No. 12-99001

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 09 2012
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SAMUEL V. LOPEZ,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, ET. AL.,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-98–0072–PHX–SMM

SUPPLEMENTAL EXCERPTS OF RECORD

Thomas C. Horne
Attorney General
(Firm State Bar No. 14000)

Kent E. Cattani
Division Chief Counsel

Jeffrey A. Zick
Section Chief Counsel

Susanne Bartlett Blomo
Assistant Attorney General
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
cadocket@azag.gov
State Bar Number 014328

Attorneys for Respondent-Appellee

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

MAY 09 2012

FILED
DOCKETED
DATE
INITIAL

INDEX OF RECORD

Excerpt	Document	Pages
P	Petition for Writ of Certorari	ii-28
Q	Brief in Opposition	ii-12
R	Motion to Alter or Amend Judgment	1-27
S	Memorandum Regarding Merits of Constitutional Violations 1(C), (D), 7 and 8, and Motion for Discovery and an Evidentiary Hearing	1-68
T	*Scott v. Schriro*, et. al. Opening Brief	i-89

CAPITAL CASE
No. 11-____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL V. LOPEZ,

Petitioner,

v.

CHARLES RYAN, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DENISE I. YOUNG
Attorney at Law
2930 N. Santa Rosa Place
Tucson, Arizona 85712
(520) 322-5344
Dyoung3@mindspring.com

KELLEY J. HENRY
Supervisory Asst. Fed. Pub. Defender
FEDERAL PUBLIC DEFENDER
Middle District of Tennessee
Capital Habeas Unit
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
kelley_henry@fd.org
** Counsel of Record*

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

Whether a Federal District Court in a 28 U.S.C. § 2254 proceeding may impose a procedural bar based on a Petitioner's purported failure to "exhaust" facts after that procedural defense had been expressly waived by the State, to petitioner's detriment, or if, as the United States Court of Appeals for the Fifth Circuit has held, a federal court may not do so?

Does 28 U.S.C. § 2254(e)(2) apply in a case where the State has waived exhaustion?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL STATUORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 12

I. HISTORY AND DEVELOPMENT OF THE EXHAUSTION DOCTRINE 15

II. EXHAUSTION IS NOT JURISDICTIONAL AND CAN BE WAIVED 17

III. THIS COURT AND LOWER COURTS HAVE FOUND THAT A DISTRICT COURT ABUSES ITS DISCRETION WHEN RESURRECTING A PROCEDURAL DEFENSE THAT WAS EXPLICITLY WAIVED 20

IV. THE DISTRICT COURT AND COURT OF APPEALS OPINIONS CONFLICT WITH THIS COURT'S DECISION IN *DAY*, THE SIXTH CIRCUIT'S DECISION IN *STUMPF* AND THE FIFTH CIRCUIT'S DECISIONS IN *CARTY* AND *BLEDSUE* 22

A. THE PANEL WAS INCORRECT WHEN IT HELD THAT THE STATE'S EXPRESS WAIVER OF EXHAUSTION COULD BE DIVORCED FROM THE INQUIRY UNDER 2254 (E)(2) 23

1. THE STATE EXPRESSLY WAIVED ITS EXHAUSTION DEFENSE 23

2. THE STATE'S EXHAUSTION WAIVER APPLIES WITH EQUAL FORCE TO THE 2254 (E)(2) INQUIRY 27

B. LOPEZ REASONABLY RELIED ON THE GOOD FAITH OF THE STATE AND FOLLOWED THE ORDERS OF THE COURT; JUSTICE AND EQUITY REQUIRE THAT HE BE ALLOWED TO PROCEED ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM 28

CONCLUSION 28

APPENDIX TABLE OF CONTENTS

A. Ninth Circuit Denial of Rehearing *En Banc* A1

B. Opinion of the United States Court of Appeals for the Ninth Circuit (January 20, 2011) A2

C. Notice of Appeal A16

D. Order of the District Court Granting, In Part, a Certificate of Appealability A18

E. Memorandum Opinion of the District Court Granting Summary Judgment in Favor of the State A22

F. District Court Order Re: Procedural Status of Claims A64

G. District Court Order Re: Procedure for Adjudicating Habeas Petition A87

TABLE OF AUTHORITIES

Page(s)

CASES

Barrientes v. Johnson, 221 F.3d 741 (5th Cir. 2000) 19

Bell v. True, 413 F.Supp.2d 656 (W. Dist. Va. 2006) 19

Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003) 21

Bradshaw v. Richey, 546 U.S. 74 (2005) 20

Bradshaw v. Stumpf, No. 01-3613, Slip opinion (6th Cir. 2011) 15,21

Bledsue v. Johnson, 188 F.3d 250 (5th Cir. 1999) ..... passim

Carty v. Thaler, 583 F.3d 244 (5th Cir. 2009) ..... passim

Darr v. Burford, 399 U.S. 200 (1950) 16

Day v. McDonough, 547 U.S. 198, 209 (2006) 14, 20, 22

Ex Parte Royall, 117 U.S. 241 (1886) 15

Felder v. Estelle, 693 F.2d 549 (5th Cir. Tex. 1982) 4,25

Fong v. Ryan, 2011 WL 3439237 (D. Ariz. Aug. 5, 2011) 4

Franklin v. Johnson, 290 F.3d (9th Cir. 2002) 21

Frisbie v. Collins, 342 U.S. 519 (1952) 18

Granberry v. Greer, 481 U.S. 129 (1987) 17,18

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) ..... passim

King v. Bell, 378 F. 3d 550 (6th Cir. 2004) 28

Lark v. Sect'y PA Dept of Corrections, 2011 U.S. App. LEXIS 12107 (3rd Cir. 2011) 19

Lopez v. Ryan, No. 10-A-1178 (June 6, 2011)(Kennedy, J.) 2

Lopez v. Ryan, 630 F.3d 1198 (9th Cir. 2011) ..... passim

Lopez v. Ryan, No. 08-99021 (9th Cir. 2011 March 30, 2011) 1

Lopez v. Ryan, No. 2:98-CV-0072-SMM (D. Ariz. Sept. 4, 2008) ..... passim

Lopez v. Ryan, No. 2:98-CV-0072-SMM (D. Ariz. July 15, 2008) ..... passim

Lopez v. Ryan, No. 2:98-CV-0072-SMM (D. Ariz. Nov. 3, 2005) ..... passim

Maples v. Allen, O.T. 2010, No. 10-63 13

Martinez v. Ryan, OT 2010, No. 10-1001 13

McMurtry v. Ryan, 539 F.3d 1112 (9th Cir. 2008) 4

Morris v. Beard, 633 F.3d 185 (3d Cir. 2001) 19

Morris v. Dretke, 415 F.3d 484 (5th Cir. 2005) 19

Porter v. McCollum, 130 S.Ct. 447 (2009) 5

Rhines v. Weber, 544 U.S. 269 (2005) 16

Ring v. Arizona, 536 U.S. 584 (2002) 4,13

Robinson v. Schriro, 595 F.3d 1086 (9th Cir. 2010) 21

Rompilla v.Beard, 545 U.S. 374 (2005) 5

Rose v. Lundy, 455 U.S. 509 (1982) 16,17

Schiro v. Summerlin, 542 U.S. 348 (2005) 13

Smith v. Cockrell, 2003 U.S. Dist. LEXIS 26621 (S. Dist. Tex. 2003) 19

Smith v. Wasden, 2011 U.S. Dist. LEXIS 32622 (Dist. Idaho 2011) 19

State v. (Samuel Villegas) Lopez, 786 P.2d 959 (1990) 6

State v. (Samuel Villegas) Lopez, 857 P.2d 1261 (1993) 6,7

Strickland v. Washington, 466 U.S. 668 (1984) 5,18

Vang v. Nevada, 329 F.3D 1069 (9th Cir. 2003) 21

Wainwright v. Sykes, 433 U.S. 72 (1977) 27

Walbey v. Quarterman, 309 Fed. Appx. 795 (5th Cir. 2009) 5

Wiggins v. Smith, 539 U.S. 510 (2003) 5

Williams v. Ryan, 623 F.3d 1258 (9th Cir. 2008) 4

Williams (Terry) v. Taylor, 529 U.S. 362 (2000) 5

Williams (Michael) v. Taylor, 529 U.S. 420 (2000) 19,27

Wilson v. Beard, 426 F.3d 365 (3rd Cir. 2005) 19

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amd. VI 2

U.S. Const. Amd. VIII 2

U.S. Const. Amd. XIV 2

28 U.S.C. § 1254 2

28 U.S.C. § 2253 26

28 U.S.C. § 2254(b) ..... passim

28 U.S.C. § 2254 (c) 15

28 U.S.C. § 2254 (d) 20

28 U.S.C. § 2254 (e)(2) ..... passim

Ariz. R. Crim. P. 32.1(e) 2

Ariz. R. Crim. P. 32.1(h) 5

Ariz. R. Crim. P. 32.2(b) 2,5

A.R.S. §13-703(F)(6) 7

S.Ct. Rule 30.1 2

SECONDARY LEGAL

Hertz and Liebman, Federal Habeas Corpus Practice and Procedure, Sixth Edition, § 23.1 (Matthew Bender) 15,20

CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

No. 11-____

SAMUEL V. LOPEZ,

Petitioner,

v.

CHARLES RYAN, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Samuel Villegas Lopez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Lopez v. Ryan,* 630 F.3d 1198 (9th Cir. 2011); A2-15. The order of the court of appeals denying rehearing is unreported. *Lopez v. Ryan*, No. 08-99021 (9th Cir. Mar. 30, 2011); A1. The order of the district court granting in part, and denying in part, a certificate of appealability is unreported. *Lopez v. Ryan*, No. 2:98-CV-0072-SMM (D. Ariz. Sept. 4, 2008); A18-

21. The memorandum opinions of the district court are unreported. *Lopez v. Ryan*, No. 2:98-CV-0072-SMM (D. Ariz. Nov. 3, 2005)(procedural issues); A64-86 and *Lopez v. Ryan*, No. 2:98-CV-0072-SMM (D. Ariz. July 15, 2008) (merits issues); A22-42. Mr. Lopez timely appealed. A-16.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 2011. A2-15. A timely petition for rehearing was denied on March 30, 2011. A1. On June 6, 2011, Justice Kennedy granted an extension of time, up to and including August 27, 2011,[1] within which to file a petition for writ of certiorari. *Lopez v. Ryan*, No. 10-A-1178 (June 6, 2011)(Kennedy, J.). Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

U.S. Const. Amend. VIII, provides in pertinent part: "[N]or cruel or unusual punishments inflicted."

U.S. Const. Amend. XIV, provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

---

[1] August 27, 2011 is a Saturday. In accordance with S.Ct. Rule 30.1, this petition is due August 29, 2011.

28 U.S.C. § 2254 (b)(3) provides in pertinent part: "A state shall not be deemed to have waived the exhaustion requirement, or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."

28 U.S.C. § 2254(e)(2) provides in pertinent part: "If the applicant has failed to develop the factual basis for of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim..."

STATEMENT OF THE CASE

This case is about fairness. May the State,[2] after an explicit waiver of exhaustion that Lopez relied and acted upon to his detriment, retract its waiver years later without notice or explanation? The court below agreed that the State "conceded that Lopez's ineffective assistance of counsel claim was 'properly exhausted," and then "[n]early eight years later, [] sought to retract its concession," but decided not to decide whether the district court abused its discretion in allowing such gamesmanship. *Lopez*, 630 F.3d at 1205. Instead, invoking 28 U.S.C. §2254(e)(2), the Ninth Circuit Court of Appeals denied Lopez relief "on an alternate ground." The lower court found Lopez was "separately barred from" relief because he failed to develop the facts in the state court proceedings even if the district court "should not have reached the issue of procedural default." *Id.* As discussed below, that is a *non sequitur*. The State can, and does, waive fact exhaustion for many

[2] This petition will refer to the Respondent as the State to be consistent with the language used in AEDPA.

reasons. *See Felder v. Estelle*, 693 F.2d 549, 553-554 (5th Cir. 1982). Its Answer unambiguously and deliberately conceded fact exhaustion. Under these circumstances, the Court below abused its discretion by resurrecting a procedural defense that was deliberately waived.

Had the State not explicitly conceded fact exhaustion, Lopez could (and would) have, returned to state court to exhaust this important constitutional violation and supporting facts and evidence. In fact, in 2003 the federal district court stayed federal proceedings and ordered Lopez to return to state court to exhaust the claim that his Sixth and Fourteenth Amendment rights were violated when a judge alone decided his capital sentence. *Ring v. Arizona*, 536 U.S. 584, 589 (2002). A-65. In fact, Arizona law specifically provides an exception to its preclusion rule in post-conviction proceedings where "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." Ariz.R.Crim.P. 32.1(e); Ariz.R.Crim.P. 32.2(b). And, where supported by the facts and law, Arizona federal district courts routinely stay habeas proceedings to allow a petitioner to exhaust constitutional violations. *See e.g.*, *Fong v. Ryan*, 2011 WL 3439237, *1 (D. Ariz. Aug. 5, 2011)("following" "third state PCR Petition," petitioner permitted to supplement [] habeas petition with additional newly exhausted claims."); *Williams v. Ryan*, 623 F.3d 1258, 1263 (9th Cir. 2008)(district court held "federal proceedings in abeyance" to permit exhaustion of misconduct violation); *McMurtrey v. Ryan*, 539 F.3d 1112. 1116-1117 (9th Cir. 2008)(federal district court stayed proceedings to allow petitioner to return to state court to exhaust ineffective

counsel and competency claim). Arizona law excepts from preclusion new evidence that "demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that ... the court would not have imposed the death penalty." Ariz.R.Crim.P. 32.1(h); Ariz.R.Crim.P. 32.2(b).

In this capital case, the State's bait-and-switch tactic (conceding exhaustion until it is too late for Lopez to return to state court) should not be countenanced.

I. THE CAPITAL TRIAL AND SENTENCING PROCEEDINGS.

Samuel Lopez was represented at his first capital trial and sentencing by court-appointed counsel who never met or interviewed any of Lopez's family, failed to investigate and gather any family or social history records. Nor did they challenge the harmful presentence report prepared by a county presentence officer, considered by the judge and which contained damning allegations later discovered to be untrue.[3] The Arizona Supreme Court vacated Lopez's sentence and remanded

---

[3]It is undisputed that sentencing counsel appointed to represent Lopez utterly failed to conduct a minimally competent investigation into Lopez's background or social history. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 691 (1984)(counsel "has a duty to make reasonable investigations"); *Williams (Terry) v. Taylor*, 529 U.S. 362, 370-373, 395-396 (2000)(counsel did not begin to prepare for [sentencing] until a week before trial"); *Wiggins v. Smith*, 539 U.S. 510, 522-526 (2003)(relief granted where counsel failed to investigate readily available mitigation); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005)("undiscovered 'mitigating evidence, taken as a whole, 'might well have influenced [sentencer's] appraisal' of [Lopez's] culpability."); *Porter v. McCollum*, 130 S.Ct. 447, 449-451 (2009)("extensive mitigating evidence" presented in post-conviction proceedings "all ... apparently unknown to [] penalty phase counsel"); *Walbey v. Quarterman*, 309 Fed.Appx. 795, 797, 801 (5th Cir. 2009)("mitigation investigation was severely limited"; counsel "scanned" "files" on Walbey's "background," but did not interview "mother" or others who knew Walbey or "hire" "mitigation expert," "essentially no effective investigation of [] mitigation....").

the proceedings for a new sentencing because the trial judge had improperly relied on Lopez's earlier conviction for resisting arrest to establish Arizona's aggravating factor of a prior conviction involving the use of threat of violence on another person. *State v. Lopez*, 786 P.2d 959, 965 (1990); A-6.

II. THE RESENTENCING PROCEEDINGS

The same court appointed appellate counsel continued to represent Lopez capital at his resentencing. The State alleged one aggravator: Arizona's oft-used

---

Appointed counsel at Lopez's first capital sentencing trial telephoned his mother and one brother (Lopez had six other brothers). He told the judge that Lopez's mother "was having some sort of problem" and "may not appear," and the "brother indicat[ed] he would be here today." R.T. 6-25-87, p. 4. Neither was present at Lopez's sentencing. Trial counsel did nothing to determine the reason for their absence, or request a continuance. Counsel also did not investigate Lopez's background, interview people who knew him or identify, gather, or review social history records, or investigate or challenge the presentence report that contained injurious (and later discovered untrue) allegations against him. The trial judge/sentencer under then Arizona law expressed his "concern over the lack of any evidence presented on behalf of defendant" at his capital trial, stating "but for the sentencing memorandum received just yesterday, the defense failed to present any mitigating circumstances to the court" at Lopez's capital sentencing. R.T. 6-25-87, pp. 2-3. The judge nonetheless proceeded to sentence Lopez to death.

At Lopez's capital resentencing hearing, new counsel appointed to represent him did little more. Counsel contacted psychiatrist Otto Bendheim and provided Bendheim a 1985 presentence report discussing Lopez's earlier conviction for resisting arrest and a report of a "sexual assault" involving a woman named Cecilia Rodriguez. The prosecutor relied on these "facts" to support his expert's opinion that Lopez was not impaired at the time of the crime, and his request that the judge again sentence Lopez to death. CA9 ER 236. The sentencing judge also relied on those "facts" to reject Lopez's mitigation and impose death, and the Arizona Supreme Court relied on them in its opinion affirming Lopez's death sentence. *State v. Lopez*, 857 P.2d at 1267-1268 ("...four days after the murder...defendant while admittedly intoxicated, planned and methodically carried out a sexual assault.") The State recently disclosed these damning "facts" it argued to support Lopez's death sentence untrue. CA9 ER 389(Alleged victim not credible. Medical examination does not fit description of alleged attack). It is unknown what sentence the trial judge would have imposed had he known these "facts" were, in fact, false.

and controversial aggravator that the crime had been committed in an "especially heinous, cruel or depraved manner." A.R.S. §13-703(F)(6). But like his predecessor, appellate/resentencing counsel, too, failed to investigate Lopez's family and background, obtain key social history records on Lopez and his family, or to conduct any semblance of the thorough investigation this Court's jurisprudence requires. *See* n. 1, above. The judge again sentenced Lopez to death. The Arizona Supreme Court now affirmed that sentence. *State v. Lopez*, 857 P.2d 1261, 1264 (1993); A-6.

III. THE STATE POST-CONVICTION PROCEEDINGS.

In state post-conviction proceedings, Lopez filed a Petition for Post-Conviction Relief alleging a broad claim titled: "Ineffective Assistance Of Counsel – Sentencing." Subclaim B was titled, "Failure to Properly Prepare Expert Witness." CA9 ER 290. Post-conviction counsel alleged sentencing counsel was ineffective when counsel failed to "properly marshal all of the obviously relevant information," including "stronger evidence of pathological intoxication," and obtain "testimony of people who not only knew [Lopez] well, and saw him the night of the offense, but also saw the radical and sudden shift in [Lopez's] demeanor only hours before [the crime]." CA9 ER 291. Post-conviction counsel also alleged that trial counsel failed to "provide the expert with all of the necessary information to render a complete diagnosis," and these omissions "easily demonstrated" "[d]eficient performance...." CA9 ER 290-291.

Post-conviction counsel identified records and witnesses important to Lopez's ineffective sentencing counsel claim and identified an expert to whom post-

conviction counsel had provided the materials he recently discovered. *Id.* Post-conviction counsel alleged Lopez was prejudiced "by the failure of" counsel to effectively represent Lopez. CA9 ER 292. Counsel requested the trial/post-conviction judge to order "a new sentencing" based on the additional "relevant," available evidence where that evidence could be presented and considered. *Id.*

Post-conviction counsel contacted the trial –level psychiatrist, Dr. Bendheim, and provided him additional materials about Lopez's actions on the night of the crime, including testimony from, and interviews of, two trial witnesses. Following review of these materials, Bendheim rendered a "more certain diagnosis": Lopez was pathologically intoxicated at the time of the crime. CA9 ER 317. But despite these facts and Lopez's repeated requests for a hearing where he could present "all" the "relevant" "necessary information" supporting a life sentence that sentencing counsel failed to present, the state post-conviction court summarily denied the hearing Lopez requested, stating, without explanation, "counsel's performance" was not ineffective, and a "reasonable probability" of a "different result" did not exist. CA9 ER 344. Lopez's motion for rehearing and petition for review to the state supreme court were denied without explanation. Mot.Rhrg (Mar.Cty.May 20, 1997); Rpl.Rehrg (Mar.Cty.Jun. 20, 1997); Pet.Rev. (Ariz.S.Ct. Dec.19, 1997).

IV. THE FEDERAL HABEAS CORPUS PROCEEDINGS

Lopez next sought relief from the Arizona federal district court. He filed a petition for writ of habeas corpus, and identified the facts that supported sentencing counsel's ineffectiveness (and other constitutional violations), and the resulting

prejudice Lopez suffered. He requested the hearing the state courts had denied, and relief from his conviction and death sentence. In this petition, Lopez detailed facts supporting relief that Lopez carefully and fully identified. The State reviewed those detailed facts and in its "Answer re procedural status of claims," explicitly conceded fact exhaustion. Lopez's good faith reliance on the State's unequivocal exhaustion concession, and the State's astounding, inexplicable about-face announced in its district court reply brief is at the heart of these proceedings. Lopez now turns to these key facts.

Following exhaustion of his state post-conviction remedies in the Arizona courts, Lopez entered federal court and requested appointment of counsel. A-87. In its order appointing Lopez counsel, the district court also set forth the procedures Petitioner and the State must follow: After Petitioner filed his "finalized petition" "set[ting] forth, in a clear and concise fashion, the legal and factual basis for each ground of relief";

> "Respondents shall thereafter file an Answer Re: Procedural Status of Claims, which addresses the procedural status of all claims raised in the finalized petition, **specifically identifying which claims, if any, Respondents contend are unexhausted** or procedurally barred from review on the merits....

A-89 (emphasis added). Lopez was ordered to "respond to the answer by filing a traverse" to which "Respondents may file a reply...," and Lopez "may file a sur-reply that is limited to arguments concerning cause and prejudice, or a fundamental miscarriage of justice should Respondents address these issues in a reply." A-90. The District Court also announced the importance of its announced 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.

Id (emphasis added). In his federal petition, Lopez followed the district court's procedure: He clearly and plainly identified the facts he alleged supported his ineffective sentencing counsel claim. CA9 ER 363-366.

The State also followed the court's order. The State read Lopez's ineffective counsel claim and the detailed allegations supporting the relief he requested. On March 11, 1999, in his "Answer Re: Procedural Status of Claims" ("Answer"), the State responded to Lopez's ineffective assistance of sentencing counsel claim and the detailed allegations supporting it. With regard to that claim, the State plainly stated, "**they have been properly exhausted.**" *Id.*, Ans., p. 12; App., A29-30 (emphasis added).

The district court reviewed Lopez's detailed allegations, too. In its November 3, 2005, "Order Re: Procedural Status of Sentencing Claims," the district court addressed the "Factual Background And Procedural History" of the proceedings, the "Principles of Exhaustion And Procedural Default," and held, "**Respondent concedes that Petitioner properly exhausted Claims 1(C)....**" A-70(emphasis added).

Following the State's repeated concessions that Lopez's ineffective counsel claim was properly exhausted; concessions that both the district court below, and Lopez relied on, the district court granted Lopez's requests for access to their client to conduct needed investigation to develop the facts supporting the claim, which had

been adjudicated available for federal review. A-30.[4]

In good faith reliance on the State's concessions, and the district court's acceptance of them, Lopez expended time and funds to discover additional available facts establishing counsel's ineffectiveness at Lopez's capital sentencing proceeding. He identified constitutional violations supported by facts that if true entitled him to relief, presented available evidence he had gathered, and requested a hearing. Eight years later, the State reversed course. Retracting its long-ago exhaustion concession, the State now argued that Lopez had not exhausted the factual bases supporting the constitutional violations that occurred at his trial, and that it was now too late to do so. A-8. At the time, the State offered no explanation for its abrupt change of heart. To the extent it claimed that it was surprised by the factual bases of the claim as presented in the merits brief, the district court below found that unbelievable:

> To the extent Respondents contend that Claim I(C) as stated in Petitioner's merits brief is substantially broader than that alleged in the Amended Petition, the Court disagrees. A comparison of the allegations in the Amended Petition and Petitioner's merits brief reveals that they are substantially similar, although Petitioner conducted an investigation between the filing of the two documents and now has submitted supporting evidence for his allegations.

A-30-31(emphasis added) .

Despite the explicit waiver of exhaustion that the District Court had earlier found, the District Court adopted the State's reversal and denied Lopez relief,

---

[4] The Arizona Department of Corrections prohibits contact visits between counsel and their death-sentenced clients absent a federal court order. The Attorney General represented the department in all proceedings seeking access to Mr. Lopez for the purposes of psychological evaluation.

contending the claim was much broader than that alleged in state court. *Id.*, A-34. The court did not explain its earlier ruling finding the opposite or its reliance on the State's exhaustion waiver.

