical Association, Atlanta, Georgia

2007: The Price of Leadership and the Cost of Success: Urban Leadership Program, Graduate School of Educational Leadership and Public Policy, California State University, Sacramento

2007: Cognitive Assessment and Curriculum, Department of Educational Policy, Urban Leadership Program, Graduate School of Educational Leadership, California State University, Sacramento

2007: Complex disorders of trauma and torture: The neurological bases examined through sleep disorders, Padua, Italy

2006: Clinical Aspects of Forensic Evaluation, Makerere University, Department of Psychiatry, Kampala, Uganda

2006: Memory, Medications, and Aging, Crockett, California Women's Club

2006: Cultural Differences: Ethics or Efficacy, Mental Health, Ethics and Social Policy, University of Montreal, Quebec, Canada

2006: An Update on Memory Function, Grand Rounds, Morehouse School of Medicine, Atlanta, Georgia

2006: Moderator & Respondent (Representing Morehouse School of Medicine) Consortium for the Poor and Underserved- Cultural Factors, DePaul University School of Law and Health, Health Law Institute

2005: Constitutional Theory and Medical Rights, Montreal, Quebec, Canada

2005: Medical Diseases with Psychiatric Manifestations: Morrison and Foerster, LLP

2004: Diagnosis and Treatment of Malaria-Induced Altered Mental States: Kidongo Chekundo Mental Hospital, Zanzibar, Tanzania

2003: Law, Mental Health, and Popular Culture: University of San Francisco College of Law

2003: Accommodating Mental Illness in the Workplace: The 28th International Conference, International Academy of Law and Mental Illness, Sydney, Australia

2002: Cultural and Psycho-biological Factors In the Assessment and Treatment of Trauma: Don't Believe Everything You Think: Traumatology 1003, The Trauma Recovery Institute, Morgantown, West Virginia

2002: Trauma, Recovery and Resiliency: University of Washington, Bothell, 2002

2001: Understanding the Relationship Between Neuroimaging, Neuropsychology, and Behavior: National Medical Association 2001 Annual Convention and Scientific Assembly, Nashville, Tennessee, 2001

2001: The Thrill is Gone: Keynote Address, African American History Month, Loras College, Dubuque, Iowa

2001: Disparate Access- Healthcare: University of Washington, Bothell Campus Nursing Program

2000: Anger Management: West Contra Costa Stroke and Aphasia Support Group, Doctors Hospital, San Pablo, California, 2000

2000: Race, Culture and Bioethics: American Society for Bioethics Annual Conference, Panel Discussion, Salt Lake City, Utah

2000: Globalization and Postmodernism: International Congress on Law and Mental Health, Siena, Italy

2000: Globalization and Neuropsychiatry: Answers that Transcend Culture? International Congress on Law and Mental Health, Sienna, Italy

1998: Managed Care in the Kenyan Medical Environment: Kenyan Medical Environment:

Kenyan Medical Association, Aga Khan Hospital, Nairobi, Kenya

1994: The Relationship Between Holidays and Mood Disorders: Doctors Hospital Pinole, California

1994: The Role of the Mental Health Expert as a Liaison Between Chemical Dependency and Pain Management Programs: American Academy of Pain Management, Vancouver, Canada

1994: Chemical Dependency: Selected Topics: Critical Care Conference, Doctors Hospital, Pinole California

1993: Detox: The First Step to Recovery: National Medical Enterprises Management Services Division Annual Conference, Colorado Springs, Colorado

1993: Substance Use and Substance Induced Organic Mental Disorders: National Medical Enterprises Management Services Division Annual Conference, Colorado Springs, Colorado

1993: Dual Diagnosis in the Inpatient Setting- Professional Seminar, Doctors Hospital, Pinole, California

1993: Depression and Strokes: Brookside Hospital, San Pablo, California

1992: Drug Interactions in the ICU: Clinical Care Rounds, Doctors Hospital, Pinole, California

1992: Overview of Sleep Disorders: Grand Rounds, Doctor Hospital, Pinole, California

1991: Benzodiazepines: Uses and Abuses: Grand Rounds, Brookside Hospital, San Pablo, California

1990: Sleep Disorders in Schizophrenia: Quarterly Medical Staff Meeting, East Bay Hospital

1987: Afro-Centricity in Psychology: Grand Rounds, San Francisco General Hospital, San Francisco, California