The court of appeals did not address whether Lopez properly relied on the State's long-ago exhaustion concession. A-9-10. It decided it "need not" even 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...." A-9, citing 28 U.S.C. §2254(e)(2). As is shown below, 2254(e)(2) is not a separate bar to relief where the state has explicitly waived fact exhaustion.

REASONS THE WRIT SHOULD BE GRANTED

Lopez initiated federal habeas proceedings in 1998. In full compliance with the procedural order of the district court, A87-92, Lopez filed a detailed petition setting forth his legal claims and the factual bases which supported his claims. The district court ORDERED the State to file an answer raising all procedural defenses, including nonexhaustion. A89. On March 10, 1999, the State filed an Answer alleging that seven claims were not exhausted, one claim was found waived by the state court and was therefore procedurally defaulted, and eight claims, including ineffective assistance of sentencing counsel, were "properly exhausted." CA9 ER 375. Lopez did not address any defenses to nonexhaustion in his traverse because of the State's concession, but rather noted his reliance that the state had conceded exhaustion. CA9 ER 378. Relying on the State's concession, the Court ruled that it

would adjudicate the ineffective assistance of counsel claim on the merits. CA9 ER 424, A-70. Mr. Lopez's undersigned counsel, who were not state post-conviction counsel, spent the next eight years, countless hours and substantial funds investigating and preparing Mr. Lopez's ineffective assistance of counsel claim for presentation to the federal habeas court for merits adjudication. Multiple experts were hired including a neuropsychologist, a neuropsychiatrist and a mitigation specialist. Volumes of documents and declarations were presented to the habeas court in reliance on the State's concession. CA9 ER 533-854.

In the interim, in compliance with the Court's order that he do so, Mr. Lopez filed a state successor post-conviction petition to exhaust a claim under *Ring v. Arizona, supra.* CA9 ER 424. Mr. Lopez did not add a claim of ineffective assistance of sentencing counsel or ineffective assistance of post-conviction counsel to that state post-conviction petition because the state had conceded that his claim would be litigated in federal court.[5] Ultimately this Court held that *Ring* was a new, non-retroactive rule and Mr. Lopez's state post-conviction petition was dismissed. *Schriro v. Summerlin*, 542 U.S. 348 (2005), It was not until after the state successor post-conviction was dismissed and the very last pleading in the federal

---

[5] The district court ruled that ineffective assistance of post-conviction counsel could not be cause for procedural default, including failure to exhaust, with respect to other claims which the Court found procedurally barred. The Court similarly rejected ineffective assistance of post-conviction counsel as a possible cause for failure to exhaust the ineffective assistance at sentencing claim. A-36. To the extent that this Court's imminent opinion in *Maples v. Allen,* O.T. 2010, No. 10-63 and *Martinez v. Ryan*, OT 2010, No. 10- 1001, will impact the Court's cause determination, this Court should hold this case pending the resolution of those cases.

district court filed that the State sought to renege on its earlier concession of exhaustion. By then, it was too late for Lopez to return to state court. The "State provided no explanation for its failure to raise the defense in its answer" as it had been ordered to do. A-31.

The district court found that the claim as presented in Lopez's merits brief, and supported by evidence, was no broader than the claim pled in the amended petition. A-30. The court also found that "[the State] should have raised exhaustion and procedural default in the Answer, before Petitioner's counsel expended time and funds to conduct an investigation." A-31. Nevertheless, the district court found that despite having "initially conceded exhaustion" because the State raised the issue at some point, it could decide the assertion. A-19. In conflict with the Fifth Circuit in *Carty v. Thaler*, 583 F.3d 244, 256 (5th Cir. 2009) and *Bledsue v. Johnson*, 188 F.3d 250, 254-55 (5th Cir. 1999), the district court disagreed that the State's concession was a deliberate waiver that would preclude consideration under *Day v. McDonough*, 547 U.S. 198, 209 (2006). *Id.*[6]

---

[6] The district court said that Lopez had the opportunity to respond to the State's assertion of nonexhaustion but that both misconstrues the record in light of the procedures employed in the district court and begs the question. Years before the State's change of heart, the Court directed that ALL arguments regarding cause and prejudice be addressed in the Traverse and surreply. A.89-90 ("the Court intends for this briefing on the procedural status of claims to be the sole briefing on all issues of exhaustion and procedural default[.]") This Court has held that a court abuses its discretion by erecting procedural barriers that have been expressly waived. There is no doubt that nonexhaustion was expressly waived in the State's Answer. It bears noting that the State had the same counsel for direct appeal, state post-conviction and for the first seven years of federal habeas litigation. This counsel, who was familiar with the record, conceded exhaustion. It was only when the State's counsel changed that the State changed its position on exhaustion.

The Court of Appeals did not decide the waiver of exhaustion issue, but instead held that Mr. Lopez loses because he failed to develop the facts that support his claim. But the Court of Appeals decision also begs an important question. A waiver of exhaustion necessarily waives exhaustion of the facts supporting a claim and thus 28 U.S.C. §2254 (e)(2) is either inapplicable or itself waived.

The State's about-face has cost Mr. Lopez the right to litigate his clearly meritorious ineffective assistance of sentencing counsel claim in any court. "Such transparent attempts at gamesmanship at this late date should not be indulged." *Bradshaw v. Stumpf*, No. 01-3613 , Slip op. at 10 (6th Cir. 2011).

I. HISTORY AND DEVELOPMENT OF THE EXHAUSTION DOCTRINE

The doctrine of exhaustion is an ordering doctrine that has its roots in this Court's 1886 decision in *Ex parte Royall*, 117 U.S. 241 (1886). Through the years, many exceptions to the exhaustion doctrine were recognized and eventually codified by Congress in 1948. 28 U.S.C. §§2254 (b), 2254(c) (1994)(superseded); *See also* Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure*, Sixth Edition, §23.1, p. 1187 (Mathew Bender).

The doctrine of exhaustion of state court remedies requires a habeas petitioner to first present his claims of federal constitutional error to the state court

---

Moreover, Lopez did not have the opportunity to fully defend against the allegations of nonexhaustion and procedural default. He sought to offer an explanation as to why the State had properly conceded exhaustion. Even if the court found that argument unavailing, it doesn't change the fact that the State expressly waived nonexhaustion and the court abused its discretion by resurrecting the defense after a deliberate waiver.

before proceeding in federal court. The doctrine is based on principles of comity and federalism. In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court:

> reasoned that the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims. [The Court] noted that "[b]ecause 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity." *Id.*, at 518, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (quoting *Darr v. Burford*, 339 U.S. 200, 204, 94 L. Ed. 761, 70 S. Ct. 587 (1950)). That doctrine "'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.'" 455 U.S., at 518, 71 L. Ed. 2d 379, 102 S. Ct. 1198.

Rhines v. Weber, 544 U.S. 269, 273-274 (2005).

The exhaustion doctrine is not a procedural bar. Rather, it simply sets out the orderly path for the adjudication of claims. Thus, under the total exhaustion rule of *Lundy* a petitioner who failed to exhaust his state remedies, but for whom state remedies remain available, is permitted to return to state court to adjudicate his claim and then later return to federal court, if necessary, for a merits review. It is only in those circumstances where a federal petitioner's return to state court would be futile that his failure to exhaust will result in a procedural default. In such cases, a petitioner's claim is said to be "technically exhausted, but procedurally defaulted."

The exhaustion doctrine has been held to apply to both claim exhaustion and fact exhaustion. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), this Court equated the principles of claim exhaustion with fact exhaustion and applied the same

procedural defenses to failure to develop facts in state court, as had previously been in place for failure to present a claim to state courts, i.e. cause-and-prejudice. Applying these principles to fact exhaustion, this Court held, "is fully consistent with, and gives meaning to, the requirement of exhaustion. The Court has long held that state prisoners must exhaust state remedies before obtaining federal habeas relief. The requirement that state prisoners exhaust state remedies before a writ of habeas corpus is granted by a federal court is now incorporated in the federal habeas statute. 28 U. S. C. § 2254." *Id.* at 9-10 (internal citation and footnote omitted). The Court went on to hold that there was no meaningful distinction between the principles of claim exhaustion and fact exhaustion. *Id.*

With AEDPA, Congress codified *Lundy's* total exhaustion rule and *Tamayo-Reyes'* requirement of fact exhaustion. Prior to AEDPA this Court's jurisprudence in the area of fact exhaustion and the related principles upon which a federal evidentiary hearing would be granted use the now familiar phrase, "failure to develop." *Compare Tamayo-Reyes*, 504 U.S. at 11 (Tamayo-Reyes entitled to a hearing if he can establish cause-and-prejudice for his "failure to develop" the facts of his claim in state court) and 28 U.S.C. §2254(e)(2) ("if the applicant has failed to develop the factual basis of a claim in State court...).

II. EXHAUSTION IS NOT JURISDICTIONAL AND CAN BE WAIVED

Prior to *Granberry v. Greer*, 481 U.S. 129 (1987), the majority of Circuit Courts held that a state could not waive exhaustion. In *Granberry*, this Court held that exhaustion of state court remedies is waivable by the state and reaffirmed its

earlier holding in *Strickland v. Washington*, 466 U.S. 668 (1984), that failure to exhaust a claim does not deprive the federal courts of jurisdiction to decide the claim.[7] In so doing the *Granberry* Court observed:

> [I]f a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may also be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted. In *Frisbie v. Collins*, 342 U.S. 519 (1952), respondent brought a habeas action in District Court, seeking release from a Michigan state prison. The State did not raise the availability of state relief, and the District Court denied the writ. The Court of Appeals reached the merits of the habeas petition and reversed. While we ultimately disagreed with the Court of Appeals' conclusion on the merits, we rejected the State's nonexhaustion argument and approved the Court of Appeals' determination that "special circumstances" required "prompt federal intervention." Id., at 522. We noted that the general rule of exhaustion "is not rigid and inflexible . . . . Whether such circumstances exist calls for a factual appraisal by the court in each special situation." Id., at 521. As we recognized in *Frisbie*, the cases in which the nonexhaustion defense is not asserted in the district court may present a wide variety of circumstances which the courts of appeals, drawing on their familiarity with state criminal practice, are able to evaluate individually.

Id., pp.135-136.

AEDPA reaffirms that the doctrine of exhaustion is not jurisdictional and can be waived. Under AEDPA, exhaustion is waived if the State does so "expressly." 28 U.S.C. §2254 (b)(3). The Fifth Circuit has directly addressed the waiver of exhaustion in the face of a state's concession of exhaustion, like that in this case, and has found, in direct conflict with the Ninth Circuit, that a state's ***concession*** of exhaustion is an ***express waiver*** of exhaustion. *Carty v. Thaler, supra,* 583 F.3d at

---

[7] Indeed *Strickland* was a case that involved a partially unexhausted claim which the Court proceeded to decide on the merits.

256 (state's concession of exhaustion waives exhaustion defense); *Bledsue v. Johnson, supra,* 188 F.3d at 254-55 (state waived independent exhaustion argument where it previously admitted that petitioner exhausted his claim).

Importantly, 2254(b)(3) does not distinguish between fact exhaustion and claim exhaustion. Instead, the statute, which was passed against the backdrop of a century of litigation, uses the broad term "exhaustion requirement." 2254 (b)(3) comes before 2254(e)(2) and logically is meant to encompass both legal and factual allegations.

2254 (e)(2) was Congress' codification of the fact exhaustion principles of *Keeney.* "[T]he opening clause of § 2254(e)(2) codifies *Keeney's* threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney's* test for excusing the deficiency in the state-court record prior to AEDPA are now controlled by § 2254(e)(2)." *Williams v. Taylor,* 529 U.S. 420, 434 (U.S. 2000). 2254 (e)(2) applied in those situations where fact exhaustion has not been waived and describes the exceptions under which a federal court may hear additional facts, where a Petitioner has "failed to develop." [8]

---

[8] Courts who have addressed questions of diligence and defaulted facts in the lower courts have found that the doctrines of exhaustion, diligence, and procedural default are analytically linked. *See Morris v. Beard,* 633 F.3d 185 (3rd Cir 2011);*Lark v Sect'y PA Dept of Corrections,* 2011 U.S. App. LEXIS 12107 (3rd Cir. 2011); *Wilson v. Beard,* 426 F. 3d 635 (3rd Cir. 2005); *Kenneth Wayne Morris v Dretke,* 415 F.3d 484 (5th Cir. 2005) (Higginbotham *concurring*)(Dennis *concurring*); *Barrientes v. Johnson,* 221 F.3d 741 (5th Cir. 2000); *Smith v Wasden,* 2011 U.S. Dist. LEXIS 32622 (Dist. Idaho 2011); *Bell v. True,* 413 F. Supp. 2d 657 (W. Dist. Va. 2006); *Smith v. Cockrell,* 2003 U.S. Dist. LEXIS 26621 (S. Dist. Tex. 2003).

2254(e)(2) is a procedural defense, not a jurisdictional bar, which can be waived. Indeed in *Bradshaw v. Richey*, 546 U.S. 74 (2005), this Court explicitly recognized that a state could waive the principles of 2254(e)(2) and remanded the case to the Sixth Circuit to determine whether the State had waived the defense by failing to raise it in their pleadings. *See also*, Hertz and Liebman, *Federal Habeas Corpus Practice and Procedure, supra*, § 20.2 [c], n. 83, p. 1048 ("Under AEDPA, the state apparently bears the burden of invoking both new section 2254(d) and (e) and waives the benefits of both provisions by failing to assert them in an adequate and timely maner.")

More logically, though, it would seem that if a State ***waives*** the exhaustion of a claim from the outset, 2254(e), and for that matter 2254(d), simply does not apply. This makes sense because if a claim is not exhausted, it also was not developed. But when the state waives the exhaustion requirement it agrees to the adjudication of the federal constitutional claim by the federal court in the first instance. Thus, the restrictions and limitations of 2254(d) and (e) fall away.

III. THIS COURT AND LOWER COURTS HAVE FOUND THAT A DISTRICT COURT ABUSES ITS DISCRETION WHEN RESURRECTING A PROCEDURAL DEFENSE THAT WAS EXPLICITLY WAIVED

In *Day v. McDonough, supra*, this Court defined a federal court's authority "on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness." *Id.*, 547 U.S. at 201. In *Day*, "the State had miscalculated the tolling time" under the statute of limitations

enacted in the Antiterrorism and Effective Death Penalty Act. *Id.*, pp. 201-202. This Court held: "[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense." *Id.*, at 202; 210, n.11 ("A district court's discretion is confined within these limits. As earlier noted, should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice.") (emphasis added).

Just this month, the Sixth Circuit held that a State waived nonexhaustion and *Teague* as procedural defenses because they waited too long in the litigation to raise the defenses. The Sixth Circuit held that, "[s]uch transparent attempts at gamesmanship at this late date should not be indulged." *Bradshaw v. Stumpf*, No. 01-3613 , Slip op. at 10 (6th Cir. 2011).

In *Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003), the Ninth Circuit held, "'[P]rocedural default is an affirmative defense.' *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003). Generally, the state must assert the procedural default as a defense to the petition before the district court; otherwise the defense is waived. *Franklin v. Johnson*, 290 F.3d 1223, 1229 (9th Cir. 2002)." *Vang*, 329 F.3d at 1073. In *Vang*, the State was held to its waiver because of the protracted litigation and the State's "lengthy response" in which it did not raise the procedural defense of waiver. *Id. See also Robinson v. Schriro*, 595 F.3d 1086, fn 10 (9th Cir. 2010).

As previously noted, nonexhaustion of the legal and factual bases for a claim is a procedural defense which can be waived. *Carty v. Thaler*, *supra,* (state's concession of exhaustion waives exhaustion defense); *Bledsue v. Johnson*, *supra*,

(state waived independent exhaustion argument where it previously admitted that petitioner exhausted his claim). When explicitly waived, this Court's decision in *Day* makes clear that it is an abuse of discretion to resurrect the defense.

IV. THE DISTRICT COURT AND COURT OF APPEALS OPINIONS CONFLICT WITH THIS COURT'S DECISION IN *DAY*, THE SIXTH CIRCUIT'S DECISION IN *STUMPF* AND THE FIFTH CIRCUIT'S DECISIONS IN *CARTY* AND *BLEDSUE*

Lopez's trial lawyer was constitutionally ineffective. The State has never denied that if a court were to adjudicate his claim, it will conclude that any objectively reasonable sentencer presented with the extensive record evidence developed over eight years of federal court litigation agreed to by the state about Mr. Lopez's violent, traumatic, and impoverished childhood and his complex neurological, psychiatric and psychological impairments would not have sentenced him to death. The crucial question presented to the Ninth Circuit was whether the State expressly waived nonexhaustion. When the State waived nonexhaustion, then no court had the discretion to resurrect its procedural defense under *Day*. The district court erred when it did so.

But, the Ninth Circuit erroneously sidestepped the issue and held that it "need not" decide whether the State had waived its nonexhaustion defense. Instead, it held that Lopez was separately barred by the terms of 28 U.S.C. §2254(e)(2). The Ninth Circuit was in error because it failed to recognize that 2254(e)(2) is itself inextricably linked to the exhaustion doctrine and is not a

separate bar. If the State waived its nonexhaustion defense, which it did, then 2254(e)(2) either doesn't apply at all or is itself waived.

A. THE PANEL WAS INCORRECT WHEN IT HELD THAT THE STATE'S EXPRESS WAIVER OF EXHAUSTION COULD BE DIVORCED FROM THE INQUIRY UNDER 2254 (E)(2).

1. THE STATE EXPRESSLY WAIVED ITS EXHAUSTION DEFENSE

Understanding the process for adjudicating capital habeas petitions in the District of Arizona at the time this case was litigated is central to this claim. The Arizona District Court had an established procedural order in all capital habeas cases whereby after the amended petition was filed, the State was ordered to file an answer on the procedural status of claims. The State's task was crystal clear: alert the court and Petitioner as to which claims (or sub-claims) the State would defend against on procedural grounds, "specifically identifying which claims, if any, [the State] contend are unexhausted." A-89. The Court ordered all merits briefing delayed until any procedural defenses the State asserted were adjudicated. A-90.

Lopez filed his amended petition alleging specific facts that gave rise to his ineffective assistance of counsel at sentencing claim. CA9 ER 354. The State filed an "Answer Regarding the Procedural Status of Claims." CA9 ER 375. In its Answer, the State plainly and clearly stated that the ineffective assistance of counsel claim and its supporting allegations in Lopez's amended petition had been exhausted. *Id.* In that same document, the State asserted numerous other procedural defenses to other claims and sub-claims raised in the petition. The State's counsel was not new to the case or the proceedings that had occurred in the

state court, but was the same counsel who represented the State in state post-conviction proceedings and on direct appeal. Thus, the State was intimately familiar with the state court record and any procedural defenses to be raised as the Court ordered. There was no ambiguity as to the State's obligation to assert any procedural defenses. In fact, the State claimed that eight out of seventeen claims were procedurally defaulted, identifying those claims it contended were not exhausted and those claims it contended were not presented as federal claims in state court, as well as other procedural defaults. *See Lopez v. Stewart*, No. 2:98-0072, Docket Entry 37 (Claims 2, 4, 6, 7, 9, 10, 11, and 14 precluded and claim 17 premature).

In the Procedural Traverse, Lopez reiterated the State's position to ensure clarity. CA9 ER 378. For eight years the litigation in the district court proceeded with the clear understanding of <u>all</u> parties -- the court, the State and Lopez-- that the States had no procedural objections to the ineffectiveness claim, and it would be reviewed on the merits. The Court and the parties took multiple actions in reliance on this explicit waiver. Lopez undertook investigation to demonstrate sentencing counsel's ineffectiveness in failing to investigate Lopez's background, and retained experts to evaluate Lopez's tragic home life of poverty and violence and his resulting mental illnesses. It was not until that investigation had been completed, Lopez filed his merits pleading and the State's counsel had been replaced with different counsel that the State suddenly reversed its position. The State sought to rescind its previous exhaustion concession arguing that the claim it had conceded

was exhausted was different from the claim Lopez presented in his federal habeas petition.

But, that is untrue. CA 9 ER 516, 863. Relying on the previous court orders that the procedural defenses were already settled, CA9 ER 516, Lopez responded in the district court to the State's specious claim that he had changed the claim in his merits brief from that in his habeas petition. A simple perusal of his habeas petition proved he had not changed his claim. CA9 ER 363-366. The District Court agreed that Lopez had not changed his claim. A30. That should have ended the matter. But instead, the Court now engaged in its own volte-face: it erroneously believed that it had the discretion, eight years later, to consider exhaustion *sua sponte* and therefore because the State had raised exhaustion the Court found that it should be considered. A31. This was unquestionable error. [9]

---

[9] The State's first counsel's actions were reasonable, logical and in keeping with longstanding law: counsel conceded exhaustion to allow the merits of the ineffectiveness claim to move forward in federal court, rather than force Lopez to return to State court and undertake additional protracted proceedings.

> It is significant, therefore, that in a case arising in the context of a Younger abstention, where the state voluntarily chose to pursue its case in a federal forum, the Supreme Court said:
>
> > It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has

Lopez was plainly prejudiced by the State's last minute bait and switch. Relying on the State's clear concession of exhaustion, Lopez spent eight years investigating his claim of ineffective assistance of counsel, sought multiple orders from the District Court, and used judicial resources, including significant CJA funding for expert assistance, only to have the rug ripped out from under him at the last minute. Had the State raised the procedural defense when ordered to, Lopez could have responded with procedural defenses of his own, requested a stay of the proceedings to return to State Court to exhaust the claim, or chosen a different litigation strategy altogether. Here, the State has reaped the windfall by failing to

---

> concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances Younger principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks.

Hodory, 431 U.S. at 480, 97 S. Ct. at 1904 (emphasis added); *see also* 17 Wright, Miller & Cooper, *supra*, at 654.

> We conclude that this analysis applies equally to the federal habeas proceeding before us. As in *Hodory*, *supra*, the State has chosen a federal forum because it explicitly wishes to avoid lengthy and protracted state judicial proceedings. We see no reason why a federal court, in the name of comity, should refuse to abide by the State's wishes. This conclusion is supported by our analysis of the doctrine of comity as applying to proper relations between sovereign states, rather than between judicial systems.

Felder v. Estelle, 693 F.2d 549, 553-554 (5th Cir. Tex. 1982)

abide by the District Court's order to raise the procedural defense at the beginning of the litigation and thus depriving Lopez of any merits adjudication in state or federal court.

2. THE STATE'S EXHAUSTION WAIVER APPLIES WITH EQUAL FORCE TO THE 2254 (E)(2) INQUIRY

The State's nonexhaustion waiver was the question of law that was certified for appeal. *See* 28 U.S.C. §2253 (certificate of appealability required to proceed on appeal). Lopez clearly demonstrated that he should prevail on the question of the State's waiver. Yet, the panel did not decide the issue before it. Rather, the panel held that it could decide the claim on the basis of 28 U.S.C. § 2254 (e)(2), as if the (e)(2) analysis was divorced from the exhaustion doctrine. The panel's holding on this uncertified issue is not only inappropriate but is erroneous and demonstrates that the waiver of claim exhaustion cannot be separated from an inquiry into the exhaustion of facts in this case. In fact, the State's waiver of claim exhaustion was equally a waiver of fact exhaustion.

This Court has noted that § 2254 (e)(2) is a codification of *Keeney's* exhaustion of facts doctrine. "In *Keeney,* the Court borrowed the cause and prejudice standard applied to procedurally defaulted claims, *see Wainwright v. Sykes*, 433 U.S. 72, 87-88, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977), deciding there was no reason 'to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim.'" *Williams v. Taylor*, 529 U.S. 420, 433 (U.S. 2000). Here, there is no principled distinction between exhaustion of claims and exhaustion of facts. If the State waived

exhaustion of claims, it also waived exhaustion of facts (failure to develop) and the panel erred in side-stepping the issue. 2254(e)(2) simply does not apply.

B. LOPEZ REASONABLY RELIED ON THE GOOD FAITH OF THE STATE AND FOLLOWED THE ORDERS OF THE COURT; JUSTICE AND EQUITY REQUIRE THAT HE BE ALLOWED TO PROCEED ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The State gained an unfair litigation advantage through their actions. Orders of the Court ought to mean something and litigants ought to be able to rely on them. *See King v. Bell*, 378 F. 3d 550 (6th Cir. 2004)(where the habeas petitioner relied on the State's representation and Court orders which resulted in the filing of a habeas petition outside the statute of limitations, he was entitled to equitable tolling).