1982: Geriatric Psychiatry-University of Southern California, 1982

PROFESSIONAL AFFILIATIONS

Northern California Psychiatric Society

American Society of Addition Medicine

American Psychiatric Association

Black Psychiatrists of America

American Neuropsychiatric Association

American Psychological Association

American Association for Intellectual and Developmental Disabilities

CLINICAL PROFESSIONAL ACTIVITIES

2010: American Association for Intellectual and Developmental Disabilities, Task Force

2007-2009: Neurocognitive Committee, PAARTNERS

2004-present: Scientific Committee, International Academy of Law and Mental Health

1993-1996: Medical Privileges Committee, Doctors Hospital, Pinole, California

1991-1996: Physicians' Advisory Committee, Doctors Hospital, Pinole, California (Chair, 1994- 1995)

1993-1995: Physicians' Advisory Committee, Alameda Contra Costa Medical Association, Oakland, California

1993-1994: Board of Directors, Solano Park Hospital, Fairfield, California

1992-1993: Board of Directors, East Bay Hospital, Richmond, California

1992: Chief of Staff, East Bay Hospital, Richmond, California

1992: Chairman, Medical Executive Committee, East Bay Hospital, Richmond, California

1992: Allied Health Committee, Doctors Hospital, Pinole, California

1992: Pharmacy & Therapeutics Committee, Doctors Hospital, Pinole, California

1991: Professional Activities Committee, Easy Bay Hospital, Richmond, California

1990: Psychiatry Committee, Chairman, East Bay Hospital, Richmond, California

HONORS

2009: Secretary General, International Academy of Law and Mental Health

2009: Co-Chair, International Academy of Law and Mental Health Congress, New York University Law School,

2007: Co-Chair, International Academy of Law and Mental Health Congress, University of Padua, Padua, Italy.

2007: Executive Committee, International Academy of Law and Mental Health

1993: Outstanding Professor Award, Goodrich Program, Department of Public Policy, University of Nebraska at Omaha

1992: National Medical Enterprises' Outstanding Medical Director of Psychiatric, Rehabilitation and Recovery Hospitals

1992: Chief of Staff Award for Outstanding Service, East Bay Hospital, Richmond, California

CLINICAL PUBLICATIONS

Greenspan, Switzky, Woods: *Intelligence Involves Risk-Awareness and Intellectual Disability Involves Risk-Unawareness: Implications of a Theory of Common Sense*, Journal on Intellectual & Developmental Disability, 2011, in press.

Woods, Greenspan, Agharkar: *Ethnic and Cultural Factors in Identifying Fetal Alcohol Spectrum Disorders:* American Academy of Psychiatry and the Law, 2011, in press.

Bradford, Fresh, Woods: Not all patients are alike: *Ethnopsychopharmacology of Bipolar Disorder in African Americans*. Psychiatric Times, February, 2007.

Abueg, Woods, Watson: Disaster Trauma; Cognitive-Behavioral Strategies in Crisis Intervention: Second Edition, Guilford Press, New York and London; p. 73-290, 2000.

FORENSIC PRACTICE

1981-present: Psychiatric Consultant (Civil, Criminal and Appellate Judicial Proceedings)

1993-2001: Consultant- the Victims' Assistance Program, State Board of Control, State of California, Sacramento, California

1983-2000: Medical Examiner Panel, San Francisco County, Marin County and Contra Costa County Superior Courts

FORENSIC PROFESSIONAL LECTURES

2010: The Trial of Hamlet, Morrison and Foerster, LLP, Law College, San Diego, California

2009: Treatment of Mentally Ill Offenders in the United States, Canada, and Japan; Japanese Association of Forensic Psychiatry, Tokyo, Japan

1998-2007: In Association With The National Institute of Trial Advocacy Training, Notre Dame University, South Bend, Indiana; Georgia State Law School, Atlanta, Georgia; New

York University Law School, New York City, University of North Carolina Law School, Chapel Hill, North Carolina; University of Houston Law School, Houston, Texas; University of Tennessee Law School, Knoxville, Tennessee; Atlanta, Georgia; University of Texas Law School, Austin, Texas; Temple University School of Law, Philadelphia, Pennsylvania

2006: Aligning Clinical Services with Correctional Treatment, Luzira Prison, Kampala, Uganda