CONCLUSION

This Court should grant the petition for writ of certiorari

Respectfully Submitted,

DENISE I. YOUNG
Attorney at Law
2930 N. Santa Rosa Place
Tucson, Arizona 85712
(520) 322-5344
Dyoung3@mindspring.com

KELLEY J. HENRY
Supervisory Asst. Fed. Pub. Defender
FEDERAL PUBLIC DEFENDER
Middle District of Tennessee
Capital Habeas Unit
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047
kelley_henry@fd.org
** Counsel of Record*

August 29, 2011

Counsel for Petitioner

No. 11–6117

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL V. LOPEZ,
PETITIONER,
-vs-

CHARLES L. RYAN, et. al.
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS C. HORNE
ATTORNEY GENERAL

KENT E. CATTANI
CHIEF COUNSEL
CRIMINAL APPEALS/
CAPITAL LITIGATION DIVISION
(COUNSEL OF RECORD)
kent.cattani@azag.gov

SUSANNE BARTLETT BLOMO
ASSISTANT ATTORNEY GENERAL
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686
susanne.blomo@azag.gov
ATTORNEYS FOR RESPONDENTS

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Does the court of appeals' decision affirming the district court's denial of habeas relief on the ground that Lopez failed to comply with 28 U.S.C. § 2254(e)(2)'s requirement that he first present the facts supporting his claim to the state court violate the constitution and conflict with this Court's relevant decisions?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Batchelor v. Cupp, 693 F.2d 859 (9th Cir. 1982) 9
Bledsue v. Johnson, 188 F.3d 250 (5th Cir. 1999) 9
Carty v. Thaler, 583 F.3d 244 (5th Cir. 2009) 9
Coleman v. Thompson, 501 U.S. 722 (1991) 7
Cullen v. Pinholster, 131 S.Ct 1388 (2011) 10–11
Day v. McDonough, 547 U.S. 198 (2006) 9
Holland v. Jackson, 542 U.S. 649 (2004) 9–11
Lopez v. Ryan, 630 F.3d 1198 (9th Cir. 2011) 1, 5–9, 11
Maples v. Allen, No. 10-63 5
Martinez v. Ryan, No. 10-1001 5
State v. Conner, 163 Ariz. 97, 786 P.2d 948 (1990) 7
State v. Lopez, 163 Ariz. 108, 786 P.2d 959 (1990) 1, 3–4
State v. Lopez, 175 Ariz. 407, 857 P.2d 1261 (1993) 1, 3–4
State v. Spreitz, 202 Ariz. 1, 39 P.3d 525 (2002) 7
Stewart v. Smith, 202 Ariz. 446, 46 P.3d 1067 (2002) 7
Stumpf v. Houk, No. 01–3613 (6th Cir. August 11, 2011) 10
Vasquez v. Hillery, 474 U.S. 254 (1986) 7
Villegas Lopez v. Arizona, 511 U.S. 1046 (1994) 4
Williams v. Taylor, 529 U.S. 420 (2000) 10
Woodfox v. Cain, 609 F.3d 774 (5th Cir. 2010) 9

Constitutional Provisions

Sixth Amendment 1
Eighth Amendment 2
Fourteenth Amendment 2
U.S. Const. Art. III 1

Rules

Ariz. R. Crim. P. 32.1(d)–(h) 7
Ariz. R. Crim. P. 32.1(e)(2) 7
Ariz. R. Crim. P. 32.2(a)(3) 7
Ariz. R. Crim. P. 32.2(b) 7
Ariz. R. Crim. P. 32.4 7
U.S. Sup. Ct. R. 10 ..... 1, 4

OPINION BELOW

In a unanimous opinion, the United States Court of Appeals for the Ninth Circuit upheld the denial of Petitioner Samuel Villegas Lopez's federal petition for writ of habeas corpus. *Lopez v. Ryan*, 630 F.3d 1198 (9th Cir. 2011); (Petitioner's Appendix [PA], A2–A15). The United States District Court for the District of Arizona's prior decision denying relief was unreported. (PA, A22–A63). The Arizona Supreme Court's unanimous decision affirming Lopez's conviction and remanding for a new sentencing hearing is set forth in *State v. Lopez* (*Lopez I*), 163 Ariz. 108, 114, 116, 786 P.2d 959, 965, 967 (1990). The Arizona Supreme Court's subsequent unanimous decision affirming Lopez's capital sentence is found at *State v. Lopez* (*Lopez II*), 175 Ariz. 407, 417, 857 P.2d 1261, 1271 (1993)

STATEMENT OF JURISDICTION

The court of appeals issued its decision on January 20, 2011. It denied rehearing on March 30, 2011. Lopez timely filed his petition for a writ of certiorari on August 29, 2011. This Court has subject matter jurisdiction to consider timely petitions for certiorari from the United States Courts of Appeal under the United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

> and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts regarding the murder for which Lopez was convicted were summarized by the Arizona Supreme Court as follows:

> On October 29, 1986, Phoenix police responded to a 'check welfare' call at an apartment in Phoenix. There police found the victim's body and evidence of a terrible and prolonged struggle. A window had been broken from the inside out, scattering glass for seven to eight feet. A screen door bore a concave impression matching the shape of a body. A bookcase was knocked over, and broken pieces of ceramic were found on the bed, the floor, and in the victim's hair. Blood was splattered on the walls in the kitchen, bedroom, and bathroom. Blood was smeared on the screen door, and, in the kitchen, police found bloody footprints, blood on the refrigerator, blood on the stove, and diluted blood around the kitchen sink.
>
> The victim was a 59-year-old woman, 5' 2" tall, and weighed 124 pounds. Her face was covered with a pillow, she was blindfolded with her pajama bottoms, and her mouth was gagged with a scarf. She had three stab wounds in the left scalp that extended to her skull, a stab wound on her left cheek, approximately 23 stab wounds in her left breast and upper chest, and her throat had been cut. Death was caused by the slit throat and multiple stab wounds to the chest. All of the wounds were inflicted pre-mortem or, at least, a very short time after death.

> In addition to the stab wounds, the victim had bruises on her left cheek and left hand, and defensive wounds on her right arm. From the flow of blood, the medical examiner determined that she had been standing at some point after having been stabbed. Semen was found in her vagina and anus.

Lopez II, 175 Ariz. at 409–10, 857 P.2d at 1263–64.

"[Lopez] had been seen in the neighborhood the night of the crime. He was also seen in the early morning after the murder walking down the street, soaking wet, as if he had recently washed himself." *Lopez I*, 163 Ariz. at 111, 786 P.2d at 962.

Five days after the murder, on November 3, 1986, Lopez was being questioned by police about an unrelated matter when he asked about the lady who was killed on the Westside who was stabbed and got her throat cut. *Id.* This information had not been shared with witnesses or the public. *Id.*

Lopez's palm print was found on the wall of the kitchen area of the victim's apartment, his fingerprint was found on the window frame, and another one of his fingerprints was found on a glass fragment that fit the broken window in the victim's apartment. This last fingerprint was on the inside of the window glass. Analysis of the seminal stains from the victim showed that the person who left the semen in the victim's vagina had a specific blood type consistent with Lopez's and found in approximately seven percent of the male, Hispanic population. Moreover, blood found in a silverware tray in the victim's apartment was of a blood type excluded as coming from the victim, but matching Lopez's specific blood type, and found in less than one percent of the population. DNA analysis was not being conducted at the time of Lopez's trial. Lopez rejected post-conviction DNA analysis.

Jurors convicted Lopez of the crimes charged, and his conviction was upheld on direct appeal. *See id.* at 110, 116, 961, 967. The sentencing court sentenced Lopez to death for the murder, but the Arizona Supreme Court reversed the sentence on appeal and remanded for a new sentencing hearing. *Id.* at 116, 967. On remand, the sentencing court again sentenced Lopez to death, and the Arizona Supreme Court affirmed the sentence on independent review. *Lopez II*, 175 Ariz. at 410, 417, 857 P.2d at 1264, 1271. This Court denied Lopez's petition for a writ of certiorari. *Villegas Lopez v. Arizona*, 511 U.S. 1046 (1994). The state court subsequently denied relief on post-conviction review, and the federal district court denied habeas relief. (PA, A22–63). In a unanimous panel decision, the Court of Appeals for the Ninth Circuit affirmed the district court's denial of habeas relief and denied rehearing. (PA, A1–15).

REASONS FOR DENYING THE PETITION

This petition should be denied because the arguments are not worthy of certiorari review. This Court limits review by a writ of certiorari to cases demonstrating "compelling reasons" for review. Rule 10, Rules of the United States Supreme Court. Here, Lopez has not presented any compelling reasons. Lopez has not identified any conflict in the lower courts regarding the issue presented; nor has he identified an issue in which the Ninth Circuit decided an important federal question in this case in a manner that conflicts with relevant decisions of this Court, or that addresses an important unsettled question of federal law that this Court should decide.

ARGUMENT

THE APPEALS COURT PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF HABEAS RELIEF BECAUSE LOPEZ DID NOT SUPPORT HIS CLAIM WITH EVIDENCE IN STATE COURT.

I. FACTS PERTAINING TO THE ISSUE.

Lopez raised four specific claims of ineffective assistance of counsel (IAC) in his state court petition for post-conviction relief (PCR) and petition for review. In one claim (hereinafter referred to as "claim 1(C)"), Lopez argued that his resentencing counsel was ineffective in failing to prepare his expert witness by providing him with four specific documents. *Lopez*, 630 F.3d at 1204. Lopez did not argue in state court that his counsel at resentencing was ineffective for failing to adequately investigate social history and mental health mitigation and provide it to his expert witness or that his resentencing counsel was ineffective in failing to present such mitigation to the sentencing court. Nor did Lopez provide evidence in support of such claims.[1]

Subsequently, in federal district court, Lopez submitted an amended habeas petition in which he outlined his habeas claims, but did not argue the merits. (*See* PA, A88). In Respondents' answer to Lopez's petition, which similarly addressed only the procedural status of Lopez's claims, Respondents initially construed the

[1] In district court, Lopez "did not allege cause and prejudice or a miscarriage of justice to overcome [procedural] default." (PA, A36). Moreover, whether PCR counsel was ineffective in failing to exhaust the expanded portion of claim 1(C), thus acting as cause for procedural default, was not a certified issue on appeal (PA, A21, A61–63), was not argued before or addressed by the court of appeals (Lopez, 630 F.3d 1198), and was not argued by Lopez in his petition for rehearing and suggestions for rehearing en banc. Thus, contrary to Lopez's contention (Petition at 13, n. 5), this Court should not hold this case pending the resolution of *Maples v. Allen*, No. 10–63 or *Martinez v. Ryan*, No. 10–1001, currently before this Court.

habeas petition as raising the same limited claim 1(C) that Lopez had raised in state court, and thus, conceded exhaustion.

Within a month of Respondents filing their answer, Lopez made his intent to expand claim 1(C) more apparent when he tried to initiate an investigation by moving for a contact visit with a neuropsychologist. Respondents clearly and timely objected, questioning how such testing "relate[d] to any claim properly before this Court" and noting that any claims relating to mental illness "are clearly procedurally defaulted or not currently ripe for adjudication." Respondents contended that the proposed testing was "irrelevant" to the claims alleged. *Id.* Thus, Respondents clearly indicated to Lopez and the district court their position that claim 1(C) was a narrow, limited claim.

The district court initially denied Lopez's motion for the contact visit. Over Respondents' objection, however, the district court later granted Lopez's motion for an *ex parte* hearing and subsequently granted Lopez's motion for the contact visit.

When Lopez filed his merits brief, he argued the merits of an obviously expanded claim 1(C).[2] What had been a limited claim that counsel had been deficient in failing to prepare an expert witness by providing him with four documents became a broad claim that counsel did not "conduct the comprehensive

[2] Both the district court and the court of appeals found that the claim Lopez raised in state court was a narrow one that he later broadened in federal court. *See Lopez*, 630 F.3d at 1205, n. 6 & 1206 (Lopez's argument that he did not broaden his claim in federal court fails; it is "not simply that Lopez failed to develop the factual underpinnings of his claim—Lopez failed to present this claim altogether"); PA, A34–A35 (district court memorandum of decision and order) (Lopez's argument that the expanded claim 1(C) was presented in state court "is not supported by the record").

investigation of [Lopez's] background and social history required."[3] Lopez also attached over 100 exhibits to his brief that had never been presented in state court. Respondents argued in their merits brief that this expanded portion of the claim had not been exhausted in state court. (PA, A30–A31). Lopez had the opportunity to respond to this defense but did not allege that Respondents waived exhaustion. (PA, A19, A31, n. 7). Respondents also asserted that the record should not be expanded and an evidentiary hearing should not be granted because the exhibits attached to Lopez's brief had never been presented in state court.

The district court found that, while the claim presented in state court had been a narrow one, Lopez was attempting to "shoehorn in" the much broader claim that counsel failed to adequately investigate and present mitigation. (PA, A34). Because Lopez had failed to exhaust this claim in state court and would be precluded from doing so,[4] the district court dismissed the expanded portion of claim

---

[3] Lopez's repeated assertion—that "the State has never denied" that sentencing counsel was constitutionally ineffective in failing to investigate Lopez's background or social history and, thus, the claim is "undisputed"—is misleading. (Petition at 5, n. 3, 22). Respondents did not dispute this claim in state court because the claim was not made. Respondents did not dispute the merits of this claim in federal district court or in the court of appeals as the claim was procedurally defaulted because it had neither been raised nor supported with any evidence in state court.

[4] Lopez contends that if Respondents had not mistakenly conceded exhaustion in their original procedural answer, he would have returned to state court to exhaust the claim but that later in the proceedings it was too late to do so. (Petition at 4–5, 14, 26). This ignores that, even at the outset of federal habeas proceedings, a successive PCR petition would have been precluded under Arizona law. *See* Ariz. R. Crim. P. 32.1(d)–(h), 32.2(a)(3), (b), 32.4; *Stewart v. Smith*, 202 Ariz. 446, 449–50, ¶¶ 8–12; 46 P.3d 1067, 1010–11 (2002); *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002); *State v. Conner*, 163 Ariz. 97, 100, 786 P.2d 948, 951 (1990). Lopez's contention that his claim would have fallen within Arizona's "newly discovered material facts" exception is incorrect because the exception does not apply where the petitioner did not exercise due diligence in securing the new facts, and "Lopez was not diligent in developing his claim." Ariz. R. Crim. P. 32.1(e)(2); *Lopez*, 630 F.3d at 1206. His claim also would not have fallen within the Rule 32.1(h) exception because the underlying facts do not establish by clear and convincing evidence that the sentencing court would not have imposed the death penalty. *See* Ariz. R. Crim. P. 32.1(h); *Lopez*, 630 F.3d at 1209 (noting the sentencing judge's remark that in his years on the bench he had "'never seen [a first-degree murder

Continued...

1(C) as procedurally barred. (PA, A36). *See Coleman v. Thompson,* 501 U.S. 722, 735, n. 1 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The district court neither expanded the record to include Lopez's new materials related to claim 1(C) nor held an evidentiary hearing on the claim.[5]

The Ninth Circuit Court of Appeals found that Lopez was not diligent in developing claim 1(C) in state court, and "[b]ecause Lopez was not diligent in presenting the new evidence at issue, no evidentiary hearing [was] required." *Lopez*, 630 F.3d at 1206. The court found that "Section 2254(e)(2) applied," and that Lopez could not meet the requirements of § 2254(e)(2)(A) that his new materials could not have been previously discovered through the exercise of due diligence. *Id.*

Accordingly, the court of appeals affirmed the district court's habeas denial, finding:

> [t]he parties strongly contest whether the state waived procedural default and whether the district court erred in reaching this issue *sua sponte*. We need not and do not address this issue, however, because we affirm the dismissal of Lopez's claim on an alternate ground. Even assuming that the district court should not have reached the issue of procedural default, Lopez failed to present any of the evidence in support of his expanded claim in state court. Thus, he is separately barred from seeking relief under 28 U.S.C. § 2254(e)(2).

Id. at 1205.

The court of appeals later denied Lopez's petition for rehearing and petition for rehearing en banc. (PA, A1).

Continued...
case] as bad as this one"'). Moreover, the district court found that Lopez would be precluded from raising his expanded claim in state court. (PA, A36.)

[5] The district court expanded the record to included exhibits relevant only to claim 1(A), not to the claim at issue here—claim 1(C).

II. ARGUMENT.

Lopez asserts that the court of appeals erred when it chose not to address the issue of procedural default and affirmed the district court's habeas denial on an alternate ground—Lopez's failure to present any evidence supporting the claim in state court. (Petition at 22–23). Lopez contends that Respondents waived a procedural default defense,[6] which applied equally as a waiver of the provisions of § 2254(e)(2). (Petition at 27.) This contention fails for several reasons.

First, even assuming that Respondents waived a procedural default defense, they never waived § 2254(e)(2)'s and *Holland v. Jackson*'s, 542 U.S. 649, 652 (2004), prohibition on federal evidentiary hearings and expansion of the record where the habeas petitioner failed to present evidence in support of his claim in state court. *See Lopez*, 630 F.3d at 1205, n. 7. In fact, very early in the district court proceedings, Respondents opposed Lopez's efforts to gather new materials. Ultimately, the district court allowed Lopez to gather new materials, but it was over Respondents' objection and based on Lopez's subsequent *ex parte* requests. Respondents also opposed expansion of the record in district court and "expressly argued that Lopez did not satisfy § 2254(e)(2)." *Id.* In the end, the district court did not expand the record to include Lopez's newly gathered materials and did not hold

[6] As the court of appeals noted, Respondents "strongly contest" Lopez's contention that they waived procedural default. *See Lopez*, 630 F.3d at 1205. Respondents raised the non-exhaustion of state court remedies in their district court merits brief, and, thus, did not waive it as a defense. *Cf. Batchelor v. Cupp*, 693 F.2d 859, 864 (9th Cir. 1982) (the State may be deemed to have waived procedural default as a defense if it does not raise it in *district court*). In response to Lopez's motion to alter or amend judgment, the district court stated that it was "not persuaded by Petitioner's [untimely] assertion that Respondents' actions constituted a deliberate waiver of the procedural default defense" because Respondents raised the defense in district court. (PA, A19, n. 2.)

an evidentiary hearing. Lopez provides no authority for the proposition that, assuming Respondents waived procedural default as a defense, they also waived the provisions of § 2254(e)(2) and *Jackson*. Neither *Day v. McDonough*, 547 U.S. 198, 201, 206–11 (2006), *Carty v. Thaler*, 583 F.3d 244, 256–57 (5th Cir. 2009), *Bledsue v. Johnson*, 188 F.3d 250, 254–55 (5th Cir. 1999)[7] nor the Sixth Circuit's slip opinion in *Stumpf v. Houk*,[8] No. 01–3613 (August 11, 2011), equate a waiver of exhaustion to a waiver of the provisions of § 2254(e)(2).

Lopez also offers no authority for the contention that, assuming Lopez's claim 1(C) was not procedurally barred, the court of appeals could not consider § 2254(e)(2) separately as a bar to consideration of new evidence on Lopez's claim 1(C), and, consequently, as a bar to habeas relief. In fact the court of appeals decision in this case was a prescient precursor to this Court's decision in *Cullen v. Pinholster*, 131 S.Ct 1388, 1401 (2011), in which this Court stated, "[s]ection 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief." "At a minimum, [] § 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Id.* Lopez's expanded claim 1(C) was not presented, and, therefore, not adjudicated on the merits in state court. Section 2254(e)(2), therefore,

---

[7] *Carty* and *Bledsue* are distinguished on their facts by *Woodfox v. Cain*, 609 F.3d 774, 793 (5th Cir. 2010), in which the court of appeals found that the State's waiver of exhaustion was not clear and unambiguous and, therefore, like the district court here, the court of appeals raised exhaustion *sua sponte* and found the petitioner's claim was procedurally barred.

[8] Cited as *Bradshaw v. Stumpf* in Lopez's petition.

precludes consideration of any new evidence on the claim and acts as a bar to habeas relief. *See id.*; *Williams v. Taylor*, 529 U.S. 420, 427–29 (2000).

Even before *Pinholster*, this Court held that "whether a state court's decision was unreasonable [under § 2254(d)(1)] must be assessed in light of the record the court had before it." *Jackson*, 542 U.S. at 652. Here, the state court had no record before it regarding Lopez's expanded claim 1(C), and therefore, the district court had no evidence upon which it could rely in granting relief on the claim. Lopez simply could not have prevailed on the claim in district court. In fact, it would have been error for the district court to have granted Lopez habeas relief on the basis of evidence not properly presented in state court. *See id.* Thus, it was correct for the court of appeals to rely upon § 2254(e)(2) as an alternate ground to affirm the district court's denial of habeas relief.

Federal courts are "limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster* at 1398. Thus, even assuming the claim was exhausted in state court—as Lopez contends—the district court could only consider the evidence presented in state court. The Court of Appeals correctly found that "Lopez was not diligent in developing his claim," and:

> [a]lthough state law required Lopez to attach 'affidavits, records, or other evidence currently available to [him] supporting the allegations' to his PCR petition, Lopez submitted none of the contested evidence regarding his childhood, mental health, or family and social history.

Lopez, 630 P.3d at 1206. Moreover, the court of appeals found that Lopez did not contend that he lacked access to information from his family regarding family history and that he could have presumably obtained it without court order and with

minimal expense. *Id.* Thus, even assuming Lopez had presented the expanded claim 1(C) in state court—an assertion rejected by both the district court and the court of appeals and clearly unsupported by the record—he could not prevail on habeas review because he presented no evidence in support of the claim to the state court.

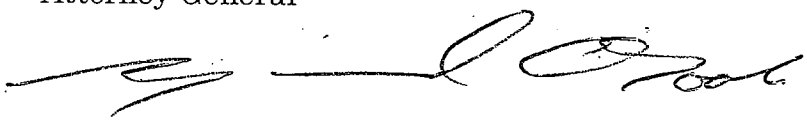
Lopez argues that Respondents somehow prevented him from obtaining habeas review on his expanded claim 1(C) by virtue of their initial procedural answer to his habeas petition. (Petition at 15). Instead, however, Lopez's own failure to raise the claim *and* to support it with evidence in state court cost him the opportunity to obtain review of the claim in federal court.

CONCLUSION

Because the issue presented is not worthy of review, this Court should deny the petition for a writ of certiorari.

Respectfully Submitted,

THOMAS C. HORNE
Attorney General



For KENT E. CATTANI
Chief Counsel
Criminal Appeals/
Capital Litigation Division
(Counsel of Record)

SUSANNE BARTLETT BLOMO
Assistant Attorney General

Attorneys for RESPONDENT

2294751

Henry A. Martin
FEDERAL PUBLIC DEFENDER
Kelley J. Henry
Assistant Federal Public Defender
Missouri State Bar No. 38849
810 Broadway, Suite 200
Nashville, TN 37203-3805
(615) 736-5047
kelley_henry@fd.org

Denise I. Young
Arizona State Bar No. 007146
2930 N. Santa Rosa Place
Tucson, AZ 85712
(520) 322-5344
dyoung3@mindspring.com

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

SAMUEL V. LOPEZ,	)	
	)	No. CIV 98-0072-PHX-SMM
Petitioner,	)	
	)	MOTION TO ALTER OR
	)	AMEND JUDGMENT
DORA B. SCHRIRO, *et al.*	)	
	)	
Respondents,	)	
	)	

Pursuant to Fed.R.Civ.P. 52(b), and 59(e), Petitioner Samuel Lopez respectfully moves this Court to reopen the judgment it entered against Petitioner without holding a

hearing or even argument to 1) reconsider its order denying relief, and a hearing on the serious constitutional violations that occurred at Petitioner's capital trial, and 2) expand its certificate of appealability to include the other serious constitutional violations and procedural issues Petitioner presented here that are debatable among reasonable jurists. This motion is supported by the following facts and law.

I. Respondents Expressly Conceded Petitioner's Constitutional Violation Resulting From His Sentencing Counsel's Ineffectiveness Was Exhausted.

In his amended petition for writ of habeas corpus filed nearly ten years ago, in November, 1998, Petitioner set forth the facts and law supporting his entitlement to a new trial, or at the least, a new sentencing hearing based on the multiple constitutional violations that occurred at his capital trial and sentencing. Dkt. 27, pp. 3-14. The facts supporting his claim were detailed. They included:

"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.

11.6.1 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.

11.6.2 The unrefuted testimony at trial established that petitioner was intoxicated the night 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.

11.6.3 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. 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.

11.6.4 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 a sixth grade reading level, Mr. Lopez's attorney failed to properly prepare his case for trial and sentencing.

11.6.5 Such investigation was necessary for the expert to review in order to establish a base line for Mr. Lopez' 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' behavior surrounding the offense, during interrogation by law enforcement, and during clinical interviews with Mr. Lopez. Counsel was ineffective. Strickland v. Washington, supra.

11.7 Trial Counsel was also ineffective because he failed to challenge unadjudicated crimes which were presented to the court through presentence reports. The

presentence reports prepared in 1987 and in 1990 contained references to arrests for crimes which Mr. Lopez was not charged. ROA 71, ROA 99.

11.7.1 One of the most damaging references was to an alleged sexual assault incident six days after the Holmes homicide. The complainant in that charge, Cecilia Rodriguez, was an acquaintance of Mr. Lopez with whom he had a consensual sexual relationship. Ms. Rodriguez admitted to being with Mr. Lopez on the afternoon when the assault was supposed to have occurred. They were both drinking at a mutual acquaintance's home. Mr. Lopez and Ms. Rodriguez left the party together to get more liquor. Ms. Rodriguez claimed that on the way to the liquor store, Mr. Lopez sexually assaulted her. However, medical experts could find no evidence of sexual assault. Moreover, the state did not press charges against Mr. Lopez because Ms. Rodriguez was not "credible." See Claim ten, infra.