2006: Decision Tree for Forensic Evaluations, Butabika Hospital, Kampala, Uganda

2006: Neuropsychiatry and The Courts: The University of Texas Law School, Austin Texas

2002: Demystifying Emotional Damages Claims: Paul, Hastings, Janofsky & Walker, San Francisco, California

2000: An Introduction-Multi-Axial Assessment and DSM-IV: Second National Seminar on Mental Illness and the Criminal Law, Miyako Hotel, San Francisco, California

2000: Psychiatric Manifestations of Mental Disorders: Second National Seminar on Mental Illness and the Criminal Law, Miyako Hotel, San Francisco, California

1999: An Introduction-Multi-Axial Assessment and DSM-IV: First National Seminar on Mental Illness and the Criminal Law, Radisson Hotel, Washington, D.C.

1999: Psychiatric Manifestations of Medical Disorders: First National Seminar of Mental Illness and the Criminal Law, Radisson Hotel, Washington, D.C.

1999: The Kenya/Tanzania Embassy Bombings: When Forensic Science, Politics, and Cultures Collide: International Academy on Law and Mental Health, Toronto, Quebec, Canada

1999: Research Collaboration Between East Africa and the United States: World Psychiatric Association/Kenya Psychiatric Association, First Annual East African Conference, Nairobi, Kenya

1999: Trauma/Resiliency In East Africa Workshop: World Psychiatric Association/Kenya Psychiatric Association, First Annual East African Conference, Nairobi, Kenya

1998: Mental Health Litigation and the Workplace: Sponsored by the University of California Davis Health System, Division of Forensic Psychiatry, Department of Psychiatry, and Continuing Medical Education, Napa, California

1998: Psychological Disabilities: Charting A Course Under the ADA and Other Statutes: Yosemite Labor and Employment Conference, Yosemite, California

1998: Current Trends in Psychiatry and the Law: Developing a Forensic Neuro-Psychiatric Team: CLE, Federal Public Defenders for the District of Oregon, Portland, Oregon

1997: The Changing Picture of Habeas Litigation: The National Habeas Training Conference, New Orleans, Louisiana

1997: Accommodating Mental Illness in the Workplace: Employment Law Briefing, Orange County

1997: Accommodating Mental Illness in the Workplace: Employment Law Briefing, Palo Alto, California

1997: Accommodating Mental Illness in the Workplace: Employment Law Briefing, Morrison & Foerster, San Francisco

1997: Psychiatric Evaluations in the Appellate Process: Emory University, Department of Psychiatry, Forensic Fellowship, Atlanta, Georgia

1997: So You Wait Until Discovery Is Over to Consult with a Psychiatrist? Can You Tell Me More About That? Morrison and Foerster Labor Law College, Los Angeles, California

1997: The Changing Cultural Perspectives in Forensic Psychiatry, San Francisco General Hospital Grand Rounds, San Francisco, California

1996: Evaluations of an Elementary School Child: Criminal Competency and Criminal Responsibility, Stanford University School of Medicine, Department of Psychiatry and Behavioral Sciences, Division of Child, Psychiatry and Child Development, Grand Rounds, Palo Alto, California

1996: Forensic Psychiatry: Cultural Factors in Criminal Behavior, Malingering, and Expert Testimony: The Black Psychiatrists of America Transcultural Conference, Dakar, Senegal, West Africa

1996: Dangerousness; Evaluation of Risk Assessment: Grand Rounds, Department of Psychiatry, University of California, Davis

1995: Violence in the Workplace: A Psychiatric Perspective of Its Causes and Remedies: The Combined Claims Conference of Northern California, Sacramento, California

1995: Experts: New Ways To Assess Competency- Neurology and Psychopharmacology: Santa Clara University Death Penalty College, Santa Clara, California

1995: Multiple Diagnostic Categories in Children Who Kill: Psychological and Neurological Testing and Forensic Evaluation: The American College of Forensic Psychiatry 13th Annual Symposium, San Francisco, California

1995: Mock Trial: Client Competence in a Criminal Case: Testing the Limits of Expertise, The American College of Forensic Psychiatry 13th Annual Symposium, San Francisco, California

1995: The Use of Psychologists In Judicial Proceedings: The California Attorneys for Criminal Justice/California Public Defenders Association Capital Case Seminar, Monterey,

California

1994: Commonly Seen Mental Disorders in Death Row Populations: The California Appellate Project, Training Session for Legal Fellows and Thurgood Marshall Investigative Interns, San Francisco, California

1994: Anatomy of a Trial: Mock Trial Participant, The California State Bar Annual Convention, Anaheim, California

1994: Developing a Forensic Neuropsychiatric Team: The American College of Forensic Psychiatry 12th Annual Symposium in Forensic Psychiatry, Montreal, Quebec, Canada

1994: Responsibility in Forensic Psychiatry: Department of Criminology Faculty Seminar, University of Nebraska, Omaha

1994: Attorney/Investigator Workshop: Brain Function: The 1994 California Attorneys for Criminal Justice/California Public Defenders Association Capital Case Seminar, Long Beach, California

1994: Appellate and Habeas Attorney/Investigator Workshop: Evaluating Mental Health Issues in Post-Conviction Litigation: The 1994 California Attorneys for Criminal Justice/California Public Defenders Association Capital Case Defense Seminar, Long Beach, California

1993: Psychological Issues in Police Misconduct: Police Misconduct Litigation, National Lawyers Guild, San Francisco

1993: Neuropsychiatry, Neuropsychology and Criminal Law: Maricopa County Office of the Public Defender, Seminar on Investigation for Mitigation and Capital Cases, Phoenix, Arizona

1993: Working With Experts: California Appellate Project, San Francisco, California

1991: Forensic Psychiatry and Ethnicity-Black District Attorneys Association, National Convention

PROFESSIONAL FORENSIC PUBLICATIONS

Psychiatry and Criminal Law, Contra Costa Lawyer, Volume II, No. 8, August 1998.

Mock Trial: Client Competence in a Criminal Case: Testing the Limits of Expertise, The Psychiatrist's Opinion as Scientific, The Expert's Foundation As Sufficient, 1995 (Available from The American College of Forensic Psychiatry and on Audiotape).

Multiple Diagnostic Categories in Children Who Kill: Psychological and Neurological Testing and Forensic Evaluation, 1995. (Available from the American College of Forensic Psychiatry and on Audiotape).

Developing a Forensic Neuropsychiatric Team,1994. (Available from the American College of Forensic Psychiatry on Audiotape).

Anatomy of a Trial: 1994 (Available for the California State Bar).

PROFESSIONAL AFFILIATIONS

• International Academy of Law and Mental Health

PROFESSIONAL DEVELOPMENT & CORPORATE SERVICES

2011: Forefront Behavioral Telecare, LLC: Director of Clinical Research

2009-2010: Forefront Behavioral Telecare, LLC: Chief Medical Officer

2009: AgeServe Communications, LLC: Director of Research/Director of Government Programs

2004: Consultant, Corporate Structure, Tostan, Non Governmental Organization, Theis, Senegal

2004: Toward Effective Retention Efforts: The use of narratives in understanding the experiences of racially diverse college students., Narrative Matters, Fredericton, New Brunswick, Canada

2003: In Association with the Council on Education in Management, Charlotte, North Carolina, Accommodating Psychiatric Disabilities: Avoiding the Legal Pitfalls of the ADA, Human Resources Conference, Palm Springs, California

2001-2003: Consultant, Vulcan Inc., Seattle, Washington

1999: In Association with Matthew Bender Legal Publishing, New York: Psychiatric Disabilities and California Workplace Requirement, With the Bar Association of San Francisco, San Francisco

1998: Psychiatric Disabilities under the Americans With Disabilities Act: Without Pretrial Strategy, Atlanta, Georgia

1998: Psychiatric Disabilities under the Americans With Disabilities Act: Without Pretrial Strategy, Los Angeles, California

THE CRITICAL MOMENTS CONSULTING GROUP

2001: Part I- Responding Creatively to Cultural Diversity through Case Stories and Part II- Strategies and Challenges for Campus-wide Diversity Project: Models of Integrating Critical

Moments, Fourteenth, Annual Conference on Race and Ethnicity in American Higher Education, Seattle Washington

2001: Teaching Complex Case Stories, Faculty Development, Loras College, Dubuque, Iowa

2000: Critical Moments: Creating a Diversity Leadership Learning Community, 13th Annual National Conference on Race and Ethnicity in American Higher Education (sponsored by the University of Oklahoma, Southwestern Center for Human Relations Studies), Santa Fe, New Mexico