11.7.2 The sexual assault charge was not supported by any credible evidence. Nevertheless, Judge D'Angelo considered this sexual assault in making his sentencing determination because none of Mr. Lopez's attorneys challenged the unsupported assertion. Mr. Lopez's attorneys basically conceded the sexual assault had occurred, even though Mr. Lopez denied the allegation.

11.8 Because Mr. Lopez's attorneys failed to recuse the trial judge who was biased against him, failed to remove a juror who had been struck for cause because of his bias, failed to properly investigate and prepare the case for trial and sentencing including failing to prepare the defense expert Dr. Bendheim, and failed to object to impermissible references to unsupported allegations of uncharged misconduct in the presentence reports, Mr. Lopez was denied his rights to a fair trial, a fair and impartial jury, to present a defense, to minimal due process, to effective assistance of counsel, and to be free from cruel and unusual punishment all in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution."

Id., pp. 3-14.

In its March 11, 1999, "Answer re procedural status of claims" to Lopez's allegations in his amended petition, Dkt. 37, Respondents expressly stated Lopez's ineffective counsel claim allegations for "fail[ing] to adequately prepare Dr. Bendheim at sentencing" "have been properly exhausted.":

> Claim I: Ineffective Assistance of Counsel
> Petitioner alleged four instances of misconduct: ....3) failure to adequately prepare Dr. Benheim at sentencing.... Petitioner presented th[is] claim[] first, in his

> petition for post-conviction relief, and then in a petition for review to the Arizona Supreme Court. Thus, they have properly been exhausted.

Id., p. 12. Based on that concession, this Court later ordered the parties to submit additional briefing on that claim and whether a hearing was needed. Dkt. 92, p. 1-2 (Respondents' answer acknowledges that certain claims are entitled to merits review...."); p. 16.[1]

Also based on Respondents' concession of exhaustion, Petitioner undertook the investigation that trial counsel did not to show the prejudice Petitioner suffered as a result of his sentencing counsel's "failure to properly investigate or prepare his case for trial and sentencing, including their failure to properly prepare the psychiatric expert, Dr. Otto Bendheim...." exactly as Petitioner alleged in his habeas petition and related pleadings. Dkt. 27. Petitioner moved this Court for appropriate orders directing the Arizona Department of Corrections at the supermaximum facility where Mr. Lopez was (and continues to be) incarcerated to allow mental health professionals to evaluate Petitioner to determine whether additional evidence mitigating the crimes for which Mr. Lopez was convicted existed to support the prejudice he suffered from counsel's ineffective

---

[1]During this time, *Ring v. Arizona,* 536 U.S. 584, 609 (2002), was announced and this Court stayed further proceedings on Mr. Lopez's sentencing claims pending exhaustion of his state court remedies on the issue of whether *Ring* would be retroactively applied to Mr. Lopez. Dkt. 92, 11-16. Based on the State's concession that Petitioner's ineffective sentencing counsel claim was fully exhausted, Petitioner did not assert again sentencing counsel's ineffectiveness in those state post-conviction proceedings.

sentencing presentation. Following the parties' pleadings and oral argument,[2] those requests were granted. *See, e.g.*, Dkt. 70-88, 137-138, 155, 157-158, 169.

Following additional investigation on the prejudice Petitioner suffered from his trial counsel's many errors in not properly preparing his lone mitigation witness, Dr. Bendheim, Petitioner provided additional support showing trial counsel's ineffectiveness at the capital sentencing trial. Petitioner filed available declarations and social history documents, including legal and medical records from mental health experts, lay witnesses, family and friends. Based on these documents, Petitioner moved this Court for a hearing on trial counsel's ineffectiveness at sentencing where these witnesses and this evidence could be considered. Dkt. 178-187.

Respondents submitted a responsive brief. Dkt., 196. In that brief, Respondents now, without explanation of any kind, directly contradicted their earlier concession of exhaustion based on the specific allegations set forth in Petitioner's that not only this Court, but Petitioner as well, relied upon in expending significant time and resources in obtaining facts and records to show the prejudice he suffered as a result of counsel's ineffectiveness. For the first time, Respondents contended that Petitioner's specific allegations in his habeas petition set forth above–that trial counsel failed to "adequately prepare" Dr. Bendheim and conduct an "adequate investigation"--were "far beyond that"

---

[2]Respondents' attorneys also represent the Arizona Department of Corrections (ADOC), and ADOC objected to contact visitations with death-sentenced inmates.

alleged in the state court. Dkt., 199, p.12. Without any discussion at all, Respondents simply ignored their earlier concession of exhaustion on which Petitioner relied in expending significant time and resources in gathering and presenting the facts and evidence establishing the prejudice resulting from trial counsel's ineffective assistance at Petitioner's capital sentencing proceedings.[3]

Despite these record facts, this Court concluded for the first time in its final order denying Petitioner relief based on this, and other constitutional violations that occurred at his trial and sentencing, that it can now–nearly ten years after Respondents' expressly stated that Petitioner's specific allegations supporting this claim detailed in the Amended Petition for Writ of Habeas Corpus were exhausted, Dkt. 37, p. 12--"sua sponte consider procedural default even if not properly raised by Respondents." Dkt. 200, p. 10. n.7. As shown above, Petitioner relied on Respondents' admission, and this Court's order, in conducting his investigation and preparing his pleadings and briefs. This Court relied on that admission in allowing that investigation, and "the State provided no explanation for its failure to raise this defense in its Answer." *Id.*, p.10 n.7.

This Court's reasoning for this complete about-face is that despite Respondents' failure to provide any "explanation" for failing to assert this defense earlier, they finally did so years later in their merits answering brief, and that was good enough. *Id.*

---

[3]This Court relied on, and agreed with, Respondents' concession as well in granting the parties additional time to investigate, gather appropriate experts, witnesses and records and prepare pleadings.

But Respondents did far more than just "not properly raise[]" this defense in their Answer. They expressly admitted exhaustion of this claim based on the specific allegations set forth in Petitioner's amended petition for habeas corpus relief . Dkt. 37 p. 12. Those specific allegations Respondents conceded were exhausted are the factual bases of Petitioner's ineffective counsel claim in his merits briefing. Dkt. 27, pp. 3-14.

In reaching its conclusion that it can now ignore Respondents' clear admission based on specific allegations that Petitioner's ineffective counsel claim was exhausted, this Court relied on *Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003), and *Day v. McDonough*, 547 U.S. 198, 209 (2006). Dkt. 200, p. 10, n. 7. But neither opinion supports this Court's decision because in neither case did the State expressly admit exhaustion of a petitioner's specific allegations supporting the constitutional violation. *Vang, supra*, 329 F.3d at 1072-1073; *Day, supra*, 547 U.S. at 201. In *Vang*, the petitioner sought to avoid a procedural default of his constitutional claims that the state court had denied because they could have, but were not, presented on direct appeal. *Vang*, 329 F.2d at 1072. Petitioner argued that because the state did not "rely on the defense of procedural default", the state court's application of that rule to Vang could not bar federal review. *Id.*

Agreeing that a district court "retains the discretion" to consider a procedural default defense "if the circumstances warrant," the Court of Appeals reviewed those circumstances and determined they did not warrant application of the bar. *Id.*, at 1073.

In his "opening brief," petitioner had "noted ... the state's failure to raise the defense of default" as to three claims. *Id.* But in its answering brief, the state "did not explain the failure or argue why its failure should be excused." *Id.* In these "circumstances," the Court of Appeals "h[e]ld the state to its waiver...."

The Court of Appeals also relied on its earlier decision in *Franklin v. Johnson*, 290 F.3d 1223, 1229 (9th Cir. 2002). There it "declin[ed] to apply procedural bar when the 'state provides no explanation whatsoever for its failure to raise a procedural default argument in the district court, much less any extraordinary reason for reaching the procedural default defense despite the state's failure to raise the issue below.'" Here, of course, the State's actions were far more than the silence that warranted the Court of Appeals to find waiver of this procedural defense in these cases. In its answer to Petitioner's specific allegations supporting the ineffective counsel claim, the State expressly stated that claim was exhausted. Dkt. 37 p. 12. This express admission was a complete waiver of the exhaustion defense.

Similarly, *Day v. McDonough*, 547 U.S. 198, 209 (2006), does not support this Court's conclusion to procedurally default a constitutional violation Respondents expressly conceded was exhausted. Dkt. 200, p.10, n. 7. *Day* addressed a federal court's authority "on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness." *Id.*, 547 U.S. at 201. There, "the State had miscalculated the tolling time" under the statute of limitations

enacted in the Antiterrorism and Effective Death Penalty Act. *Id.*, pp. 201-202. The Court held:

> [W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense.

Id., at 202; 210, n.11 ("A district court's discretion is confined within these limits. As earlier noted, should a State intelligently choose to waive a statute of limitations defense, a district court would not be a liberty to disregard that choice."). Because there had been "no intelligent waiver on the State's part" in *Day*, the Court held the lower federal court "had discretion to correct the State's error" and dismiss the untimely-filed habeas petition. *Id.*

Here, of course, the State's long ago admission that the specific allegations Petitioner pleaded were exhausted was "not merely an inadvertent error" as it was in *Day*. *Id.*, at 21. It was intelligent, express, and deliberate. It was based on Petitioner's detailed description of the allegations supporting this claim.[4] That admission was the law of the case relied on by both parties, and this Court for nearly ten years while extensive time and resources were expended in litigating the merits of this constitutional violation. As the United States Supreme Court held:

> Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. Further, the

---

[4]It should be noted that Respondents counsel, Ms. Dawn Northup, was also counsel of record in the state court proceedings. Thus, Ms. Northup was intimately familiar with the claims that had been presented in state court.

> court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the [procedural issue] and `determine whether the interests of justice would be better served' by addressing the merits...

Day, p. 210. Under these facts, circumstances, equities and law, including the right to principles of fundamental due process requiring notice and an opportunity to respond, Petitioner requests this Court vacate its order denying Petitioner's habeas corpus petition, find Petitioner's ineffective sentencing claim fully exhausted, and set this matter for a hearing.

II. A Certificate of Appealability Should Issue On Sentencing Counsel's Ineffectiveness.

Petitioner also requests this Court reconsider its final order and grant Petitioner a certificate of appealability on the substantive constitutional violation asserted here that resulted from his sentencing counsel ineffectiveness in failing to properly investigate and prepare for Petitioner's capital sentencing hearing. After deciding it would not consider the evidence Petitioner presented supporting the allegations he had pleaded on the prejudice he suffered as a result sentencing counsel's ineffectiveness, and despite the State's deliberate and express concession that this claim and Petitioner's supporting allegations were exhausted, this Court reformulated Petitioner's ineffective sentencing counsel claim into "a very narrow one, focused solely on counsel's failure to provide the expert with four specific documents." It then reviewed the merits of its reformulated claim. Dkt. 200, pp. 13-14; 16-22.

After concluding, without a hearing of any kind, or even notice and briefing on the

Court's reformulated issue, that "even if Dr. Bendheim initially had been provided all of the documents he eventually reviewed, there is not a reasonable probability of a different result," it denied relief. *Id.*, p. 22. This Court reached that determination by relying on State witness, Dr. Dean, who testified that his disagreement with Dr. Bendheim's diagnosis was not affected by the new facts. *Id.*, p. 21.

Reasonable jurists could differ as to this Court's conclusion on the prejudice Petitioner suffered as a result of his sentencing counsel's ineffectiveness. First, this Court agreed the "information" from Rodriguez and Sabori provided to Dr. Bendheim at Petitioner's resentencing trial was both "new" and "different." *Id.*, p. 21. Although this Court characterized the new information as only "minimally different" from the information Dr. Bendheim already knew, the record shows otherwise. *Id.* Rodriguez and Sabori provided key facts about Petitioner's impaired mental state very near the time of the crime. Those facts supported critical mitigation supporting life: Mr. Lopez was severely intoxicated at the time of the crime and as a result, in an altered state of mind. R.T. 7-13-90 (p.m.), Ex. 3. Those facts provided Dr. Bendheim what he did not <u>know</u> to be true at either Mr. Lopez's first or second capital sentencing proceedings: that readily available witnesses <u>confirmed</u> Mr. Lopez's drastically changed behavior when intoxicated.

These new facts were not just "minimally different" from those Dr. Bendheim had earlier relied upon, and did not just provide "slightly more corroboration" of Dr.

Bendheim's assumptions. Dkt. 200, p. 21. These facts were substantively and substantially different facts from anything sentencing counsel had provide Dr. Bendheim. Based on these facts, Dr. Bendheim's opinion changed from a "tentative" one to "a more certain diagnosis: Mr. Lopez suffered was in a severely altered state at the time the victim was killing, and suffered from "pathological intoxication" at the time the victim was killed. *Id.*, p. 21; ROA 116, Ex. 3.

Although this Court minimizes the difference between a "tentative" diagnosis and "a more certain" one because Dr. Bendheim did not opine to a "level of medical certainty," Dkt. 200, p. 21, a hearing is needed to decide this key issue in this case. *Williams (Michael) v. Taylor*, 120 S.C. 1479, 1494 (2000)(If a petitioner "has made a reasonable effort" to develop evidence and claims in state proceedings, "§2254(e)(2) will not bar him from developing them in federal court.") Petitioner gathered powerful facts and evidence demonstrating sentencing counsel's performance was grossly deficient when he failed to conduct a reasonable investigation. He requested a hearing in state court to prove his constitutional violation, but that request was denied.

Petitioner requests this Court reconsider its decision denying Petitioner relief, or even a hearing, and even a certificate of appealability based on the merits of his allegations showing sentencing counsel's ineffectiveness. "[R]easonable jurists could debate whether (or for that matter, agree that) ...th[is] issue ... [was] `adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-884 (2000),

quoting Barefoot v. Estelle, 463 U.S. 890, 893 & n. 4 (1983). Issuance of a certificate of appealability is a "modest standard," and this Court "must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus." *Lambright v. Stewart*, 220 F.3d 1022, 1024-1025 (9th Cir. 2000). "[O]bviously the petitioner need not show that he should prevail on the merits [since h]e has already failed in that endeavor." *Barefoot*, 463 U.S. at 893 n.4.

Rather, in deciding whether to issue a COA, the Court does not apply the standard of review under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). A COA determination is "a separate proceeding [] distinct from the underlying merits." *Id.* "[A]ny doubts about whether the petitioner has met the *Barefoot* standard must be resolved in his favor." *Silva v. Woodford*, 279 F.3d 825, 833 (9th Cir. 2002). "The question is the debatability of the underlying constitutional claim, not the resolution of the claim." *Miller-El*, 537 U.S. at 342.

For these reasons, a certificate of appealability should be granted unless a petitioner's constitutional claims are "utterly without merit." *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000). Also, in a capital case like this one, "the nature of the penalty is a proper consideration in determining whether to issue a certificate." *Barefoot v. Estelle,* 463 U.S. at 893. At the very least, Petitioner has also shown this Court's resolution of the underlying merits of his ineffective sentencing counsel claim satisfies AEDPA's modest standard for a certificate of appealability.

III. A Certificate of Appealability Should Issue On Trial Counsel's Ineffectiveness In Failing To Request The Trial And Sentencing Judge Be Recused For Bias.

Petitioner also requests this Court issue a certificate of appealability on the debatable issue of whether Petitioner's appointed trial counsel was ineffective in failing to move to recuse the trial and sentencing judge for bias. As discussed above, the standard for granting a certificate of appealability is a "modest one: Petitioner need only show that reasonable jurists could debate whether this issue is "'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. at 483-884 (internal citation omitted.). Petitioner plainly meets that standard here.

Under Arizona law at the time Petitioner was sentenced, the trial judge alone made the decision whether a defendant convicted of a capital crime lived or died. *State v. Lopez*, 175 Ariz. 407, 417, 857 P.2d 1261, 1271 (1993)(*Lopez II)*; *Walton v. Arizona*, 497 U.S. 639 (1990). As a result, the assignment of a particular judge to a particular case carried significant consequences.

Only months before Petitioner's capital proceeding began, the trial judge appointed to Petitioner's trial was exposed to key, prejudicial information about Petitioner and his closest relatives, his two younger brothers Jose and George Lopez. Jose, who was two and half years younger than Petitioner, had been jointly indicted along with younger brother George, who was four years younger than Petitioner, for first degree murder in an unrelated case. Jose avoided a trial when he pleaded guilty to first degree murder in

exchange for a life sentence. *State v. (Jose Villegas) Lopez*, 153 Ariz. 285, 736 P.2d 369 (1987). At the time Petitioner's appointed counsel undertook his representation, counsel knew his office also represented Jose Lopez.

George was represented by counsel outside the Public Defender's Office and proceeded to trial. Petitioner's trial judge presided over George's capital trial. Following George's conviction for first degree murder, the judge sentenced nineteen-year-old George to death. *State v. (George) Lopez*, 158 Ariz. 258, 260, 762 P.2d 545, 547 (1988).

As result of the simultaneous representation of Petitioner and one of his brothers by the same public defender office, Petitioner's attorney knew that the trial judge, the sole sentencer under then Arizona law, had been exposed to highly prejudicial information about Petitioner and his family contained in Jose Lopez's presentence report that the judge reviewed and considered only a few months before he was assigned to Petitioner's first degree murder case. Counsel also knew that the trial judge was exposed to highly prejudicial information about Petitioner and his family contained in the first degree murder proceedings and sentencing proceedings of George Lopez that also took place before Petitioner's capital trial. *State v. (George Villegas) Lopez*, 158 Ariz. at 260-263, 762 P.2d at 547-550.

Under Arizona law at the time, a defendant's counsel could move to recuse the judge appointed to his case peremptorily. Ariz.Crim.P. Rule 10.2 ("[i]n any criminal case in Superior Court, any party shall be entitled to request a change of judge."). Arizona law

also provided for a judge's removal for cause. Ariz.Crim.P. Rule 10.1(a). Based on the facts Judge D'Angelo knew from both Petitioner's brothers' proceedings, cause existed to obtain a change of judge. But despite these two available avenues to obtain appointment of a judge who had not been exposed to outside highly prejudicial information about Petitioner and his family from his brothers' proceedings, trial counsel did nothing to obtain a new and impartial judge.

"A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison*, 349 U.S. 133, 136 (1955); see also *Bracy v. Gramley*, 520 U.S. 899 (1997). Minimally competent counsel must ensure a defendant's "right to have an impartial judge" "[n]o matter what the evidence [is] against him"is honored. *Tumey v. Ohio*, 273 U.S. at 535. Another fundamental principle of due process in a capital case requires all "facts which may influence the sentencing decision in capital cases" be disclosed. *Gardner v. Florida*, 430 U.S. 349, 360 (1977).

Petitioner's fundamental due process rights under state and federal law were violated here when trial, sentencing and resentencing counsel failed to provide competent representation by filing a timely notice to remove Judge D'Angelo for cause. As a result of counsel's egregious omissions, Judge D'Angelo considered prejudicial information outside Petitioner's proceedings that Petitioner had no opportunity to confront or rebut. That right and counsel's obligations extend even to a judge who has only the appearance of impropriety. *In re Murchison*, 349 U.S. at 136.

As this Court knows, although Petitioner's death sentence imposed by Judge D'Angelo was later vacated, Petitioner was resentenced by the same judge despite these facts. At that time of Petitioner's resentencing, Judge D'Angelo knew that the Arizona Supreme Court had vacated George Lopez's convictions resulting from the trial over which he had presided, and vacated the death sentence he had imposed. Judge D'Angelo also knew that George's case had been assigned to a different judge, that George had been convicted of first degree murder, but that the new judge not only rejected the aggravating evidence Judge D'Angelo had found, but found mitigating evidence Judge D'Angelo had rejected. George was sentencing to life in prison. Despite these strong, uncontested facts, Petitioner's sentencing counsel never moved to recuse Judge D'Angelo from presiding over Petitioner's resentencing proceedings.

This Court denied Petitioner's request for a hearing on this claim, and denied relief. Based on the evidence gathered here, Petitioner asks this Court to issue a certificate of appealability on this serious constitutional violation addressing the fundamental bases of his death sentence: the right to sentencing proceeding presided over by a fair and impartial judge. As mentioned above, and discussed in Petitioner's previous pleadings on this issue, the consequences of assigning a new judge in George Lopez's case were profound: George received a life sentence. The new judge assigned to George case not only rejected aggravating circumstances Judge D'Angelo had previously concluded existed (that George committed the crime in an "especially heinous and

depraved" manner), but found mitigating circumstances Judge D'Angelo had previously rejected: George's age at the time of the offense. Exhibit 4.

These facts meet the COA standard discussed above. *Re Murchison*, 349 U.S. at 136; *Tumey v. Ohio*, 273 U.S. at 523; *Gardner v. Florida*, 430 U.S. at 360. Petitioner's fundamental due process rights under state and federal law were violated here when trial, sentencing and resentencing counsel failed to provide competent representation by filing a timely notice to remove Judge D'Angelo for cause. As a result of counsel's egregious omissions, Judge D'Angelo considered prejudicial information outside Petitioner's proceedings that Petitioner had no opportunity to confront or rebut. The denial of this serious constitutional violation in this serious capital case is not "utterly without merit," but is debatable. *Miller-El*, 537 U.S. at 342; *Jefferson v. Welborn*, 222 F.3d at 289. Because any doubts regarding issuance of a COA are resolved in Petitioner's favor, *Silva v. Woodford*, 279 F.3d at 833, Petitioner requests this Court reconsider its order and grant Petitioner a certificate of appealability on this key issue in this case.

IV. <u>This Court Should Reconsider Its Ruling Or At The Least, Issue A Certificate of Appealability On The Arizona Court's Failure To Consider Constitutionally Relevant Mitigating Evidence Supporting A Life Sentence</u>.

Petitioner also requests this Court reconsider its final order, and grant Petitioner a new sentencing hearing where all his mitigating evidence will be fully considered by an impartial sentencer unconstrained by Arizona law that required at the time of Petitioner's capital sentencing the defendant prove a causal connection between his mitigating

evidence and the facts of his crime. *Tennard v. Dretke*, 542 U.S. 274 (2004). In *Tennard*, the Supreme Court found unconstitutional a nexus requirement the Fifth Circuit employed identical to the nexus requirement the Arizona courts have long applied, and applied here to Petitioner. That barrier required that before the sentencer–here the trial judge--would consider evidence of Petitioner's noticeably impaired mental state, Petitioner present evidence showing his capacity to appreciate his conduct or conform to the law his conduct to the requirements of the law was substantially impaired.

As Petitioner explained, clearly established, longstanding Supreme Court law required that even where particular mitigating evidence does "not relate specifically to . . . [the defendant's] culpability for the crime he committed," the defendant is constitutionally entitled to offer such evidence because it might "serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 4-5, quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). A history of childhood abuse can have a very "powerful" effect on the jury's sentencing deliberations. *See Wiggins v. Smith*, 539 U.S. 510, 534-545 (2003).

Here, despite trial counsel's ineffectiveness in failing to conduct a competent investigation of Petitioner's background, the record contained clear mitigating evidence that the trial court did not weigh or consider because of Arizona's caselaw prohibiting consideration of that evidence. At the time of the crime, Mr. Lopez was hungry, broke and homeless, regularly consumed alcohol, marijuana and toxic substances, and had been

doing so since at least 1975, and had a low IQ. *See, e.g.*, R.T. 7-13-90 (p.m.), Exs. 8, 9; ROA 99. As discussed above, witnesses confirmed Petitioner's radically different behavior when intoxicated. Evidence also showed Petitioner's family was very poor, suffered severe emotional and financial hardships as a result of his father's abuse, and then abandonment of Petitioner and his family. R.T. 7-13-90 (p.m.), Ex. 8. It also showed, Mr. Lopez's brothers have substance abuse problems, and been imprisoned for serious assault and a homicide. *See, e.g.*, R.T. 7-13-90 (p.m.), Ex. 8; *State v. Lopez*, 158 Ariz. 258, 762 P.2d 545 (1988); *State v. Lopez*, 153 Ariz. 285, 736 P.2d 369 (1987). As discussed above, the trial judge knew these facts because he presided over the homicide trial of Petitioner's younger brother, George, and sentenced him to death, and accepted the guilty plea of Mr. Lopez's brother, Jose, who received a stipulated life sentence. *State v. Lopez*, 158 Ariz. at 260, 762 P.2d at 547. The record also showed Petitioner's "exemplary" behavior during his recent incarceration. R.T. 7-13-90(p.m.), p. 57. At the time of his resentencing, he was a "model prisoner." *Id.*

The sentencer, however, found no mitigating evidence of any kind to weigh against the aggravating factors the State alleged. ROA 103. The Arizona Supreme Court agreed, and affirmed that finding. *State v. Lopez*, 175 Ariz. at 417, 857 P.2d at 1271. As Petitioner also explained, that result occurred because at the time of Petitioner's capital sentencing, Arizona's longstanding law prevented Arizona sentencers and the appellate court from considering and weighing this highly relevant evidence if a petitioner did not

prove a causal nexus between the mitigation proof offered and the offense. *See, e.g., State v. Stanley,* 167 Ariz. 519, 809 P.2d 944 (1991).

But Arizona's causal connection requirement is unconstitutional. *Tennard v. Dretke*, 542 U.S. 274 (2004); *Lambright v. Schriro*, 490 F. 3d 1103 (9th Cir. 2007). In *Tennard*, the Supreme Court struck down an identical nexus requirement used by the Fifth Circuit, holding that a scheme requiring mitigating evidence to have a nexus or causal connection to the capital crime before it can be given full consideration and effect had "no foundation in the decisions of this Court." *Id.* at 289. Applying *Tennard* in *Lambright*, the Ninth Circuit vacated the petitioner's death sentence because the Arizona state courts applied the same unconstitutional causal connection requirement before it would give full consideration to mitigating evidence. More recently that Court explained again: "The mitigating evidence need not have any connection whatsoever to the crime in order to be relevant and humanizing. *See Tennard v. Dretke*, 542 U.S. at 287-88, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004); *Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998)." *Belmontes v. Ayers*, 529 F.3d 834, 865 n. 18 (9th Cir. 2008).

As Petitioner previously explained to this Court, the Arizona courts applied this same longstanding, unconstitutional causal connection to Petitioner. Like the Texas rule at issue in *Tennard*, the Arizona nexus rule is firmly rooted in the Arizona Supreme Court's jurisprudence. Under this law in place when the Arizona judge and courts review Petitioner's conviction and sentence, a petitioner was required to first establish a nexus

between his proffered mitigation and his actions at the time of the crime before the sentencer could consider the mitigating evidence in assessing the appropriate punishment:

> A difficult family background, in and of itself, is not a mitigating circumstance. If it were, nearly every defendant could point to some circumstance in his or hr background that would call for mitigation. A difficult family background is a relevant mitigating circumstance **if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control**.

State v. Wallace, 160 Ariz. 424, 773 P.2d 983, 986 (1989)(emphasis added).

Despite these facts and law, this Court denied Petitioner relief on this important constitutional violation that occurred at his capital sentencing for two reasons. First, it relied on *State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006), an Arizona decision announced sixteen years after Petitioner was sentenced to death, and after the U.S. Supreme Court made clear in *Tennard* that the similar causal connection applied by the Texas courts was unconstitutional. Dkt. 200, p. 35. In reaching that decision changing longstanding Arizona law, *Newell* specifically cited *Tennard*. But that was not the law in Arizona when the Arizona Supreme Court decided *Wallace*, *supra*, and it was not the law in Arizona, when that same court decided Petitioner's appeal. See *Lambright v. Schriro*, *supra*.

The second reason this Court provided for denying relief on this constitutional violation is that Petitioner did not identify the record "indicating the court applied a causal connection." Dkt. 200, p. 35. Relying on the trial court's announcement that it considered everything presented in aggravation and mitigation, it concluded the

constitution requires no more. *Id.*

Tennard and *Lambright* are clear the constitution does require more, particularly when a defendant's life is at stake. As Petitioner showed in earlier briefing to this Court, and this Court agreed, before the judge sentenced Petitioner to death, this longstanding Arizona law required a defendant prove a causal connection between his crime and the mitigating evidence he proffered. But this Court's conclusion that somehow this constitutional violation evaporated when the judge "clearly articulated he considered all the mitigation presented" ignores this very same law. Dkt. 200, p. 34. Under Arizona law at the time of Petitioner's capital sentencing, a judge could <u>not</u> consider Petitioner's evidence <u>mitigating</u> unless he showed a causal connection to his actions at the time of the crime. Dkt. 200, p. 35. *State v. Wallace*, 160 Ariz. at 427,773 P.2d at 986. The trial judge is, of course, presumed to have followed the law of the Arizona Supreme Court. *See Bell v. Cone*, 543 U.S. 447 (2005).

Based on these same facts and law, this Court's conclusion that the Arizona Supreme Court somehow "cured" this critical, constitutional violation, Dkt. 200, p. 35, is also contrary to clearly established Arizona law applied at the time of both Petitioner's sentencing and his appeal to the Arizona Supreme Court, and the facts. It was the Arizona Supreme Court that announced this unconstitutional restriction on mitigating evidence, *State v. Wallace, supra*, and applied it to capital cases until *Tennard* and later, *Newel*. As Arizona case law, and *Lambright* made clear, Arizona law did erect a barrier

to consideration of important mitigating evidence unless a defendant showed a causal connection between that evidence and the defendant's actions at the time of the crime. Based on that rule and despite uncontradicted evidence in the record about Petitioner's extreme intoxication at the time of the crime, the state court concluded Petitioner had not proven intoxication or pathological intoxication, either as statutory or nonstatutory mitigating factors, and affirmed the trial judge's rejection of Petitioner's good conduct during his incarceration as a mitigating factor. *State v. Lopez*, 175 Ariz. at 414, 417, 857 P.2d at 1268, 1271.

Again, the Arizona Supreme Court is presumed to follow its own law. Its law did not allow it to consider this important, relevant evidence. This law explains why the Arizona Supreme Court's important "independent review" of Petitioner's capital sentencing did not change the violation that occurred here. After all, it was the Arizona Supreme Court law that the Arizona trial court was following. And, as explained above, it was that very Arizona Supreme Court law that prevented Arizona courts, including its highest Supreme Court from considering mitigating evidence that was not shown to be casually connected to the defendant's actions at the time of the crime.

Based on these facts and law, Petitioner requests this Court reconsider its decision concluding that Arizona law did not preclude full and proper consideration of Petitioner's relevant mitigating evidence introduced at sentencing, and grant Petitioner relief on this constitutional violation. Alternatively, Petitioner requests this Court grant Petitioner an

evidentiary hearing where he can prove these facts to this Court.

But at the very least, and based on these facts and law, Petitioner requests this Court expand its order on the certificate of appealability and certify for appeal this important issue. These facts and law show this important constitutional violation is not "utterly without merit," but is debatable. *Miller-El*, 537 U.S. at 342; *Jefferson v. Welborn*, 222 F.3d at 289. Resolving any doubts regarding issuance of a COA in Petitioner's favor, *Silva v. Woodford*, 279 F.3d at 833, Petitioner requests this Court grant Petitioner a certificate of appealability on this key issue in this case.

Based on these reasons and law, Petitioner requests this Court vacate its order and judgment denying Petitioner relief, reopen these proceedings, and either grant Petitioner relief, or schedule the evidentiary hearing given the disputed issues of fact underlying these constitutional violations. At the very least, Petitioner requests this Court issue a certificate of appealability on the other important constitutional violations addressed here that occurred at his capital trial and sentencing proceedings that are debatable among jurists of reason.

Respectfully submitted this 28th day of July, 2008.

By: */s/ Denise I. Young*
Kelley J. Henry
Assistant Federal Public Defender

Denise I. Young

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that on July 28, 2008, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

Dawn Northup
Assistant Attorney General
1275 W. Washington
Phoenix, AZ 85007-2997
dawn.northrup@azag.gov

Attorney for Respondents

/s/ Denise I. Young
Counsel for Petitioner

1(c)

P
E-Filed

87-0962
Northup

Henry K. Martin
FEDERAL PUBLIC DEFENDER
Kelley J. Henry
Assistant Federal Public Defender
Missouri State Bar No. 38849
810 Broadway, Suite 200
Nashville, TN 37203-3805
(615) 736-5047
kelley_henry@fd.org

Denise I. Young
Arizona State Bar No. 007146
2930 N. Santa Rosa Place
Tucson, AZ 85712
(520) 322-5344
dyoung3@mindspring.com

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

SAMUEL V. LOPEZ,	)	
	)	No. CIV 98-0072-PHX-SMM
Petitioner,	)	
	)	MEMORANDUM REGARDING MERITS
v.	)	OF CONSTITUTIONAL VIOLATIONS
	)	1(C), (D), 7 AND 8, AND MOTION FOR
DORA B. SCHRIRO, *et al.*	)	DISCOVERY AND AN EVIDENTIARY
	)	HEARING
Respondents,	)	
	)	

In its November 3, 2005 Order, this Court agreed to consider four of the constitutional violations that occurred at Petitioner's capital sentencing trial: his

appointed counsel's incompetence in preparing his only mitigation witness, a mental health expert, to testify, and failing to challenge statements contained in the presentence report alleging that Petitioner committed a sexual assault four days after the victim's murder, the trial court's failure to consider constitutionally relevant mitigating evidence supporting a life sentence, and the state court's use of an unconstitutional aggravating factor to enhance Mr. Lopez's sentence to death. Dkt. No. 160, p. 22. Based on the facts and law discussed below, Petitioner's death sentence is unlawful, must be vacated, and this matter remanded to the state court for further proceedings. Alternatively, this Court should grant an evidentiary hearing so that it can consider the relevant evidence establishing the unconstitutionality of Mr. Lopez's death sentence.

We begin at the beginning of these sentencing violations: appointed counsel's actions at Mr. Lopez's 1990 capital sentencing proceedings, and the prejudice those actions caused.

I. TRIAL COUNSEL'S FAILURE TO CONDUCT A REASONABLE INVESTIGATION AND PREPARE HIS KEY WITNESS AT SENTENCING PREJUDICED PETITIONER.

A. Trial Counsel Did Not Conduct An Independent, Thorough Investigation of Petitioner's Background.

I. The Facts Counsel Learned While Representing Petitioner on Direct Appeal.

George Sterling was appointed by the Arizona courts to represent Mr. Lopez on his direct appeal following his 1987 conviction for first degree murder and death sentence.

Resps.Ans.Re Procedural Status of Claims ("Resps.Ans."), Ex. H.[1] To prepare Mr. Lopez's appeal to the Arizona Supreme Court, Mr. Sterling necessarily reviewed the record of the 1987 trial proceedings, including transcripts, pleadings and related sentencing proceedings.[2] From that review, Mr. Sterling learned what Mr. Lopez's trial attorney, Maricopa County public defender Joel Brown, did to prepare for Mr. Lopez's capital sentencing proceeding in 1987: 1) Mr. Brown telephoned Dr. Otto Bendheim and asked him to interview Mr. Lopez and review police reports Mr. Brown sent him. The police reports included a statement Raymond Hernandez provided to police about Mr. Lopez's radically different behavior when he is intoxicated, see Ex. 1, attached, 2) Mr. Brown prepared and filed a three-page "Sentencing Memorandum" in which he argued that the record was "undisputed as to the fact that the defendant was heavily intoxicated a few hours, at most, before the murder of" the victim, and "there is little question that the degree of intoxication substantially impaired his judgment and his ability to appreciate the nature of his actions," Resps.Ans., Ex. G, p. 2;[3] and 3) a few days before Mr. Lopez's

---

[1]As discussed in previous documents, at the time Judge D'Angelo sentenced Mr. Lopez to death 1987, and re-sentenced him to death in 1990, Judge D'Angelo had also presided over the first degree murder trial of Mr. Lopez's younger brother, George Lopez, and following George's conviction, sentenced him to death. Dkt. # 107.

[2]Mr. Sterling passed away on May 28, 2005.

[3]Nine sentences in Mr. Brown's three-page memorandum were devoted to discussing this mitigating factor. The remaining discussion addressed the State's use of Mr. Lopez's earlier unrelated arrest for resisting arrest to establish the aggravating circumstance of a prior conviction involving the use or threat of violence. Resps.Ans., Ex. G, pp. 2-3.

sentencing hearing, Mr. Brown "talked" by phone to one of Mr. Lopez's brothers, Frank Lopez,[4] and his mother, Concha Lopez to see if they could attend the hearing. R.T. 6-25-87, p. 4.[5]

From this review, Mr. Sterling discovered what Judge D'Angelo wrote in his 1987 Special Verdict sentencing Mr. Lopez to death, "No evidence was presented by the defendant at the presentence hearing," ROA 46, p. 5, and what Judge D'Angelo stated during Mr. Lopez's sentencing hearing:

> The court is now concerned with the fact that but for the sentencing memorandum received just yesterday, the defense failed to present any mitigating circumstances to the court at the hearing....

---

[4]In addition to his brother Frank, Mr. Lopez had six other living siblings. As discussed in previous briefing submitted to this Court, see Dkt 107, Pet.Brf.Purs.Ct's Jan.7,2003 Order, pp. 20-21, Jose Lopez, who is 2 ½ years younger than Sam Lopez, was represented by another attorney in Mr. Brown's office at the Maricopa County Public Defender's Office on capital charges before Judge D'Angelo. Sam Lopez's nineteen-year-old brother, George, was a co-defendant in Jose's case. George's capital murder charges were also before Judge D'Angelo. Pursuant to a plea agreement, Jose pleaded guilty and in April, 1986, Judge D'Angelo sentenced him to a sentence of life without the possibility of parole for twenty-five years. *State v. (Jose Villegas) Lopez*, 153 Ariz. 285, 736 P.2d 369 (1987). George's case proceeded to trial with Judge D'Angelo presiding, George was convicted of first degree murder on March 27, 1986. On May 2, 1986, Judge D'Angelo sentenced George to death. *State v. (George) Lopez*, 158 Ariz. 258, 260, 762 P.2d 545, 547 (1988). After George's death sentence was vacated by the Arizona Supreme Court, like Sam Lopez's here, it was assigned to a different judge who sentenced George to a life sentence. See Dkt No. 107, Pet.Brf.Purs.Ct's Jan.7,2003 Order, Ex. 4.

[5]Six days earlier, Mr. Brown told Judge D'Angelo that he had "been trying this week" to "get[] in contact with his family, Mr. Lopez' family by the sentencing date," but had "not had any success at doing that." He also said, "[t]he only person is his mother." R.T. 6-19-87, p. 12.

Resps.Ans., Ex. F, p.3.[6]

From reading the trial transcripts and record, Mr. Sterling also learned that Mr. Brown's representation of Mr. Lopez at his capital trial was equally wanting. Mr. Sterling read again Judge D'Angelo's recorded comments about Mr. Brown's abysmal representation:

> At the time of trial the court was concerned over the lack of any evidence presented on behalf of defendant. I believe I so expressed to counsel, either formally or informally.

Resps.Ans., Ex. F, p. 2.

In addition to discovering Mr. Brown's meager efforts in representing Mr. Lopez at his capital trial and sentencing, Mr. Sterling also learned the little Joel Brown had to have known about Mr. Lopez from reading police and pre-sentence reports: Mr. Lopez was homeless, living in the neighborhood park, R.T. 4-21-87, pp. 108, sleeping in the car of his friend, Cipriano Chavez, where he stored the few clothes he had, R.T. 4/22/87, p. 31-32, using the water fountain in the park to bathe, was often unclean and hungry, and just as often intoxicated by alcohol, marijuana and sniffing toxic fumes from paint cans. R.T. 4-16-87, pp. 16, 18, 28-30; 4-21-87, 13, 124; Presentence Report dated Sept. 1, 1981.

Mr. Sterling also learned that four days after the victim's death, Mr. Lopez was arrested for the sexual assault of a girlfriend he had dated, Ms. Cecilia Rodriguez. R.T. 4-

---

[6]"Resps.Ans." refers to Respondents' Answer Re: Procedural Status Of Claims (Mar. 10, 1999) .

16-87, pp. 31-33. From reading the 1987 Presentence Report, Mr. Sterling learned that the presentence author of that report, Robert Cherkos, considered and relied on Mr. Lopez's arrest for "sexually assaulting" a woman who "managed to get away" in reaching this conclusion:

> [D]efendant has proven he is a danger to society and capable of committing the most heinous of crimes [and] should be sentenced in such a fashion so that he will be permanently removed from the community.

ROA 48i. As Mr. Sterling read that report, and Judge D'Angelo's signature at the end of that report below the statement "I have reviewed and considered the probation officer's report," he knew this terrible allegation had become a centerpiece of the State's case for executing Mr. Lopez.

After reading the records and transcripts, Mr. Sterling filed his opening brief in the Arizona Supreme Court in Mr. Lopez's direct appeal. In that brief, Mr. Sterling described what he had learned about Mr. Brown's representation of Mr. Lopez at his capital trial:

> The only evidence and testimony submitted at the trial was that of the prosecution.

Resp.Ans., Ex. H, p. 4. Mr. Sterling described what he had learned about Mr. Brown's abandonment of Mr. Lopez again at the sentencing hearing where Mr. Lopez's life was at stake:

> [T]he trial court held the presentence hearing. . . . Once again the only evidence presented was the prosecutor's evidence as to two aggravating factors....
> The next morning, following the trial court's inquiry of defense counsel as to a total lack of any defense effort or evidence, Judge D'Angelo rendered and filed his

> special verdict finding the two statutory aggravating as alleged ... and a total absence of any mitigating factors ....

Id., p. 5.

Because Mr. Brown had conducted no investigation of Mr. Lopez's life and social history, and presented no evidence of his own to support a sentence less than death, Mr. Sterling had no choice but to rely on the prosecutor's description of Mr. Lopez's altered, intoxicated state at the time of the crime in his appellate brief:

> Other neighbors across the street saw Sammy Lopez in that area where Essie lived at about 11:00 to 12:00 on the night ... and at that time they saw him he was intoxicated or high on something. He was not acting normally...

Id., p. 12, citing R.T. 4/20/87, p. 15. Mr. Sterling relied as well on the testimony of two prosecution witnesses to demonstrate Mr. Lopez's extraordinarily impaired state shortly before the crime occurred:

> [T]wo lay witnesses (Rodriguez and Sabori) met with a highly intoxicated and aberational [sic] Appellant shortly before and in the immediate vicinity of the crime.

Id., p. 4. He quoted Ms. Sabori's testimony describing Mr. Lopez's abnormal state:

> [Mr. Lopez] was different from the way he was at the park....then Angel told me they had been drinking together.

Id., p. 16. He also quoted Ms. Sabori's description of Mr. Lopez when, after she declined his invitation to "get high," Mr. Lopez went "to the side of the apartments on the alley side," returning a few moments later:

> He was different, he was shaking, like shaking, and he ... acted like he was mad, like everything bothered him. He just couldn't stand still... he had to hold himself on the wall, stand on the wall, just stand on the pole. [His

hands] were shaking.

Id., p. 16, quoting R.T. 4/21/87, pp. 72-74.

Mr. Sterling relied as well on Pauline Rodriguez's trial testimony corroborating Ms. Sabori's description of Mr. Lopez's deranged state:

> ....he was not himself.... I know him before when he was sober and stuff.... I can't say it was beers, but he was loaded on something. .... He was acting strange... in a real bad mood.

Id., p. 17, quoting R.T. 4-21-87, p. 83. He quoted the 1987 presentence report writer's conclusion that Mr. Lopez "'had a pattern of alcohol and substance abuse' which the previous presentence report in CR-151615 equally documents as involving long term vapor or paint sniffing." *Id.*, pp. 17-18. He argued Judge D'Angelo erred in rejecting "undisputed evidence" of Mr. Lopez's "alcohol or drug intoxication" on the night of the crime, and that error "coupled with available evidence of longstanding abuse of vapors/paint" "clearly deprived" Mr. Lopez of a "singular mitigating factor" supporting a life sentence. *Id.*, p. 18.

In attacking Judge D'Angelo's use of Mr. Lopez's prior conviction for resisting arrest as an aggravating factor supporting a death sentence, Mr. Sterling discussed the facts underlying that arrest. He wrote that Mr. Lopez had been "inhaling toxic substances," and relied on Mr. Lopez's description of how his intoxicated state affected him: "I panicked ... and when I panicked ... I accidently touched one of [the officer's] hands...." *Id.*, pp. 11-12. In attacking Mr. Brown's representation of Mr. Lopez, Mr. Sterling explained that trial counsel's "total failure ... to offer any trial evidence,

presentence evidence, or even produce a single witness" for Mr. Lopez at his capital sentencing hearing left "even the trial court ... concerned" about the fairness of the proceedings. *Id.*, pp. 31-32.

Following the parties' briefing and oral argument, the Arizona Supreme Court affirmed Mr. Lopez's convictions, but vacated his death sentence. The appellate court found Judge D'Angelo erred when he relied on Mr. Lopez's earlier conviction for resisting arrest to establish Arizona's (F)(2) aggravating circumstance because that crime did "not qualify" as a prior conviction involving the use or threat of violence on another. *State v. Lopez*, 163 Ariz. 108, 114, 786 P.2d 959, 965 (1990). The state court, however, disagreed that Judge D'Angelo erred when he rejected Mr. Lopez's "alleged intoxication at the time of the murder" as a mitigating circumstance. *Id.*, 163 Ariz. at 115, 786 P.2d at 966. Noting that Joel Brown "offered no evidence concerning intoxication at [the] sentencing hearing," but "relied instead on the state's opening statement and the testimony of two trial witnesses as proof that [Mr. Lopez's] intoxication was a significant impairment," the Court concluded:

> Based upon <u>our review of the record</u>, we agree with the trial court's assessment of the [mitigation] evidence.

Id. (emphasis added).[7] But because the appellate court did "not know and [could not]

---

[7]As discussed below, the barrier the Arizona Supreme Court's erected before it would consider evidence of Mr. Lopez's noticeably impaired mental state–that such evidence "impair significantly his capacity to appreciate his conduct or conform to the law"--is unconstitutional. See *Tennard v. Dreke*, 124 S.Ct. 2562 (2004).

ascertain" what decision Judge D'Angelo would have reached absent consideration of the invalid prior conviction aggravating circumstance, it vacated Mr. Lopez's death sentence, and remanded for a new sentencing trial. *Id.*, 163 Ariz. at 116, 786 P.2d at 967.

ii. Trial counsel did not investigate Petitioner's background or key evidence the State relied on to support Petitioner's death sentence.

Once the proceedings returned to the trial court for a new sentencing, Mr. Sterling decided to continue representing Mr. Lopez. At the outset of his representation of Mr. Lopez in his re-sentencing, Mr. Sterling knew two important facts: 1) Mr. Brown had not investigated Mr. Lopez's background and other sources for facts supporting a sentence less than death, and 2) the Arizona appellate court agreed with Judge D'Angelo that the record evidence of Mr. Lopez's impaired state did not establish mitigation. Given these facts, it is all the more shocking how little Mr. Sterling did at Mr. Lopez's re-sentencing.

Mr. Sterling did file a motion seeking a jury to decide the facts the State alleged increased Mr. Lopez's punishment to a sentence of death, Def.Req.Jur.Sent. (Jun. 15, 1990).[8] But despite knowing that Judge D'Angelo had earlier sentenced to death Mr. Lopez's younger brother, George, for an unrelated homicide, Mr. Sterling never sought a judge unbiased by those prejudicial facts and influences. Instead Mr. Sterling pointedly reminded Judge D'Angelo that the Arizona Supreme Court had reversed and vacated

---

[8]At the time of Mr. Lopez's 1990 re-sentencing neither Arizona nor the U.S. Supreme Court had yet recognized a defendant's right to a jury determination of the facts the prosecution alleges increases a sentence of life to death. *Ring v. Arizona,* 536 U.S. 584, 609 (2002); *Walton v. Arizona*, 497 U.S. 639 (1990).

George Lopez's convictions, and after George was convicted of murder again, the new judge sentenced George to a term of years, not death. R.T. 8-3-90, p. 23.

Just as baffling, Mr. Sterling did not conduct the investigation he had recognized Mr. Brown failed to conduct not conducting in the 1987 proceedings–an investigation courts have long recognized as essential to competent representation. *See e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003)(granting relief based on counsel's error in failing to investigate readily available mitigation); *Williams (Terry) v. Taylor*, 529 U.S. 362, 395-396 (2000)("counsel did not begin to prepare for [sentencing] until a week before the trial" and "did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 404.1, commentary, p. 4-55 (2d 3d 1980)"); *Strickland v. Washington*, 466 U.S. 668, 691 (1984)(counsel "has a duty to make reasonable investigations"). Instead of undertaking that thorough investigation, Mr. Sterling contacted Dr. Bendheim, the same psychiatrist Mr. Brown telephoned before the 1987 sentencing hearing. R.T. 6-25-87, p. 3.

Dr. Bendheim was a forensic psychiatrist certified by the American Board of Neurology and Psychiatry, who, at the time of his testimony at Mr. Lopez's re-sentencing proceedings, had been practicing for over fifty years.[9] As Dr. Bendheim later explained in his videotaped testimony, Ex. 2, p. 3, and documented in his 1987 Report, *see*

---

[9]Dr. Bendheim has since passed away. The videotape of his testimony is attached to Resps.Ans., Ex. L. The videotape is also found at R.T. 7-13-90 (p.m.), Exhibit 6. For ease of reference, however, Petitioner attaches as Exhibit 2 here the transcript of Dr. Bendheim's testimony.

Resps.Ans., Ex. K, pp. 1-2, Mr. Brown sent him police reports regarding the crime that included records regarding Mr. Lopez's previous charges and arrests, and a police interview of Raymond Hernandez. Ex. 2, p.13.