2000: Critical Moments: Practicum on Teaching Diversity Through Case Stories, 13th Annual National Conference on Race and Ethnicity in American Higher Education (sponsored by the University of Oklahoma, Southwestern Center for Human Relations Studies), Santa Fe, New Mexico

2000: Improving Undergraduate Education: Teaching and Learning in the Context of Cultural Differences, The Washington Center for Improving the Quality of Undergraduate Education, Thirteenth Annual Conference, Seattle, Washington

1999: Critical Moments: Deepening Our Understanding of Cultural Diversity through Critical Analysis, Effective Interviewing, Case Writing, and Case Teaching, The Washington Center, Evergreen State College, Olympia, Washington

1999: Teaching Complex Issues with Case Studies: A Workshop for Faculty and Graduate Teaching Assistants, University of Nebraska at Lincoln, Teaching and Learning Center and Critical Moments Project

1999: Critical Moments: Writing the Stories of Diverse Students, Washington Center for Improving the Quality of Undergraduate Education Workshop for College and University Faculty, Administrators, Staff and Students, Evergreen State College, Bothell, Washington

1999: Critical Moments: A Case Study Approach for Easing the Cultural Isolation for Under-represented College Students, Presented at Transforming Campuses Through Learning Communities, National Learning Communities Conference, Seattle, Washington

1993: Contextualism and Multi-Cultural Psychology-Graduate Seminar, University of Nebraska, Omaha, Nebraska

1992: Curriculum and Developmental Stages-North Central Educational Research Lab, Northwestern University

CRITICAL MOMENTS PUBLICATIONS

Diane Gillespie, Ph.D., Gillies Malnarich, and George Woods, M.D. (2006). Critical Moments: Using College Students' Border Narratives as Sites for Cultural Dialogue, In M.B. Lee (Ed.), Ethnicity Matters: Rethinking How Black, Hispanic and Indian Students Prepare for and Succeed in College. (pp. 99-116). New York: Peter Land Publishing Group.

Diane Gillespie, Ph.D. and George Woods, Jr., M.D. (2000). Critical Moments: Responding

Creatively Cultural Diversity Through Case Stories; Third Edition.

Updated January 8, 2012

AFFIDAVIT OF SAMUEL VILLEGAS LOPEZ

1. My Name is Samuel Villegas Lopez. My ADOC inmate number is 43833. My family calls me Sammy. My date of birth is June 30, 1962.

2. I am on death row in Arizona for the murder of Estefana Holmes.

3. Since I was arrested for Mrs. Holmes's murder in 1986, I have been represented by many different lawyers. My first trial attorney was Joel Brown. My second trial lawyer was George Sterling. My third lawyer was James Rummage. Mr. Rummage represented me on my second direct appeal. My fourth lawyer was Robert Doyle. Mr. Doyle represented me in state post-conviction. My current lawyers are Kelley Henry and Denise Young. They have represented me in federal court on habeas.

4. During post-conviction, the Arizona Capital Representation Project (ACRP) volunteered to help Mr. Doyle investigate my case. I met regularly with ACRP attorney Statia Peakhart. Ms. Peakhart was the first attorney who explained to me why my family and my background mattered for my case. I was really happy to understand this, and I accepted ACRP's help investigating my background. Since Mr. Doyle was representing me at the time, I told him that I wanted him to work with ACRP and follow their advice. I even wrote Mr. Doyle and told him that I wanted him to ask for more time so that the ACRP could finish their investigation on my case. I never wanted my post-conviction attorney to waive any of my claims. I told him that.

5. I'm not educated. I don't even have a high school education. I don't understand what lawyers know about the law. It's just too complicated for me. From the moment I was arrested for Mrs. Holmes's murder, I knew that the best thing I could do was follow my attorneys' advice. I never put any restrictions on what my lawyers could or could not do to investigate my case. I have always counted on my lawyers to represent me because I do not know how to represent myself.