Dr. Bendheim also had "a telephone interview with Mr. Joel Brown...." *Id.*, p. 16. Mr. Brown told Dr. Bendheim that "'[m]any, many character witnesses described [Mr. Lopez] as a mild person unless he's drinking. It's like he is a different person when he drinks.'" *Id.,* pp. 16-17. Mr. Brown asked Dr. Bendheim to review the documents, interview Mr. Lopez and prepare a "pre-sentence report possibly to be used in mitigation" like the "usual format of the Rule 26.5 questionnaire the court submit[s] regarding pre-sentencing reports."[10] Ex. 2, pp. 3-4, 12-15; Resps.Ans., Ex. K, pp. 1-2. After reviewing the documents and interviewing Mr. Lopez for an unknown duration of time,[11] Dr. Bendheim later testified that he concluded Mr. Lopez possibly suffered from a substance abuse disorder, "particularly in regards to alcohol to which apparently he reacted in a pathological, unusual fashion, known as "pathological intoxication." Ex. 2, p.4. Dr. Bendheim explained that his diagnosis was necessarily "tentative" because he "wasn't present" when the crime occurred, and Mr. Lopez could not confirm that his character changes when he is impaired. *Id.*, pp. 5-6.

---

[10]Dr. Bendheim appears to be referencing the presentence reports Arizona trial courts are required to order for matters where a defendant's potential sentence is greater than a year. *See e.g.*, Ariz.Crim.P. Rules 16.4, 26.5 and 26.6.

[11]Dr. Bendheim did not remember the length of his interview with Mr. Lopez. He speculated it may have lasted 1 ½ to 2 hours. Exhibit 2, p. 4.

Dr. Bendheim also later testified that Mr. Lopez told him during their interview that he was not intoxicated on the night the crime occurred. *Id.*, p. 6. Dr. Bendheim did not believe Mr. Lopez's denial, however, because the records he had reviewed demonstrated Mr. Lopez was "apparently at least under the influence of alcohol" a short time before the crime occurred. *Id.*, p. 6.

Dr. Bendheim testified that he had prepared a report after interviewing Mr. Lopez and reviewing the court documents, opining that at the time of the crime, Mr. Lopez possibly "was intoxicated and may have had a `pathological intoxication,' an unusual reaction to even minor amounts of alcohol...." Resps.Ans., Ex. K, p. 5. In that report, Dr. Bendheim wrote:

> [he] found no evidence of mental illness with the possible exception of substance abuse disorder, particularly Marijuana and paint sniffing, but there is no evidence that this took place just prior to the incident. However, pathological intoxication cannot entirely be ruled out.

Id. Mr. Brown did not call Dr. Bendheim as a witness at Mr. Lopez's 1987 sentencing.

In the 1990 re-sentencing proceedings, Dr. Bendheim testified that Mr. Sterling had contacted him "about a month ago," which would have been sometime around the middle of June, 1990. Ex. 2, p. 7.[12] Mr. Sterling asked Dr. Bendheim to review his report again because Mr. Sterling "wanted to know about this intoxicated pathology." *Id.* Mr. Sterling sent Dr. Bendheim two additional documents to review that Dr. Bendheim had

---

[12]The mitigation/aggravation trial took place on July 13, 1990. Resps.Ans., Exs. I-J. The Arizona Supreme Court's decision granting Mr. Lopez a re-sentencing hearing was issued on January 18, 1990. *State v. Lopez,* 163 Ariz. 108, 786 P.2d 959.

not previously seen. *Id.*, p. 8. The first was the 1985 presentence report prepared by Neal Nicolay discussing the circumstances of Mr. Lopez's arrest and conviction for resisting arrest. Ex. 8 to R.T. 7-13-90 (p.m.). The second was the November 3, 1986, Phoenix Police Department report, No. 86-147145, that Mr. Sterling described as "a sexual assault incident that occurred" involving Cecilia Rodriguez. Ex. 2, p. 8; Ex. 7 to R.T. 7-13-90 (p.m.).

Dr. Bendheim testified these two documents "change [] slightly" his 1987 conclusions. He opined that these "crimes," "at least one crime of extreme violence," were committed "under the influence of intoxication." Ex. 2, pp. 9- 10. When asked how these facts altered his prior conclusions, Dr. Bendheim testified:

> I would probably have added ... that there had been other incidents where the defendant displayed criminal behavior out of character for his usual conduct and in a bizarre reaction pattern to intoxicants.

Id. Based on these two documents, Dr. Bendheim now "could state pretty firmly that this person is subject to unusual reactions of behavior and conduct, including criminology and including assaultiveness when under the influence" of "alcohol or drugs," and "this type of intoxication definitely diminishes capacity." *Id.*, pp. 10-11. He "speculated, but on fairly good grounds," with "probability," "that this murder would not have occurred" if Mr. Lopez had not been intoxicated. *Id.*, pp. 11-12.

On cross-examination, however, Dr. Bendheim agreed that the predisposing factors for alcohol idiosyncratic intoxication (unusual fatigue, debilitating physical illness

and advancing age)[13] were not present in Mr. Lopez. *Id.*, p. 21-22. He acknowledged he had "no other source of information" about Mr. Lopez's changed character other than Mr. Hernandez and "the verbal input of Mr. Brown." *Id.*, p. 17.[14] He agreed as well that the author of the November 13, 1985 presentence report addressing Mr. Lopez's conviction for resisting arrest had noted that he found nothing in Mr. Lopez's probation files indicating any problems Mr. Lopez suffered as a result of sniffing paint. *Id.*, p. 24.

Even more devastating to Mr. Sterling's reliance on a single witness to establish a single mitigating factor was what happened next when the prosecutor informed Dr. Bendheim that despite what Mr. Brown had told him at the time of Mr. Lopez's trial:

> There were no witnesses who testified under oath or gave statements to the court at any time concerning Mr. Lopez's difficulties or problems with substance abuse ...

Id., p. 26. Dr. Bendheim conceded that "assuming there is no evidence in the record anywhere to substantiate that people have claimed this," his conclusions were "more

---

[13]Idiosyncratic intoxication was a recognized mental disorder in the Diagnostic and Statistical Manual of Mental Disorders III-R (1987). The diagnostic criteria were:

A. Maladaptive behavioral changes, e.g., aggressive or assaultive behavior, occurring within minutes of ingesting an amount of alcohol insufficient to induce intoxication in most people.

B. The behavior is atypical of the person when not drinking.

C. Not due to any physical or mental disorder.

DSM III-R at 129.

[14]At the time of his deposition, Dr. Bendheim no longer had the police reports Mr. Brown had sent him, including the police interview of Mr. Hernandez. He had not interviewed Mr. Hernandez, and did not know how long Mr. Hernandez had known Mr. Lopez. *Id.*, p. 14.

speculative." *Id.*, p. 27. As a result, Dr. Bendheim's "pretty firm[]," "probab[le]" opinion about Mr. Lopez's mental state that had been based "on fairly good grounds" transformed at the end of his testimony into a "tentative," and "to a very large degree speculative" diagnosis. *Id.*, pp. 26-27, 30.

Other than the documents identified above, Mr. Sterling did not provide Dr. Bendheim any evidence to support his now tentative conclusion that Mr. Lopez suffered from pathological intoxication. Instead, he asked Dr. Bendheim to speculate that "we have witnesses that are saying after two or three beers this guy goes bizarre...." *Id.*, p. 35. Dr. Bendheim testified that if he heard "witnesses say that" he "would entertain the diagnosis very seriously." *Id.*, p. 36. The exchange between Mr. Sterling and Dr. Bendheim makes it transparently clear that Mr. Sterling had spent virtually no time talking to or preparing Dr. Bendheim for his deposition.

Because Mr. Sterling had not investigated Mr. Lopez's medical, mental health or social history background, the only "witnesses" besides Raymond Hernandez to whom Mr. Sterling could have been referring were prosecution witnesses Yodilia Sabori and Pauline Rodriguez.[15] But despite Mr. Sterling's long-standing knowledge of both the content of their pretrial statements <u>and</u> trial testimony, he did not provide Dr. Bendheim, his <u>only</u> mitigation witness, these documents to support his trial testimony and expert opinion.

---

[15]As discussed above, Dr. Bendheim had previously reviewed the statement Raymond Hernandez provided police.

Mr. Sterling's omissions were the very same omissions Mr. Brown had made before him. Mr. Brown, too, never provided Dr. Bendheim either the trial testimony or the witness interviews of Pauline Rodriguez and Yodilia Sabori. Instead, Mr. Brown briefly mentioned their trial testimony in a sentencing memorandum he filed shortly before the sentencing hearing. *State v. Lopez*, 163 Ariz. at 115, 768 P.2d at 966; Resps.Ans., Ex. G, pp. 1-2. Mr..Brown, too, never conducted an independent and reasonable investigation of Mr. Lopez's background.

The consequences of Mr. Sterling's neglect were patent. Ironically, the prosecutor described best Mr. Sterling's rehashing of the same evidence that was before the judge at the 1987 sentencing:

> On the mitigating factor, he's not met his burden of proof. If you will recall, the first time around, they made a similar argument. They tried to establish the alcohol consumption impaired his ability. And this court found, the first time around, that that was not sufficient enough to constitute a mitigating factor.
>
> On appeal, the Arizona Supreme Court said, Judge D'Angelo, you were right. *They have rephrased the argument, is all they've done.* Now they throw out this theory of pathological intoxication. The problem is, it's not there. Otto Bendheim couldn't say it was there three years ago. And they've tried to dress it up to make it look a little better, but it isn't there. The best he can say is a tentative diagnosis. How reliable can that be?

R.T. 8-30-90, pp. 26-27(emphasis added).

Mr. Sterling's failure to conduct an adequate investigation had another harmful consequence. The state's expert, Dr. Dean, who is not board certified in psychiatry, R.T. 7-13-90 (p.m.), p. 20, concluded that although Mr. Lopez's actions were consistent with

intoxication, *id.* at 32-34, and his personality and behavior changed when he is intoxicated, *id.*, p. 50, Dr. Dean needed "an adequate history of similar responses in the past...." *Id.*, p. 52. Because Mr. Sterling had not conducted that investigation, he could not provide Dr. Dean with the evidence showing just such similar responses in the past, as well as abundant evidence establishing Mr. Lopez's severe addictions, history of trauma, mental illness and cognitive impairments. See Ex. 3.

Mr. Sterling committed other serious errors as a result of his failure to conduct an independent investigation. As discussed above, Mr. Sterling presumed, without conducting any independent investigation, that Mr. Lopez sexually assaulted Cecilia Rodriguez a few days after the victim's murder. Mr. Sterling knew that the presentence report prepared before the 1987 sentencing specifically addressed Mr. Lopez's arrest for this alleged crime and its author had opined that "the defendant has proven he is a danger to society and capable of committing the most heinous of crimes." ROA 71, p. 8.[16] Had Mr. Sterling investigated the reasons the police did not pursue these charges,[17] he would have discovered that no crime had occurred. Ex. 4. The medical expert who examined

---

[16]Because Mr. Sterling never investigated the facts of this arrest, the presentence report writer in the 1990 re-sentencing proceedings also addressed and considered this arrest: "[Mr. Lopez's] apprehension [for the victim's murder] occurred while he was being investigated for another sexual assault involving assaultive conduct." ROA 99, p. 7.

[17]Although the State withheld these material facts exonerating Mr. Lopez of a crime, had Mr. Sterling investigated the facts as he was required to do, *see Rompilla v. Beard*, 125 S.Ct. 2456, 2465-2468 (2005), he at least would have discovered the examining physician's conclusion that no rape or assault occurred.

Ms. Rodriguez at the hospital found no evidence of a sexual assault, Ms. Rodriguez's assertion that Mr. Lopez choked her was contradicted by the evidence, and Ms. Rodriguez's other statements about the events of that night were not credible. *Id.*

Evidence that Mr. Lopez did not assault Ms. Rodriguez was extraordinarily important. The former presentence report writer relied on this "fact" to recommend Mr. Lopez "be permanently removed from the community." ROA 71, p.8. The 1990 presentence report writer described this encounter as "another sexual assault involving assaultive conduct." ROA 99, p. 7. The State's expert, Dr. Dean, heavily relied on this report as evidence that Mr. Lopez did not have an unusual reaction when intoxicated. R.T. 7-13-90 (p.m.), pp. 33-34, 38-39. The prosecutor used this lie to argue why the judge should reject Mr. Lopez's proffered mitigating evidence. He argued:

> You look at these facts, *you look at this man's history. You look at the fact that four days after he murdered this woman he's out there raping another woman. He's threatening to kill her.* 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.

R.T. 8-3-90, p. 27 (emphasis added).[18] In his July 23, 1990 Supplemental Sentencing

---

[18]This Court recently denied Mr. Lopez's *Brady* violation based on these facts, concluding that the State's withholding of evidence exculpating Mr. Lopez of this crime was not material because it was not relevant to statutory aggravation. Dkt. 160, Order Re: Procedural Status of Sentencing Claims, pp.17-18 (Ariz.D.Ct. Nov. 3, 2005). Petitioner disagrees that the State's suppression of this important fact did not harm him. This fact was relevant to the trial and appellate court's rejection of mitigation. Both Mr. Sterling, the State's expert, Dr. Dean, and the Arizona Supreme Court presumed this fact true, and the State never corrected those false beliefs. Judge D'Angelo specifically relied on this lie to reject Petitioner's only mitigating evidence. R.T. 7-13-90 (p.m.), pp. 30, 32-34.

Memorandum, the prosecutor wrote:

> Dr. Bendheim attempted to corroborate his previous report by referring to a Presentence Report conducted in connection with CR 151615 (Exhibit 8) and a sexual assault report wherein defendant Lopez was a suspect, dated November 3, 1987 (Exhibit 7). *It should be noted that the sexual assault report was in connection with a crime that was committed four days after defendant Lopez raped and murdered Essie Holmes.* The facts in both these reports do not establish pathological intoxication. On the contrary, they depict an individual who, even though intoxicated, is fully aware of the ramifications of his actions. *In particular, the sexual assault report clearly indicates that the defendant planned and executed the rape of Cecilia Rodriguez.* There is no evidence in that report that the defendant became psychotic after a small amount of intoxicating liquor. *In fact, the facts establish that he had been drinking for some time prior to his decision to forcibly drag Cecilia Rodriguez to the automobile where he ultimately raped her. These facts clearly show that the defendant does not suffer from any type of pathological intoxication.*

ROA 98, pp. 4-5 (emphasis added).

Because Mr. Sterling did not conduct the investigation that prior counsel also failed to conduct in Mr. Lopez's case, and that the law required Mr. Sterling conduct, but instead, with the exception of two documents (the interviews of Rodriguez and Sabori), relied on the very same record before Judge D'Angelo that resulted in Mr. Lopez's death sentence in 1987, Mr. Lopez's re-sentencing trial lasted one day. Mr. Sterling presented one witness to testify on Mr. Lopez's behalf in mitigation at the hearing, Richard Bailey, a classification officer at the Maricopa County Jail. R.T.7-13-90 (p.m.), pp. 56-58. Mr.

The Arizona Supreme Court did as well: "Furthermore, four days after the murder in this case, and before he was apprehended, defendant while admittedly intoxicated, planned and methodically carried out a sexual assault." *State v. Lopez*, 175 Ariz. at 413, 857 P.2d at 1267-1268.

Bailey testified that he met Mr. Lopez about three months ago when Mr. Lopez was transferred from the prison to the jail for his re-sentencing proceedings. Mr. Bailey had visited Mr. Lopez on a weekly basis and found him to be an exemplary prisoner who caused no problems. *Id.*, pp. 56-57.

Mr. Sterling submitted as an exhibit the videotaped deposition of Dr. Bendheim discussed above, R.T. 7-13-90 (a.m.), p. 4, Ex. 6, the three documents Dr. Bendheim discussed during his testimony, *id.*, Exs. 7-9,[19] and as noted above, transcripts of the interviews of two prosecution trial witnesses, Yodilia Sabori and Pauline Rodriguez, who had seen Mr. Lopez shortly before the crime occurred. *Id.*, pp. 6-7, Exs. 10-12.[20] Although the interviews of Ms. Sabori and Ms. Rodriguez took place in 1987, Mr. Sterling inexplicably did not provide the transcripts of those interviews, or even the witnesses' trial testimony, to Dr. Bendheim for his consideration in formulating his expert

---

[19]Exhibit 7 is the police report addressing Ms. Rodriguez's now known to be false allegations. Exhibit 8 is the 1985 probation report by Neal Nicolay discussing Mr. Lopez's resisting arrest conviction, and Exhibit 9 is Dr. Bendheim's 1987 psychiatric report concerning Mr. Lopez.

[20]In the morning of Mr. Lopez's one-day sentencing trial, Mr. Sterling presented the testimony of pathologist, Dr. Philip Keen, to attack the sole aggravating factor supporting a sentence of death: that the crime had been committed in an especially heinous, depraved and cruel manner. R.T. 7-13-90, pp. 8-30. Mr. Sterling introduced five documents relating to Keen's testimony. *Id.* The most charitable characterization that can be said about Mr. Sterling's presentation of this evidence is that it was ill-conceived. Had Mr. Sterling bothered to investigate, he would have discovered, as discussed below, that Mr. Lopez's frantic, disorganized behavior at the time of the crime resulted from multiple neurological disabilities he suffered since childhood that were exacerbated by inhalants and alcohol and "increase[d] his sense of threat and perception of danger." Exhibit 3, p. 95.

opinion, even after it became clear that Dr. Bendheim had not seen this evidence and that this type of evidence was important to his diagnosis.

Mr. Sterling also did not conduct the comprehensive investigation of Petitioner's background and social history required of competent counsel in a capital case. Mr. Sterling had "a duty to make a `diligent investigation into his client's troubling background and unique personal circumstances.'" *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005), *quoting (Terry) Williams v. Taylor*, 519 U.S. 362, 415 (2000)(O'Connor, J., concurring). "[A]ll relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999); *see also Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999); Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. REV. 299, 323-24 (1983) ("Trial counsel has a duty to investigate the client's life history, and emotional and psychological make-up .... There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings.... The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized."); Lois Heaney, National Jury Project, Constructing a Social History, H49-HS0 (1983) (a social history of a defendant should include investigating school and other institutional records, as well as any experiences of child abuse, learning disabilities, emotional problems, substance abuse, and involvement with criminal justice, mental health or social service agencies); Michael Morrissey,

Investigating the Death Case, in Illinois Death Penalty Defense Manual, at 7-9 to 7-13 (Andrea D. Lyon ed., 1988)(describing need for defense counsel investigating penalty phase to obtain school and military records, alcohol and drug history, juvenile court records, prison records, mental health records, criminal records).

This "duty is intensified ... by the unique nature of the death penalty[.]" ABA Guidelines §11.4.1 cmt. "To perform effectively at the penalty phase of a capital case," Mr. Sterling needed to "conduct sufficient investigation and engage in sufficient preparation to be able to `present[] and explain[] the significance of all available [mitigating] evidence.'" *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001)(en banc)(internal citation omitted). To do that, he needed to make "inquiries into social background and evidence of family abuse...." Courts have long recognized that "[e]vidence of a difficult family history ... is typically introduced by defendants in mitigation," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), because it bears on the defendant's character, and is based on "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The investigation Mr. Sterling was required to conduct included examining "the defendant's physical health history, particularly for evidence of potential organic brain damage and other disorders," "his history of drug and alcohol abuse..." *Summerlin*, 417 F.3d at 630. It also "'should always include efforts to secure information in the

possession of the prosecution and law enforcement authorities.'" *Rompilla v. Beard*, 125 S.Ct. at 2466 (internal citation omitted). *See also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases §11.4.1.D.4 (1989);[21] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases §10.7, comment (rev. ed. 2003)("Counsel must ... investigate prior convictions ...."). In sum, "counsel has a duty to investigate the case thoroughly." *Id.*, §10.7 cmt.

But here, just as in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), trial "counsel abandoned [his] investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources...." *See* ABA Guidelines (2003) §11.4.1©) and §11.8.6. As a result, he did not discover readily available mitigation supporting a life sentence for Mr. Lopez, and important evidence disproving Mr. Lopez's sexual attack of Ms. Rodriguez four days after the murder. As discussed below, this evidence was central to a reliable and convincing diagnosis by Dr. Bendheim and understanding of the many reasons supporting a life sentence for Mr.

---

[21]The ABA Guidelines were first adopted in February 1989, and "applied the clear requirements for investigation set forth in the earlier Standards [for Criminal Justice] to death penalty cases." *Rompilla v. Beard*, 125 S.Ct. at 2466-2467 & n. 7 (applying ABA Guidelines to 1988 capital trial); *Bean v. Calderon*, 163 F.3d 1073, 1080 (9th Cir. 1998)("conducting an adequate investigation and preparing witnesses for trial testimony were not alien concepts in 1981, but were an integral thread in the fabric of constitutionally effective representation."); *Marshall v. Cathel*, 428 F.3d 452, 467 (3d Cir. 2005)("A separate penalty phase investigation was the very foundation of reasonable representation in 1986."); *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003)(ABA Guidelines did not "represent norms newly discovered after *Strickland*."). The updated ABA Guidelines reinforce the same minimal standards of investigation as the 1989 ABA Guidelines. *See Rompilla v. Beard, supra.*

Lopez.

B. Counsel's failure to conduct a reasonable investigation prejudiced Petitioner.

Had trial counsel conducted the investigation he was required to conduct, he would have discovered important, relevant mitigating evidence supporting a life sentence, evidence which he could have provided to his expert so that his expert could reach a valid and supportable diagnosis. As explained by psychiatrist George Woods, Mr. Lopez "was born into a volatile, chaotic, and unpredictable environment to cold, unaffectionate, and distant caretakers." Ex. 3, p. 3. Little is known about the background of Mr. Lopez's father, Arcadio Lopez, other than that he was born in Tombstone, Arizona. What is known is that Arcadio was a life-long alcoholic who suffered depression, and who repeatedly and brutally beat and raped his common law wife, Conception (or Concha as she is known), Lopez, Mr. Lopez's mother. The beatings were so terrible that Mr. Lopez and his brothers often feared their father had finally killed their mother. Without provocation or justification, Arcadio beat and terrorized Mr. Lopez and his brothers as well, threatening to kill them. Ex. 3, p. 4-6. Although Arcadio was arrested once, he soon was released and returned to terrorizing his family. Ex. 3, p. 46.

Mr. 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, cruel 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. Ex. 3, pp. 17-31.

Concha attended a segregated school for Mexican children, and 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 much older, close family friend. 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. She moved to Arizona where an aunt lived. *Id.*

In Arizona, while working in the agriculture fields, as she had in Texas, Concha met 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. 4-6, 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 Mr. Lopez and his seven brothers. She did not display love or affection for her children, and neglected them. With the benefit of the results of a social history investigation that Mr. Sterling should have conducted and provided Dr. Bendheim, and interviews of Mr. Lopez and family members, psychiatrist

Dr. George Woods explains:

> 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 Mr. Lopez suffered, thus, began at the hands of his father who was "violent and unpredictable," and whose alcoholic rages and mental illness worsened over Mr. Lopez's childhood. Because Mr. Lopez 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." *Id.*, p. 4. To this day, Mr. 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 Mr. Lopez's childhood caused him to experience, among other things, "night terrors," a "common symptom in children who are traumatized...." *Id.*, p. 5. Mr. Lopez's family vividly describes Mr. 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, Mr. 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 that "he suffered from frequent tooth pain, cavities, repetitive tonsillitis, and ear infections." School personnel and others told Concha that Mr. 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.*, pp. 5-6, 69 .

Mr. 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 Mr. 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, Mr. Lopez's "affective dysregulation would take over, and [his] chaotic behavior would ensue." *Id.*, p. 58.

When Mr. Lopez was seven years old, he suffered yet another loss. His ten-month-old sister, Gloria, was born with a serious birth defect that required repeated hospitalizations. Mr. Lopez, his mother and seven brothers believed her birth to be a miracle and the family's salvage in the otherwise wretched life they lived. But in yet

another tragedy to befall this family, Gloria died following an unsuccessful surgery. Mr. Lopez'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. Mr. Lopez's father's reaction was quite different: he abandoned his family and never returned. *Id.*, pp. 59-60.

Although Mr. Lopez and his family never knew what happened to Arcadio, records show that after he abandoned his 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 Mr. 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 Mr. 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 Mr. 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 himself, and knew only the child-rearing practices of his father to model, Junior continued to physically abuse and threaten Mr. Lopez, and his other siblings. *Id.*, pp. 62-65. When Mr. Lopez tried to intervene in one particularly terrible beating Junior was inflicting on their younger brother, Joe, Junior

turned his anger and fury on Mr. 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.*

But like his father, Junior, too, soon abandoned his mother and younger brothers. He married, moved out of the family house, and rarely had contact with his mother and brothers. *Id.*

But before Junior left, Mr. Lopez's family suffered yet another terrible trauma. While walking home from the store, Concha was brutally assaulted and raped. Once she was released, she ran home nearly naked, where Mr. 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, 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 Mr. Lopez, beating him up, pointing a gun at him, and threatening to kill him. *Id.*, pp. 65-67. He soon began moving in his children from another marriage. *Id.*

Had he investigated Mr. Lopez's social history, Mr. Sterling also would have

learned that Mr. 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 extraordinarily poor.

Id., p. 4. It has long been known that "[e]arly 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 Mr. 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.

Mr. Lopez and his family, like other "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." *Id.*, pp. 35-36. His family's poverty resulted in Concha constantly changing residences because she could not 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 her neighbors for many years in the 1960s and 1970s. 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.

Ex. 33.

Mr. Lopez's only escape from this pervasive neglect and abuse was the school he attended. He enjoyed school and worked hard to succeed there. Ex. 3., pp. 68-70. But his family's instability made it difficult for Mr. 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. Neurpsychological testing reveals that Mr. 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, Mr. 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 Mr. Sterling conducted the investigation he was required to conduct, he also would have discovered that the "prevalence of alcoholism and drug addiction" in Mr. 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." *Id.*, p. 29.

"The relationship between chronic exposure to trauma, early childhood neglect, and alcoholism" is well documented in Mr. Lopez's immediate family, and his maternal relatives. *Id.*, p. 30. Mr. 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 Mr. Lopez, "is frequently accompanied by bizarre changes in their behavior." *Id.*

For most of Mr. Lopez's brothers, their alcoholism and/or drug addictions have resulted in legal problems. Mr. 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. Mr. Lopez's brother, Frank, suffers alcohol problems and has been arrested for drunken driving. Mr. Lopez's brothers, Joe and George, began drinking when they were 10 years old, and like Mr. Lopez, were heavy drinkers by the time they were teenagers, when they also began inhaling solvents, paint 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.

Had Mr. Sterling conducted this investigation, he would have discovered that Mr. 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.

This new information would have provided the support Dr. Bendheim needed to change his tentative diagnosis regarding Mr. Lopez's impairments to one that he could state with a reasonable degree of medical certainty: Mr. Lopez's background and history established relevant mitigating evidence supporting a life sentence. With the information and records about Mr. 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.

Id., p. 7.

Instead, because he had not conducted the reasonable investigation he was obligated to conduct, Mr. Sterling knew nothing about Mr. Lopez's background and social history except what he read in the court and prison documents. Mr. Sterling's own words to Mr. Lopez's sentencer best illustrate his incompetence and the resulting prejudice Mr. Lopez suffered::

> There's nothing societally [sic] redeeming in the defendant's background. I wish we could all argue with [the prosecutor] on that. Probably can't.

R.T. 8-3-90, p. 27. In fact, as shown here, had he only looked, Mr. Sterling would have

discovered a far different truth:

> 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 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 Mr. Lopez suffers:

> 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.

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.

As discussed above, this mitigating evidence and records available to Mr. Sterling had he only conducted a reasonable investigation establishes the prejudice Mr. Lopez suffered as a result of his counsel's failures. Had he only looked, Mr. Sterling would have discovered evidence demonstrating valuable mitigating evidence:

> Sammy long-standing mental disorder is characterized by paranoia, delusions, 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.

Id., p. 93.

Mr. Sterling 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. Based on the information Mr. Sterling knew about Mr. Lopez, "[n]o reasonable lawyer would forego examination" of available records about Mr. Lopez and his family members, and no reasonable lawyer would forego interviewing available key witnesses who held valuable information about Mr. Lopez's life circumstances, and provide that information to his expert. *Id.* Counsel's "duty to conduct a full and complete mitigation investigation before making tactical decisions," is "sancrosanct." *Earp v. Ornoski*, 431 F3d 1158 (9th Cir. 2005); *see also Douglas v. Woodford*, 316 F.3d 1079, 1088 (9th Cir. 1999)("When it comes to the penalty phase of a capital trial, '[i]t is imperative that all relevant mitigation information be unearthed for consideration.'")(internal citation omitted).

Mr. Sterling's errors and omissions "clearly demonstrate that trial counsel did not fulfill [his] obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396. When looking at "the totality of the available mitigation

evidence," both the little presented at trial and that presented here, there is a reasonable probability that the result would have been different had counsel performed competently. *Id.* (new sentencing required where counsel failed to fulfill obligation to conduct thorough investigation of the defendant's background because he failed to uncover and present mitigating evidence); *Wiggins*, 539 U.S. at 530-31 (counsel's failure to present other available mitigating evidence and records about defendant's background prejudiced defendant where counsel's investigation was limited to a pre-sentence investigation report and social service records when other records were available); *Hendricks v. Calderon* 864 F.Supp. 929, 946 (N.D. Cal. 1994), *aff'd Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1994)("the existence of a substantial amount of mitigating evidence that was not presented to the jury is one factor relied upon to indicate that the petitioner was prejudiced by trial counsel's deficient performance.").

Mr. Sterling's failure to conduct a thorough investigation was not the result of some strategic decision not to offer more evidence in mitigation. *See, e.g., Strickland*, 466 U.S. at 673; *Wiggins*, 539 U.S. at 521. Mr. Sterling made clear he provided all that he knew:

> As to mitigation, I think a very important thing must be done before I go into it. 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.

R.T. 8-3-90, p. 18. This was all Mr. Sterling knew because he confined his investigation to the pre-trial and trial records generated in <u>this</u> case. *See Wiggins*, 539 U.S. at 521-22;

Strickland, 466 U.S. at 690-91. But even under those self-imposed (and plainly unconstitutional) constraints, he committed yet another serious error. Mr. Sterling did not even provide Dr. Bendheim the readily available trial testimony and interview transcripts of witnesses Pauline Rodriguez and Yodilia Sabori.[22] These were the very records that Dr. Bendheim needed to bolster his previous tentative conclusions and opinions about Mr. Lopez. Resps.Ans., Ex. P. And, as discussed above, he also did not interview readily available key witnesses or obtain readily available important records about Mr. Lopez's background and that of his family. See Ex. 3, and attachments thereto. The Sixth Amendment required more. *Williams v. Taylor*, 529 U.S. at 395-396.

Because Mr. Sterling did not conduct the investigation he was require to conduct, the sentencer did not hear any of the compelling evidence presented here support a life sentence. As a result, Judge D'Angelo concluded:

> Testimony was presented on behalf of the Defendant that he possibly suffered from a condition known as "pathological intoxication." Said testimony did not rise to any level of medical certainty, but rather was based upon a "hypothesis" or "speculation." The State presented evidence to rebut the "hypothesis" and "speculation," and the Court specifically finds that the Defendant failed to meet his burden of proof of establishing this mitigation factor by a preponderance of the evidence. Thus, this mitigation factor does not exist.

ROA 57, p. 6. Mr. Sterling's errors and omissions had another disastrous result as well: Judge D'Angelo found no other mitigating circumstances of any kind. *Id.*

---

[22]As discussed earlier, Mr. Sterling only provided Dr. Bendheim two additional documents: a police report regarding the alleged, but not know to be false, sexual assault of Cecilia Rodriguez, and a presentence report discussing Mr. Lopez's arrest and conviction for resisting arrest.

The trial court's decision denying relief was contrary to and an unreasonable application of federal law. Petitioner alleged a colorable claim that counsel's failure to investigate available mitigating evidence that if true entitled him to relief. He alleged that counsel unreasonably and inexplicably confined his investigation into mitigating evidence to records produced during Mr. Lopez's trial proceedings. In doing so, he failed to obtain the records and evidence produced here showing, among other important findings, that 1) Mr. Lopez and nearly every one of his family members had a long history of serious substance abuse, extreme trauma and severe neglect," 2) that the "life-threatening" trauma Mr. Lopez suffered "disrupted his normal development," 3) that Mr. Lopez suffered depression, intrusive thoughts and "learned to use drugs, alcohol, and organic solvents to quell those frightening emotions," 4) that Mr. Lopez's repeated use of these drugs changed the structure of his brain and had a "disinhibiting effect" on his behavior, and increased "his sense of threat and perception," 5) that Mr. Lopez had "a history of irrational behavior during periods of intoxication," and 6) that his neurological deficits," including impaired cognitive functioning, "augmented by bone-and-soul-crushing beatings, paranoia, poverty, neglect," and self-medication are consistent with the "chaotic event" of the victim's unfortunate murder. Ex. 3, pp. 91-95. Had Mr. Sterling discovered these facts, he could have provided them to Dr. Bendheim who doubtlessly would have reached the same conclusions as Dr. Woods. Equally important, he could have answered the concerns raised by Dr. Dean's testimony.

Based on these facts and law, Petitioner is entitled to a new sentencing where the

evidence that Mr. Sterling could have presented had he investigated can be introduced. But at the very least, he has presented a colorable claim of counsel's ineffectiveness in failing to investigation and present available mitigating evidence, and that counsel's ineffectiveness prejudiced him. *See Wiggins*, 539 U.S. at 521. Comparing the negligible evidence Mr. Sterling presented at Mr. Lopez's sentencing trial with the wealth of evidence presented here, the prejudice Mr. Lopez suffered is clear. *See, e.g., Williams*, 529 U.S. at 368 (prejudice found despite fact that petitioner's other crimes included a "brutal[] assault[] [of] an elderly woman [that left] her in a vegetative state"); *Landrigan v. Schriro*, __ F.3d __, 2006 WL 549027 (9th Cir. Mar. 8, 2006)(colorable claim of ineffective assistance of counsel found where counsel failed to uncover "Landrigan's tortured family history," in capital case where defendant had escaped from prison where he was incarcerated for "murder[ing] his best friend" and while in prison "brutally stabbed a fellow inmate," and then traveled to Arizona where he engaged in consensual sexual relations with victim and then killed him); *Earp v. Ornoski*, 431 F.3d 1158, 1164 (9th Cir. 2005)(colorable claim of ineffective assistance of counsel found where defense counsel failed to uncover and present records and/or testimony documenting history of emotional, psychological and neurological problems, family history of substance abuse and mental illness, and results of neurological and psychiatric evaluations in case where defendant convicted of raping and murdering eighteen-month old child).

C. Petitioner Diligently Pursued Relief On This Claim In State Court.

In the state postconviction proceedings, Mr. Lopez alleged that trial counsel's

performance was deficient because, among other things, counsel failed to "properly marshal all of the obviously relevant information" and "provide the expert with all of the necessary information to render a complete diagnosis...." ROA 138, p. 3. Petitioner's postconviction counsel contacted Dr. Bendheim and provided him some additional materials that Mr. Sterling had not provided. The materials included the trial testimony and witness interviews of Pauline Rodriguez and Yodilia Sabori. Resps.Ans., Ex. P, pp. 9-10, & Ex. 3. As shown above, the testimony of these witnesses contained important mitigating evidence. After reviewing these additional documents, Dr. Bendheim offered a "more certain diagnosis": Mr. Lopez was pathologically intoxicated at the time of the crime. *Id.*, Ex. 3.

Based on these facts and law, Petitioner is entitled to a new sentencing where the evidence that Mr. Sterling could have presented had he investigated can be introduced. The state court's summary ruling denying relief is contrary to and an unreasonable application of clearly established law as discussed above. 28 U.S.C. §2254(d)(1) and (2). As we have shown, valuable evidence mitigating this crime was readily available had counsel only bothered to look. This evidence is the very kind of evidence that supports a life sentence: serious mental illnesses, trauma and abuse throughout Mr. Lopez's life, significant cognitive impairments, and severe alcohol and organic solvent addiction. *Rompilla*, 125 S.Ct. at 2468-2469. And, it is evidence that completely changes the picture Judge D'Angelo had at trial. *Id.*, at 2468; *Wiggins,* 539 U.S. at 537 ("Had the jury been able to place Petitioner's excruciating life history on the mitigating side of the scale,

there is a reasonable probability that at least one juror would have struck a different balance."). This "undiscovered 'mitigating evidence taken as a whole, might well have influenced the [sentencer's] appraisal of [Mr. Lopez's] culpability." *Rompilla,* 125 S.Ct. at 2469. For all these reasons, counsel's complete failure to provide minimally competent representation prejudiced Petitioner and he is entitled to relief. *See also*, *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) ("even though [counsel] obtained school records, counsel failed to examine [...] employment records, medical records, prison records, past probation reports, and military records"); *Jermyn v. Horn*, 266 F.3d 257, 307 (3d Cir. 2001) (counsel ineffective where failed to obtain school records that disclosed childhood abuse); *Carter v. Bell*, 218 F.3d 581, 588-89 (6th Cir. 2000) (counsel ineffective where failed to obtain a release from client to view prison records, and did not seek any other available records regarding the client or his family); *Glenn v. Tate*, 71 F.3d 1204, 1208 (6th Cir. 1995) (counsel ineffective where failed to examine the client's school, medical, mental health, or probation records); *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995) (counsel ineffective where failed to request hospital, school, and child welfare records).

D. Petitioner Is Entitled to an Evidentiary Hearing in This Court

At the very least, Petitioner is entitled to an evidentiary hearing where this evidence can be presented. In the state postconviction proceedings, postconviction counsel alleged that trial counsel's performance was deficient because, among other things, counsel failed to "properly marshal all of the obviously relevant information" and

"provide the expert with all of the necessary information to render a complete diagnosis...." ROA 138, p. 3. Postconviction counsel contacted Dr. Bendheim and provided him some additional materials that Mr. Sterling had not provided. The materials included the trial testimony and witness interviews of Pauline Rodriguez and Yodilia Sabori. Resps.Ans., Ex. P, pp. 9-10, & Ex. 3. As shown above, the testimony of these witnesses contained important mitigating evidence. After reviewing these additional documents, Dr. Bendheim offered a "more certain diagnosis:" Mr. Lopez was pathologically intoxicated at the time of the crime. *Id.*, Ex. 3.

Postconviction counsel then requested an evidentiary hearing and/or relief at which he could do and present what trial counsel was obligated to do and present but did not: "marshal[] all ... relevant" and "necessary information" for the expert. ROA 138, p. 3. Under Arizona law, a "defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant's allegations are true, might have changed the outcome." *State v. Watton,* 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

Petitioner met that showing: he alleged counsel's failure to conduct a reasonable investigation to gather all the relevant facts and provide them to the expert. He alleged that he needed to do what counsel did not–gather all the available relevant and necessary information for the expert.

But despite this showing requiring a hearing under Arizona law, the state postconviction court summarily denied relief on this claim without a hearing. Without any kind of analysis, the state court concluded that "counsel's performance" was not

ineffective, and Petitioner had not shown "a reasonable probability that" the result would have been different." ROA 167. Similarly without any explanation, the state court concluded that even if Mr. Sterling had provided additional, relevant information and materials to Dr. Bendheim that he needed to support his expert opinion, it would not have made a difference. ROA 167.

Where, as here, petitioner alleges a colorable claim of ineffective assistance of counsel and made reasonable efforts to develop this claim in the state courts, a hearing is warranted. *Williams (Michael) v. Taylor*, 120 S.C. 1479, 1494 (2000)(If a petitioner "has made a reasonable effort" to develop evidence and claims in state proceedings, "§2254(e)(2) will not bar him from developing them in federal court."). Petitioner did not fail to develop this claim, but requested a hearing in the state courts where these and other facts supporting this claim could be discovered and presented.

II. Trial Counsel Was Ineffective for Failing to Challenge Inaccuracies in the Presentence Report.

Trial Counsel was also ineffective because he failed to challenge unadjudicated crimes presented to the court through presentence reports. The presentence reports prepared in 1987 and in 1990 contained references to arrests for crimes which Mr. Lopez was not charged. ROA 71, ROA 99.

One of the most damaging references was to an alleged sexual assault incident four after the Holmes homicide. The complainant in that charge, Cecilia Rodriguez, was ntance of Mr. Lopez with whom he had a consensual sexual relationship. Ms.

Rodriguez admitted to being with Mr. Lopez on the afternoon when the assault was supposed to have occurred. They were both drinking at a mutual acquaintance's home. Mr. Lopez and Ms. Rodriguez left the party together to get more liquor. Ms. Rodriguez claimed that on the way to the liquor store, Mr. Lopez sexually assaulted her. However, medical experts found no evidence of sexual assault. In fact, the state did not press charges against Mr. Lopez because Ms. Rodriguez was not "credible." Exhibit 4. Indeed, the sexual assault charge was not supported by <u>any</u> credible evidence. Nevertheless, Judge D'Angelo considered this sexual assault in making his sentencing determination.

Counsel not only failed to challenge this evidence, he embraced the evidence as if it were true. Counsel's actions were well below objective standards of reasonableness and meet the deficient performance prong of *Strickland.* Mr. Lopez pleaded not guilty to the crime of first degree murder. Indeed, Mr. Lopez has no memory of the murder. The evidence supporting the jury's verdict was circumstantial. It is inconceivable that a competent counsel would concede, without conducting any investigation of any kind, that his client had committed a sexual assault just days after the murder.

Mr. Lopez was prejudiced by trial counsel's unprofessional errors. The effect of this concession was to paint Mr. Lopez as a monster. Indeed, counsel's failure to investigate opened the door to an extremely damaging and prejudicial argument from the prosecutor:

> You look at these facts, you look at this man's history. You look at the fact that four days after he murdered this woman, he's out there raping another woman. He's threatening to kill

> her. Where is there any mitigation in this man's life, either past or present or future, that is in any way socially redeeming? There is none. No mitigation here. There is extreme aggravation.

R.T. 8-30-90, p. 27.

The trial judge's summary dismissal of Mr. Lopez's claim was contrary to and an unreasonable application of *Strickland*. 28 U.S.C. §2254 (d). It was also an unreasonable application of the law to the facts presented. 28 U.S.C. § 2254(d). At the very least, Mr. Lopez was entitled to an evidentiary hearing in state court.

For all of the reasons stated above, Mr. Lopez did not fail to develop this claim and he is entitled to an evidentiary hearing. *Williams v. Taylor*; 28 U.S.C. §2254 (e).

III. The Trial Court Violated Mr. Lpez's Eighth and Fourteenth Amendment Rights By Failing To Consider, Give Effect To, and Weigh Mitigating Evidence.

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (same); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (same). Even where particular mitigating evidence does "not relate specifically to . . . [the defendant's] culpability for the crime he committed," the defendant is constitutionally entitled to offer such evidence because it might "serve 'as a basis for a sentence less than death.'" *Skipper*, 476 U.S. at 4-5 (quoting *Lockett*, 438

U.S. at 604). In particular, the Supreme Court has recently confirmed that a defendant's history of childhood abuse can have an especially "powerful" effect on the jury's sentencing deliberations. *See Wiggins v. Smith*, 123 S. Ct. 2527, 2542-44 (2003).

A corollary to the *Lockett* rule is that a sentencer in a capital case may not refuse to consider any relevant mitigation evidence. *Hitchcock v. Dugger*, 107 S.Ct 1821, 1824 (1987); *Eddings v. Oklahoma*, 102 S.Ct. 869, 876-77 (1982); *Smith v. McCormick*, 915 F.2d 1153, 1167 (9th Cir. 1990).

> The sentencer . . . may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration.

Eddings, 455 U.S. at 115-116, 102 S.Ct. at 877. When it is not clear whether the sentencer actually considered all the mitigation evidence, the appellate court may not speculate about the sentencer's thinking, but instead must remand the case to resolve any ambiguity. *Id.* at 119, 102 S.Ct. at 879 (O'Connor, J., concurring). *See also*, *Penry v. Lynaugh*, 109 S.Ct 2934 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). A "mitigating circumstance" is any factor relevant in determining whether to impose a sentence less than death.

Even though trial counsel failed to uncover and present the volumes of mitigation which we present here, there was mitigation evidence in the record that the trial court did not weigh or consider in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Instead, Judge D'Angelo found that there was no mitigation

of any kind. ROA 103. The Arizona Supreme Court agreed, and affirmed that finding. *State v. Lopez*, 175 Ariz. at 417, 857 P.2d at 1271.

In fact, Arizona law precluded the consideration of much of the relevant mitigation that was present in the record. The Arizona courts required a capital defendant to prove a causal nexus between the mitigation proof offered and the offense before a sentencer may weigh or consider the evidence. *See State v. Stanley,* 167 Ariz. 519, 809 P.2d 944 (1991). The trial judge, of course, is presumed to have followed the law of the Arizona Supreme Court. *See Bell v. Cone*, 543 U.S. 447, 125 S.Ct. 847 (2005). The Arizona Supreme Court's decision affirming the trial judge's finding that no mitigation of any kind existed presumably followed its own law. *Id.* The Arizona Supreme Court's decision is contrary to clearly established federal law that the defendant must be allowed to introduce, and the sentencer must consider, "*any aspect of a defendant's character or record* . . . that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. *Tennard v. Dretke* 542 U.S. 274, 124 S.Ct. 2562 (2004)(Texas law requiring a showing of a nexus between the offense and mitigation unconstitutional).

A. Mitigation Evidence Contained in the Trial Court Record

Here, Mr. Lopez introduced substantial evidence of intoxication from alcohol and/or toxic inhalants at the time of the crime from a variety of witnesses. Unrebutted evidence was submitted at Mr. Lopez's capital trial and sentencing hearing that at the time of the crime, Mr. Lopez was hungry, broke and homeless, that he regularly drank alcohol, smoked marijuana and inhaled toxic substances, and had a documented history of

doing so at least as far back as 1975. *See, e.g.*, R.T. 7-13-90(p.m.), Exs. 8 and 9; ROA 99. A number of witnesses also confirmed Mr. Lopez's regular use of alcohol and toxic inhalants. R.T. 7/13/90 (p.m.), Exs. 6 and 11; R.T. 4-21-87, pp. 39-40. Unrebutted expert testimony established that Mr. Lopez has a low IQ.

Although Mr. Lopez denied substance abuse problems and that he was intoxicated at the time of the crime, Dr. Otto Bendheim, board certified in neurology and psychiatry, testified that he did not believe Mr. Lopez's denials. Dr. Bendheim testified that such denials "are very common" from "people who have alcohol problems." R.T. 7-13-90 (p.m.), Ex. 6. Dr. Robert Dean, who is not board certified in neurology or psychiatry, and who had not examined or spoken to Mr. Lopez, agreed that it is common for people to deny or minimize their use of alcohol, and that such denials are properly disregarded. R.T. 7-13-90(p.m.), pp. 17-18, 45, 47. Dr. Dean also testified that a person will not know if he suffers from pathological intoxication because he will have no memory of the event, including any criminal conduct committed. For that reason, experts must rely on reports of others who witnessed the person's behavior. *Id.* at 43-44.

Witnesses described Mr. Lopez as "shy", "mild and meek," "quiet," and "real nice" when he is not under the influence of intoxicants. R.T. 7-13-90 (p.m.), Exs. 6 and 11. Witnesses who were with Mr. Lopez shortly before the crime testified that he had been drinking, but then left the area where they had been talking for four or five minutes to get "high." When Mr. Lopez returned, "major changes" had taken place in him from the way he was only a few moments before. Mr. Lopez was "shaking," acting "mad,"

couldn't "stand still," was staggering, needing to hold onto a pole to stand up against the wall, and "falling down." R.T. 4-21-87, pp. 73-78; R.T. 7-13-90 (p.m.), Ex. 10. Still others described Mr. Lopez as "not himself," "different," "loaded on something," and "angry." *Id.*, pp. 83-84, 87.

Based on these facts, Dr. Bendheim testified that the homicide was attributable to Mr. Lopez's intoxicated state at the time of the crime, and Mr. Lopez's unusual reactions to intoxicants in which he displayed criminal conduct, "including assaultiveness when under the influence." R.T. 7-13-90 (p.m.), Ex. 6. Dr. Bendheim also testified that as a result of this intoxication, which he described as "pathological intoxication," Mr. Lopez's capacity to understand the consequences of his behavior was diminished, and that had Mr. Lopez not been in this state, the homicide would not have occurred. *Id.*

Although Dr. Dean disagreed that Mr. Lopez suffered from pathological intoxication, he testified that Mr. Lopez's actions were consistent with someone who was intoxicated. R.T. 7-13-90 (P.M.), p. 34. This testimony supported an intoxication instruction to the jury. Dr. Dean also testified that he believed paint sniffing and other toxic inhalants would cause responses similar to those caused by pathological intoxication. *Id.*, p. 46.

The record also showed that Mr. Lopez came from a poor, dysfunctional family who suffered severe problems and financial hardships that were exacerbated by his father's abandonment of Mr. Lopez, his seven brothers and his mother when Mr. Lopez was a young boy. R.T. 7-13-90 (p.m.), Ex. 8. Mr. Lopez completed only the tenth grade,

and has only a sixth grade reading level. ROA 99. Several of Mr. Lopez's brothers have substance abuse problems, and have been imprisoned, including one brother for a serious assault and two brothers for a homicide. *See, e.g.*, R.T. 7-13-90 (p.m.), Ex. 8; *State v. Lopez*, 158 Ariz. 258, 762 P.2d 545 (1988); *State v. Lopez*, 153 Ariz. 285, 736 P.2d 369 (1987). The trial judge was well aware of this dysfunctional family with a history of substance abuse problems, as he had previously presided over the homicide trial of Mr. Lopez's younger brother, George, and sentenced him to death, and accepted the guilty plea of Mr. Lopez's brother, Jose, who received a stipulated life sentence. *State v. Lopez*, 158 Ariz. at 260, 762 P.2d at 547.