6. My mom is Concha Villegas, and my dad was Arcadio Lopez, Sr. They were both born in this country. My mom and dad had 8 boys and 1 daughter who died when she was a baby. I am their sixth son. My brothers and I were all born in Phoenix, Arizona. My dad was a violent drunk. He used to beat my mother in front of all of us. He didn't just hit her once and stop. He hit her over and over until she was bloody. We tried to protect her, but then he beat us too. We were afraid of our dad the way some kids are afraid of monsters. I often sat at the window and kept a lookout for my dad. I felt like this was my job when I was a little boy. When I saw him, I told my mom to run and hide, and I ran and hid too. My mom worked and fed us and tried to protect us from my dad. She was the only one on our side and the only person that kept us alive. Every day I was afraid that my dad was going to kill her, and without my mom around, I would die too. I grew up without hope. I know people will probably read that and think I'm trying to make up excuses for Mrs. Holmes' horrible murder. I'm not. I'll say more about that crime in a minute. I'll never make excuses for it. I just know that my lawyers say my background matters and that my childhood was more hopeless than most people could ever understand.

7. I've always wondered how things would have been different for my brothers and me if my dad loved us and took care of us. It's so hard for me to believe that most people actually grow up with that kind of love. If anyone ever looks at my life and tries to learn something, I hope they learn to appreciate having two loving parents. What a blessing that must be.

8. My little sister, Gloria, was the last of my parent's children. My mom and my brothers and I were all so happy to have a little girl in our family. It didn't matter to us that she was deformed. We felt like she was an angel sent from God. She was the one bright spot in our lives. Gloria had a surgery that was supposed to fix her deformed arm, and she died in the hospital afterwards. When Gloria died, it was like someone turned out the only bright spot we ever had.

9. After Gloria died, my dad took off for good. We never heard from him again. I hated what my dad did to our family, but it still hurt that he abandoned us. I wanted him to be a normal dad. When he finally left, it was just another slap in the face. A few years ago, my lawyer, Kelley Henry, told me that he died homeless and alone under a bridge in California. It made me sad to learn what happened to him. I don't understand how I could feel this way about a man who was such a monster.

10. My mom was the only one who put food on our table. She had to work like a dog at two and sometimes even three jobs just to put food on the table. We moved around a lot because we got evicted and couldn't afford rent many, many times. My mother did the best she could, but she didn't have skills for a good job. Even though she was born in the United States, she has never spoken good English. She was only able to get cleaning and other physical jobs that paid very little. She did everything possible to keep my brothers and me alive. I loved her, and I wished I could take good care of her. I hope that whoever reads this understands how hard my mom had to work to protect us from my dad and take care of eight boys.

11. Because my mom had to work and my dad was almost always drunk, my seven brothers and I never had adults watching us, teaching us, taking care of us, of showing us they loved us. We didn't have adults in our lives to teach us things like discipline and schoolwork and all the other things that help people live productive lives. We didn't even know what a productive life was. We thought it was just as made-up as what we used to watch on Gilligan's Island.

12. Growing up, I started to hang out with other kids in the neighborhood who were poor like me and who also had problems at home. I spent a lot of time with Pete Servin and his older brother, Manuel. Manuel was friends with my older brother Steve. Manuel and Steve were my heroes. I wanted to be around them, and I tried to be like them. Manuel and Steve taught us how to break into houses so that we could get money for food. We didn't want to hurt anyone. It's just that burglaries were the only way we knew how to get a little money. Our neighborhood and our messed up families convinced us we had no other options.

13. Manuel and Steve used to sniff paint. I very young when they showed me how to do it. That's when I starting sniffing paint a lot. I did it because it was the only way I knew to escape my hopeless life. I didn't see any other way out.

14. I used to sleepwalk, and I had really bad nightmares as a kid. The day after I sleepwalked, my brothers or my mother always told me that I ran out of the house screaming or that they found me in the kitchen all curled up. They said I was sweating and shivering and really scared, but I had to take their word for it. I never remembered sleepwalking.

15. After my father left, my mother got a boyfriend named Pedro Santibenez and let him move into our house. We called him Pete. Pete had wife in Mexico and he had children from that marriage. Some of those children were in the United States illegally.

16. Pete never liked me. One time he woke me up in the middle of the night and pointed a gun in my face, threatening to kill me. I hid his gun after that, and when Pete noticed it was gone, he turned red and threatened to kill me again if I didn't return his gun. Pete insisted that my mom kick me and my younger brothers, Joe and George, out of the house. She did.

17. It just broke me apart to see that my mom chose Pete and his illegal children over us. I couldn't believe it. We felt let down and betrayed like no one loved us. We were her flesh and blood, and she put us out on the street. My mom was the only one who had protected me and kept me alive, and then suddenly, she turned her back on me too. I felt like I had absolutely nothing. I knew things would never get better for me. I had no reason to stay alive. I did nothing with myself but try to stay high on paint or any other drugs or alcohol I could find.

18. At the time Mrs. Holmes was murdered, I was at the lowest point in my life. I had been in prison for resisting arrest when police found me sniffing paint in the park. While I was in prison, my two younger brothers, Joe and George, were arrested for murder and my brother George was sent to death row. I felt like I failed them. I should have been there to protect them and keep them out of trouble, but I was locked up. I wanted to die. I didn't have a father, my mother had kicked me out, and I wasn't there when my little brothers needed me most. I was living in a friend's car, and I was spending all my time sniffing paint because it was the only answer to my problems that I had ever learned.

19. I'm no lawyer, so I've always followed my lawyers' advice. But when they assigned my case to the same judge who sentenced my younger brother George to death, I asked my lawyer to get me a different judge. I did not think that the judge who sentenced George to death could be fair to me. My lawyer did not try to get the case moved to a new judge like I asked him to.

20. Until now, none of my lawyers have ever let me tell this to anyone besides them: I've never remembered the night that Estefana Holmes was killed. I was losing hours and days all the time during that period. There were afternoons, evenings, and whole days that just disappeared from my memory. People commented on the things that happened or the things I did while I was high on paint and other drugs, and I just couldn't remember any of it.

21. I don't remember going into Mrs. Holmes's house. I don't remember being there or doing any of the things the police said I did. I cannot believe I could ever do those horrible things. My mom was raped. I know what an awful thing rape is. I've never been able to believe that I could

actually do the same thing to someone else. What happened to Ms. Holmes was so horrible and so wrong. I've always been sorry for what she went through that night and for what her family has gone through ever since. But I don't know if I actually committed that crime. That awful night is just one of many days and nights that I couldn't remember.

22. I'm not saying I'm not responsible for the crime. I'm just saying I don't know if I actually am. I've always wondered, because it never added up for me. If you asked anyone who knew me, they'd tell you that I was not the kind of person to rape and stab an elderly woman to death. I've never wanted to do anything like that. The only person I ever wanted to hurt was myself.

23. I can't blame Mrs. Holmes's family for hating me. I would hate anyone convicted of killing one of my family members. I just wish I could remember that night.

Further affiant sayeth not.

Dated this 9TH day of February, 2012 in Florence, Pinal County, Arizona.

Samuel Villegas Lopez

State of Arizona)
)
County of Pinal)

Subscribed and sworn to before me this 9 day of February, 2012.

Notary Public

OFFICIAL SEAL
A. FRANCES OWENS
NOTARY PUBLIC - State of Arizona
PINAL COUNTY
My Comm. Expires April 1, 2013

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Attorney for Petitioner Samuel Villegas Lopez

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA	)	
	)	
Respondent,	)	No. 09-0247AP
v.	)	
	)	Maricopa County Superior Court
SAMUEL VILLEGAS LOPEZ	)	No. CR-163419
	)	
Petitioner.	)	Motion to Defer Ruling on
_____	)	Motion for Warrant of Execution

¶1 Samuel Villegas Lopz moves this Court to Defer Ruling on the State's Motion for Warrant of Execution. This motion is made pursuant to Mr. Lopez's state and federal constitutional rights to due process, equal protection, competent counsel and freedom from cruel and unusual punishment. In support of this motion, Mr. Lopez states as follows.

¶2 On today's date at 9:15 a.m. Eastern time (6:15 a.m. Arizona time), the United States Supreme Court issued its opinion in *Martinez v. Ryan*, Case No. 10-1001. The decision in *Martinez* is directly relevant to issues raised by Mr. Lopez's

Opposition to the State's Motion for Warrant of Execution as well as the pending Rule 32 petition filed by Mr. Lopez in the Superior Court of Maricopa County

¶3 Given the hour, counsel have not had an opportunity to fully digest the Court's 7-2 decision. Importantly, the Court does observe, "To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney." *Id*, Slip op. at 9.

¶4 Mr. Lopez has provided this Court, and the Maricopa County Superior Court, with ample evidence that he did not have an effective attorney in post-conviction. As a result, his substantial and meritorious claim of ineffective sentencing counsel **has never been adjudicated** by any court. It is appropriate to take pause and allow the parties to review this important decision and provide this Court with further briefing and argument. Moreover, it is prudent to allow the proceedings in Maricopa County Superior Court to proceed before moving forward with the State's Motion. Mr. Lopez filed his Rule 32 petition on February 16, 2012. The State responded on March 9, 2012. Mr. Lopez replied on March 19, 2012. Mr. Lopez will expeditiously supplement his Rule 32 petition with argument related to today's decision from the High Court.

¶5 Wherefore, Mr. Lopez respectfully suggests that this Court defer ruling on the Motion for Warrant of Execution and allow the parties to file further briefing.

Respectfully submitted this 20th day of March, 2012.

/s/ Denise I. Young
Denise I. Young
2930 N. Santa Rosa Place
Tucson, AZ 85712
Counsel for Petitioner

Copy of the foregoing
emailed this 20th day of
March, 2012, to:

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/s/ Denise I. Young

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-90-0247-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR-163419
SAMUEL VILLEGAS LOPEZ,	)	
	)	
Appellant.	)	
	)	
	)	

WARRANT OF EXECUTION

This Court heard and considered the appeal in the above-entitled cause on June 3, 1993, and on August 24, 1993, affirmed the judgment of the Superior Court in Maricopa County, State of Arizona, and filed its OPINION, which is still in effect and has not been affected by any subsequent decision of this or any other Court.

On December 16, 1997, following the denial of relief in Appellant's first post-conviction proceeding, this Court denied Appellant's petition for review filed pursuant to Rule 32.9(c), Ariz. R. Crim. P.

On December 29, 2011, the Attorney General filed a motion to issue a Warrant of Execution, which motion was granted by this Court on March 20, 2012,

Therefore, pursuant to Rule 31.17(c)(2), Ariz. R. Crim. P.,

IT IS ORDERED fixing Wednesday, the 16th day of May, 2012, as the date for commencement of the execution time period when the

Judgment and sentence of death pronounced upon SAMUEL VILLEGAS LOPEZ by the Superior Court in Maricopa County shall be executed by administering to SAMUEL VILLEGAS LOPEZ by intravenous injection a substance or substances in a quantity sufficient to cause death, except that SAMUEL VILLEGAS LOPEZ shall have the choice of execution by either lethal injection or lethal gas. SAMUEL VILLEGAS LOPEZ shall choose either lethal injection or lethal gas and notify the Department of Corrections at least twenty (20) days before the execution date. If SAMUEL VILLEGAS LOPEZ fails to choose either lethal injection or lethal gas and notify the Department of Corrections of that decision, the penalty of death shall be inflicted by lethal injection.

IT IS FURTHER ORDERED that this Warrant is valid for twenty-four (24) hours beginning at an hour to be designated by the Director of the Department of Corrections, with written notice of the designated hour to be given to the Supreme Court and parties at least twenty (20) calendar days prior to the execution date.

IT IS FURTHER ORDERED that the Clerk of this Court shall forthwith prepare and certify a true and correct copy of this Warrant and shall cause the same to be delivered to the Director of the Department of Corrections and the Superintendent or Warden of the State Prison, at Florence, Arizona, and the same shall be sufficient authority to them for the execution of SAMUEL VILLEGAS LOPEZ.

IT IS FURTHER ORDERED that, upon the execution of SAMUEL VILLEGAS LOPEZ, the Superintendent or Warden shall, pursuant to Rule 31.17(c)(4), Ariz. R. Crim. P., forthwith make a return of this

Warrant to the Supreme Court of Arizona, which return shall show the time, mode and manner of execution.

Dated in the City of Phoenix, Arizona, at the Arizona Courts Building, this 20th day of March, 2012.

Rebecca White Berch, Chief Justice

Andrew D. Hurwitz, Vice Chief Justice

W. Scott Bales, Justice

A. John Pelander, Justice

Robert M. Brutinel, Justice

STATE OF ARIZONA
SUPREME COURT

I, JANET JOHNSON, Acting Clerk of the Supreme Court of the State of Arizona, hereby certify the above and foregoing 3 pages to be a full and true copy of the Warrant of Execution of SAMUEL VILLEGAS LOPEZ, filed by said Supreme Court in the above-entitled action on this 20th day of March, 2012.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Supreme Court of the State of Arizona this 20th day of March, 2012.

Janet Johnson

Janet Johnson, Acting Clerk of Court