Mr. Lopez also presented mitigating evidence that he exhibited "exemplary" behavior during his recent incarceration. R.T. 7-13-90(p.m.), p. 57. Although Mr. Lopez encountered difficulties initially adjusting to prison, as prisoners typically do, his behavior changed and at the time of his resentencing, Mr. Lopez was described as a "model prisoner." *Id.*

B. The Trial Judge's Failure to Consider Mitigation.

Notwithstanding that Mr. Lopez's mitigation evidence showed a number of reasons why he should not die, Judge D'Angelo apparently failed to consider and clearly failed to weigh this evidence as either statutory or nonstatutory mitigating evidence. Judge D'Angelo concluded the evidence that Mr. Lopez suffered from pathological intoxication did not support the statutory mitigating circumstance that Mr. Lopez's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements

of the law was impaired, 9-3-90 Special Verdict, p. 6, and that Mr. Lopez's good behavior during incarceration was not established. *Id.*, p. 7. Judge D'Angelo said nothing, however, about the remaining mitigating evidence presented (including the unrebutted testimony that Mr. Lopez was intoxicated at the time of the crime and came from a dysfunctional family with a history of substance abuse problems), as either statutory or nonstatutory mitigating factors, and conducted no weighing of the sole aggravating factor against any of this mitigating evidence. *Id.,* pp. 8-9.

The state appellate court did not cure these constitutional violations, but either repeated or compounded them. It concluded that Mr. Lopez had not proven intoxication or pathological intoxication, either as statutory or nonstatutory mitigating factors. It said nothing, however, about the unrebutted evidence that Mr. Lopez was intoxicated at the time of the crime, or any of the other record mitigation evidence. *State v. Lopez*, 175 Ariz. at 414, 857 P.2d at 1268. It affirmed Judge D'Angelo's rejection of good conduct during incarceration. *Id.*, 175 Ariz. at 417, 857 P.2d at 1271.

C. Arizona Law Unconstitutionally Restricts the Sentencer's Consideration of Relevant Mitigation Evidence.

It is clear that the trial judge did not consider this mitigation because Arizona law prohibited the Court from considering the evidence without also establishing a causal nexus. The Arizona Supreme Court failure to see the error was contrary to and an unreasonable application of clearly established federal law as articulated in *Lockett v. Ohio*, *Eddings v. Oklahoma, Hitchcock v.Dugger*, and their progeny. *Tennard v. Dretke*,

542 U.S. at 285, 124 S.Ct. at 2570-2571.

Like the Texas rule at issue in *Tennard*, the Arizona nexus rule is firmly rooted in the Arizona Supreme Court's jurisprudence. The following discussion outlines just two areas of mitigation, both of which are relevant to Mr. Lopez's case, where the Arizona Supreme Court has refused to consider or give effect to mitigation proof absent a showing of a connection between the proffered evidence and the crime.

1. Abused childhood.

In *State v. Jackson*, 186 Ariz. 20, 918 P.2d 1038 (1996), the state court wrote, "(w)e are aware that children who are emotionally and physically abused are adversely affected to some extent for the rest of their lives. ... But we have never reduced a defendant's death sentence on such a basis." *Id.*, 186 Ariz. at 31, 918 P.2d at 1049. The clear implication from this statement is that the Arizona court has not, and will not, reduce a death sentence based on an abusive upbringing, which means that the court will not fairly consider such evidence as mitigating.

The Arizona Supreme Court's holding in *Jackson* stands in direct contradiction of United States Supreme Court holdings on this issue. "There can be no doubt that evidence of a turbulent family history, [and] of beatings by a harsh father ... is particularly relevant [to mitigation]." *Eddings v. Oklahoma*, 455 U.S. at 115. "Defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

California v. Brown, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring).[23]

In *State v. Murray*, 184 Ariz. 9, 906 P.2d 542 (1995), the Arizona Supreme Court reversed the trial court's finding that "Robert suffered from a dysfunctional childhood" as mitigating, *Id.*, 184 Ariz. at 40, 906 P.2d at 573, because it did not "impact his behavior in a way that was beyond his control." *Id.* With regard to Roger Murray, the court reprises the same reasoning as with Robert to discount the horribly abusive childhood that Roger Murray suffered as mitigating. *Id.*, 184 Ariz. at 44, 906 P.2d at 577.

In *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999), Mr. Sharp presented testimony of his terribly abusive childhood, including evidence that he was "sodomized by an older stepbrother from the age of five through thirteen." *Id.*, 193 Ariz. at 415, 973 P.2d at 1182. The court rejected this evidence as mitigating because it was "self-reported" by Mr. Sharp and because there was no "causal connection" between Mr. Sharp's upbringing and the homicide. *Id.*

In *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995), the court held that the fact

---

[23] *See also, Burger v. Kemp*, 483 U.S. 776, 789, n.7 (1987)(there is "no doubt" that evidence of a defendant's "exceptionally unhappy and unstable childhood" is "relevant mitigating evidence"); *Parker v. Dugger*, 498 U.S. 308, 314 (1991)(capital defendant has a right to present evidence of a "difficult childhood, including an abusive, alcoholic father); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)(evidence of childhood abuse is relevant to a capital defendant's "moral culpability" and jurors must be allowed to consider that evidence in assessing punishment); *Smith v. Dugger*, 758 F.Supp. 688, 694 (N.D.Fla. 1990)(granting writ of habeas corpus and vacating death sentence because capital defendant was precluded from presenting evidence of "history of childhood deprivation" and "lack of adequate parenting"); *Elledge v. State*, 613 So.2d 434, 436 (Fla. 1993)(evidence of an abused childhood is a mitigating circumstance that must be given consideration by the sentencer in a capital case).

that Mr. Walden was raised in a dysfunctional family was "not a mitigating circumstance" because Mr. Walden "does not explain how this had anything at all to do with the rapes and murder." *Id.*, 183 Ariz. at 620, 905 P.2d at 999.

In *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998), the Arizona Supreme Court held that Mr. Djerf did not prove a difficult family background because it was not "linked" to the crimes for which he was convicted.

In *State v. Ross,* 180 Ariz. 598, 886 P.2d 1354 (1994), the Arizona Supreme Court held that Mr. Ross's "childhood background of emotionally and physically abusive foster homes and sexual abuse" did not constitute a mitigating factor because "(t)here is no indication here that (Mr.) Ross was unable to control his actions because of a difficult childhood." 180 Ariz. at 607, 886 P.2d at 1363.

In *State v. Mann,* 188 Ariz. 220, 934 P.2d 784 (1997), the court noted that Mr. Mann presented evidence that his abusive family background "directly contributed to (Mr. Mann's) behavior because he lacked 'healthy socialization experiences.'" *Id.*, 188 Ariz. at 231, 934 P.2d at 795. Nonetheless, the Arizona Supreme Court held that Mr. Mann did not "show any connection" between his background and the crimes for which he was convicted. *Id.*

In *State v. Pandeli,* 200 Ariz. 365, 26 P.3d 1136 (Ariz.2001), the Arizona Supreme Court agreed that Mr. Pandeli was subject to repeated sodomy throughout his childhood, had a neglectful mother and absent father, attempted suicide several times, had learning disabilities and unsound mental health, was forced to sell his body on the streets, and had

a sexual history wrought with violence and confusion. Although the Arizona Supreme Court found Mr. Pandeli's proffered evidence of his "family and developmental history" and "mental/emotional health" credible, it refused to consider this evidence as mitigation because there was no causal connection between his abysmal childhood and his appreciation of the wrongfulness of the conduct or ability to control his conduct. *Id.*, 200 Ariz. at 379-380, 26 P.3d at 1150-51. The Arizona Supreme Court upheld the trial court's finding that proof of childhood sexual abuse and physical abuse does not constitute nonstatutory mitigation absent a scientifically supported causal connection. *Id.*

In *State v. Hoskins,* 199 Ariz. 127, 14 P.3d 997 (2000), the Arizona Supreme Court acknowledged that Mr. Hoskins suffered from a horrific childhood, which included such traumatic events as molestation by his older sibling, statutory rape, beatings, neglect, suicide attempts, self-medication with alcohol beginning at age six, and multi-generational family history of alcohol addiction and drug abuse. Shockingly, the Arizona Supreme Court discounted this evidence entirely, holding that absent proof of causal connection, "the factual circumstances of defendant's childhood, though extremely difficult, *do not translate into relevant mitigation* of his premeditated crimes." *Id.,* 199 Ariz. at 153, 14 P.3d at 1023 (2000)(emphasis added). The Arizona Supreme Court does not hesitate to make clear its preclusion of this evidence: "Family dysfunction ... *can be mitigating only when* actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts. We reaffirm that doctrine here." *Id.*, 199 Ariz. at 151, 14 P.3d at 1021 (emphasis added).

The United States Supreme Court does not permit the consideration of mitigating factors to be restricted to only those shown to have caused defendant's actions at the time of the crime. Instead, the Court stresses the important and relevant nature of evidence of childhood abuse, which is undeniably mitigating. It is constitutional error to refuse to consider evidence of childhood abuse as non-statutory mitigation, even if that evidence does not provide a legal excuse from criminal responsibility. *Eddings*, 455 U.S. at 114. Courts in other jurisdictions have faithfully followed United States Supreme Court's precedent and determine that evidence of a traumatic upbringing is mitigating. *See Wright v. Cowan*, 149 F.Supp.2d 523, 527-38 (C.D.Ill.,2001) (traumatic childhood is mitigating); *Boyd v. French*, 147 F.3d 319, 325 (4th Cir. 1998) (troubled upbringing entitled is mitigating); *Blanco v. State*, 706 So.2d 7, 10-11 (Fla. 1997) (impoverished childhood is mitigating); *State v. Raglin*, 699 N.E.2d 482, 497 (Ohio 1998) (difficult childhood can be entitled to meaningful weight); *Guthrie v. State,* 689 So.2d 948 (Ala.Cr.App. 1996) (finding as nonstatutory mitigation that defendant's childhood was "not all that it could have been"); *Coleman v. State*, 741 N.E.2d 697 (Ind. 2000) ("difficult childhood" was entitled to some mitigating weight), *Buttrum v. State*, 293 S.E.2d 334 (Ga. 1982)(deprived childhood is mitigating).

2. History of Alcohol or Substance Abuse.

In *State v. Kayer*, 194 Ariz. 423, 984 P.2d 31 (1999), the Arizona Supreme Court held that the trial court did not err in finding that defense did not prove the statutory mitigator of impaired capacity or the nonstatutory mitigator of mental impairment. The

court held that the extensive evidence of Mr. Kayer's alcoholism, substance abuse, and mental illness did not meet the standard for establishing the mitigating factor that Mr. Kayer was unable to appreciate the wrongfulness of his conduct because Mr. Kayer did not prove that there was a "causal link" between his mitigating evidence and "the crime itself." *Id.*, 984 P.2d at 45-46.

In *State v. Rienhardt*, 190 Ariz. 579, 951 P.2d 454 (1997), the court refused to consider the "substantial" evidence regarding Mr. Rienhardt's history of drug and alcohol abuse as mitigation, holding that there was "no evidence connecting (Mr.) Rienhardt's history to the crime itself." *Id.*, 190 Ariz. at 592, 951 P.2d at 467.

In *State v. Medrano*, 185 Ariz. 192, 914 P.2d 225 (1996), the Arizona Supreme Court held that, despite expert and lay witnesses' testimony regarding the defendant's long time drug problem **and** drug use on the night of the homicide, the defendant failed to establish either a statutory or non-statutory mitigating circumstance. *See Jeffers v. Lewis*, 974 F.2d 1075 (9th Cir. 1992)(after court determines that mitigating evidence did not satisfy statutory mitigating circumstance, it must consider whether evidence is sufficient to be nonstatutory mitigating circumstance). The court also held that the trial judge did not apply an improper standard in assessing whether the defendant's drug use was a mitigating circumstance despite the trial judge's explicit statement that he personally rejected drug use as an "excuse" for murder.

In *State v. Stanley,* 167 Ariz. 519, 530-531, 809 P.2d 944, 955-956 (1991), the Arizona Supreme Court held that Mr. Stanley's "chronic alcohol and drug problems" did

not constitute a mitigating circumstance because they did not "overwhelm ... his ability to control his physical behavior." The court specifically noted that Mr. Stanley "had sought help" for his substance abuse addiction.

In *State v. Jeffers*, 135 Ariz. 404, 431, 661 P.2d 1105, 1132 (1983), the Arizona Supreme Court considered Mr. Jeffers "long term heroin" use only to diminish the effect of Mr. Jeffers' heroin use on the day of the homicide. The court noted that "evidence showed that long term heroin users like (Mr. Jeffers) develop a tolerance to the drug" and that Mr. Jeffers "had not used an excessive amount of heroin, by (Mr. Jeffers') standards, on the day of the murder." *Id.*

Other courts around the country, applying the standards enunciated by the United States Supreme Court,[24] have come to a dramatically different conclusion than the Arizona Supreme Court regarding whether a history of alcohol or substance abuse constituted a mitigating circumstance. As one court stated, "Documented alcohol and drug problems can be probative mitigating evidence. (Mr. Boliek's) long history of drug abuse was especially crucial at the mitigation stage (of his trial) in light of testimony that he had been using large amounts of drugs and alcohol before and during (the homicide)." *Boliek v. Delo*, 912 F.Supp. 1199, 1207-1208 (W.D.Mo. 1995), *rev'd on other grounds*,

---

[24]In *Skipper v. South Carolina*, the Court held that it was "now well established" that a capital sentencer may "not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Skipper*, 476 U.S. at 4, quoting, *Eddings*, 455 U.S. at 110; and *Lockett*, 438 U.S. at 604.

Boliek v. Bowersox, 96 F.3d 1070 (8th Cir. 1996). *See also*, *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991). In *State v. Quisenberry,* 401 S.E.2d 632 (N.C. 1999), the Supreme Court of North Carolina held that the defendant's "pattern of drug and alcohol abuse extending over a period of approximately eight years" was relevant mitigating evidence. *Id.*, 401 S.E.2d at 634. *See also, Scott v. State*, 603 So.2d 1275, 1277 (Fla. 1992)("long term drug and alcohol abuse" is a mitigating factor); and *State v. King*, 718 S.W.2d 241, 248 (Tenn. 1986).

3. The Trial Court Unconstitutionally Failed to Weigh and Consider Relevant Mitigation Evidence.

It is clear from the record and deeply rooted Arizona law, that the trial judge did not consider or weigh the mitigation evidence in the record which established Mr. Lopez's long-standing substance abuse disorder, his impoverished upbringing, his low IQ, his dysfunctional family, his homelessness, or the neglect of his family, or any of the other relevant mitigation present in the record. It is equally clear that the Arizona Supreme Court's failure to correct this error was the result of their own unconstitutionally restrictive relevance standards for mitigation, standards which fly in the face of *Lockett* and its progeny. The United State Supreme Court has recently reaffirmed that "[v]irtually no limits are placed on the relevant mitgating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*, 542 U.S. at 285, 124 S.Ct. at 2570.

Similarly, the Arizona courts erred in rejecting evidence that Mr. Lopez suffered

from pathological intoxication. The facts supporting this diagnosis were unrebutted and proven by a preponderance of the evidence.

Pathological intoxication is a major mental disorder identified as Alcohol idiosyncratic intoxication in Diagnostic Statistical Manual of Mental Disorders (3rd ed. Rev.) (DSM III-R). Three criteria must be present before this diagnosis can be made: maladaptive behavior changes occurring shortly after ingesting an amount of alcohol insufficient to induce intoxication in most people, behavior atypical of the person when not drinking, and the behavior is not due to any physical or other mental disorder. DSM III-R at 129.

The evidence presented at Mr. Lopez's capital sentencing hearing established these criteria. Evidence was presented that Mr. Lopez is shy, mild and meek when he is sober, but that he changes dramatically when he is intoxicated or under the influence of toxic vapors. Evidence also established that Mr. Lopez consumes little intoxicating substances before reacting in this way. Based on these facts, Dr. Bendheim's diagnosis was proved by a preponderance of the evidence. Although Dr. Bendheim did not testify to a reasonable degree of medical certainty, such testimony was not required to satisfy the burden of proof. Although Dr. Dean disagreed with Dr. Bendheim's diagnosis of pathological intoxication, he agreed that "descriptions of the subject's behavior while under the influence of alcohol would either confirm or nonconfirm [sic] the diagnosis." R.T. 7-13-90(p.m.), p. 52. Dr. Dean also agreed that witnesses described Mr. Lopez's personality as changing substantially when intoxicated. R.T. 7-13-90 (p.m.), p. 50.

The Arizona courts also erred in rejecting evidence that Mr. Lopez suffered from intoxication at the time of the crime, and that the crime would not have occurred but for that intoxicated state. This evidence established both the statutory mitigating factor of significant impairment under A.R.S. §13-703(G)(1), and nonstatutory mitigation.

The evidence was unrebutted that Mr. Lopez was significantly impaired at the time of the crime. Although Dr. Dean disagreed with Dr. Bendheim's diagnosis of pathological intoxication, Dr. Dean never disagreed with or disputed evidence that Mr. Lopez was intoxicated at the time of the crime and that the murder was attributable to that intoxication. Although Mr. Lopez denied intoxication, neither Drs. Bendheim nor Dean credited that denial. Witnesses who observed Mr. Lopez shortly before the crime described him as "not himself," "different," "shaking," staggering, "falling down," and "loaded on something."

The Arizona courts also erred in rejecting evidence of Mr. Lopez's good behavior while incarcerated. The evidence that Mr. Lopez's conduct in prison had changed and that, at the time of the resentencing, he was a model prisoner was unrebutted. The Arizona courts summarily rejected this evidence based on conduct that occurred years before the resentencing. The Arizona courts failure to consider relevant mitigating evidence violated Mr. Lopez's rights under the Eighth and Fourteenth Amendment, and as a result, Mr. Lopez's death sentence is unconstitutional.

Based on these facts and law, the Arizona Supreme Court decision is thus contrary to and an unreasonable application of clearly established federal law. 28 U.S.C. §

2254(d). It is likewise an unreasonable application of the law to the facts presented. *Id.*

IV. Mr. Lopez's Capital Sentence Is Predicated on an Unconstitutional Aggravating Circumstance.

The Arizona courts violated Mr. Lopez's rights under the Sixth, Eighth, and Fourteenth Amendments in finding that the F(6) heinous, cruel and depraved aggravating circumstance exists in his case and their decision rejecting his claim is contrary to and an unreasonable application of *Godfrey v.* Georgia, 446 U.S. 420 (1980); *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853 (1988) and their progeny. Further, the Arizona court decision upholding the application of this vague and unconstitutional aggravator to the facts of this case was an unreasonable application of the facts to the law. *Id.*, 28 U.S.C. § 2254(d).

There is no doubt that the statutory language defining the heinous, cruel and depraved aggravating circumstance under A.R.S. 13-703(F)(6) at the time of Mr. Lopez's sentencing trial is unconstitutionally vague and overbroad on its face. *Walton v. Arizona*, 497 U.S. 639(1990). In this case, the Arizona courts failed to adequately narrow the application of this aggravating circumstance and as a result, the application against the defendant is unconstitutional. *See Arave v. Creech*, 507 U.S. 463 (1992); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Under Arizona law, the question of heinousness or depravity focuses on the mental state of the defendant. *State v . Gretzler*, 135 Ariz. 41, 51, 659 P.2d 1, 10 (1983). Arizona law holds that a crime is heinous or depraved if it meets one of five (5) factors articulated

in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983). The five factors are: 1) relishing; 2) gratuitous violence; 3) needless mutilation; 4) senselessness and 5) helplessness. *Id.* Each of these factors is meant to be an expression of the defendant's mental state. None of these five factors exist in the instant case.

To support a finding of cruelty, the state must prove beyond a reasonable doubt that the "victim consciously experienced physical or mental pain prior to death ... **and the defendant knew or should have known that suffering would occur.**" *State v. Trostle*, 191 Ariz. 4, 951 P.2d, 869, 883 (1997)(emphasis added). Here there was no evidence to support the finding of cruelty.

The trial judge did not make specific findings with respect to the *Gretzler* factors or to the cruelty prong. Rather, the judge simply found that under the circumstances of the case, in his opinion, the murder was especially heinous, cruel and depraved. The Arizona Supreme Court attempted to cure this error by putting its own gloss on the trial judges finding. It held that the murder constituted gratuitous violence, senselessness, helplessness and was cruel. In fact, the evidence does not support the state court's conclusion.

As a matter of Arizona law, senselessness and helplessness alone are insufficient to support a finding of heinousness or depravity. *Trostle*, 191 Ariz. 4. In this case, neither finding is supported by the evidence. The Arizona supreme court stretches the definition of senselessness beyond its constitutional boundaries in violation of clearly established federal law when it found that because the sexual assault could have been

accomplished without the homicide, the murder was senseless. This finding begs the question. If this were to be the law, then every felony murder would be senseless because every felony, except murder, can be accomplished without killing. As a result, the aggravating factor would not serve its narrowing function and the imposition of a death sentence on this basis is arbitrary and capricious. *Godfrey v. Georgia,* 446 U.S. 420; *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853.

Likewise there is no evidence that the victim was helpless. To the contrary, the victim was middle-aged woman of similar size and build to Mr. Lopez. R.T. 7/13/90 (a.m.), Ex. 1. The testimony of Dr. Phillip Keen establishes that in, fact the victim, was not helpless. *Id.* at 22, 29.

Finally, there is no evidence of gratuitous violence in this case. Dr. Keen testified that the wounds inflicted were to a lethal part of the body. Rather than support a finding of gratuitous violence, the evidence as to the number of wounds and the weapon used support the conclusion that the homicide was an impulsive act that got out of control due to a psychotic reaction.

Judge D'Angelo and the Arizona Supreme Court ignored Dr. Keen's testimony as well as the testimony as to Mr. Lopez's mental state as it relates to this aggravator. Judge D'Angelo did not even understand that Dr. Keen's testimony was offered in rebuttal to the (F)(6) aggravator. Instead, he characterized the testimony as being offered as non-statutory mitigation. ROA 103. Also, the evidence as to Mr. Lopez's mental state presented at trial and resentencing established that Mr. Lopez was incapable of forming

the requisite mental state required for a finding under the (F)(6) aggravator. Mr. Lopez could not form the intent for the heinous or depraved prong, nor, could he foresee the cruelty of the crime because of his severely impaired state of mind. ROA 71; ROA 99; R.T. 7-13-90 (a.m.), Ex. 3; R.T. 7-13-90 (p.m.), Exs. 6, 8, 9, 10, and 11.

Mr. Lopez's sentence is based entirely on the unconstitutional application of this single aggravating circumstance. The aggravating circumstance is not supported by the evidence and the Arizona courts applied an unconstitutionally vague and overbroad construction of this aggravator to this case. Their decision is contrary to and an unreasonable application of *Godfrey*, *Maynard*, and their progeny. Further, the Arizona court's decision involves an unreasonable application of the facts. 28 U.S.C. § 2254 (d). Accordingly, Mr. Lopez's sentence is in violation of the Sixth, Eighth, and Fourteenth Amendments and should be set aside.

For all these reasons, Petitioner asks this Court to grant Petitioner relief on these claims and vacate his death sentence, or alternatively, to schedule an evidentiary hearing.

Respectfully submitted this 6th day of April, 2006.

BY: */s/ Kelley J. Henry*
Kelley J. Henry
Assistant Federal Public Defender
Denise I. Young

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed electronically.

Notice of this Filing will be sent by operation of this Court's electronic filing system to counsel for respondent, Ms. Dawn Northup, Esq., 1275 W. Washington, Phoenix, AZ 85007-2997 on this the 6th day of April, 2006.

/s/ Kelley J. Henry
Counsel for Petitioner

No. 05-99012

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER MARK SCOTT,

Petitioner - Appellant,

vs.

DORA SCHRIRO, Director,
Arizona Department of Corrections, and
JOHN ONTIVEROS, Warden,
Arizona State Prison - Eyman Complex,

Respondents - Appellees.

On Appeal from the United States District Court
District of Arizona, No. CIV-97-1554-PHX-PGR

OPENING BRIEF OF APPELLANT

JON M. SANDS
Federal Public Defender

MICHAEL L. BURKE (Arizona Bar No. 013173)
JENNIFER Y. GARCIA (Arizona Bar No. 021782)
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 / (602) 889-3960 (facsimile)

COUNSEL FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

Table of authorities . . . . . iv-viii

Jurisdictional statement 1

Standard of review 1

Statement of the issues presented for review 2

I. Certified Issue 2

II. Uncertified Issues 2

Statement of the case 3

Statement of the facts 4

A. Introduction 4

B. The Crime 6

C. Scott's History 7

D. Scott's Role in the Crime 12

E. Scott's Interrogation 14

F. State Court Procedural History 16

G. Federal Habeas Corpus Proceeding 38

1. District Court Proceedings 38

2. Proceedings before this Court 39

Summary of argument 41

Argument 44

I. Scott received ineffective assistance of counsel at sentencing in violation of the Sixth Amendment to the United States Constitution and the district court erred in finding otherwise 44

A. Scott was constitutionally entitled to effective assistance of counsel during his capital sentencing proceedings 44

B. Steinle provided ineffective assistance of counsel when he failed to present readily-available mitigation evidence at Scott's capital sentencing proceedings 47

1. The court-ordered pre-sentence report contained crucial evidence in mitigation of Scott's sentence that Steinle failed to develop and present to the sentencing court . 49

2. Steinle compounded his failure to develop and present Milke's statements regarding leniency by ensuring that the court did not read the pre-sentence report until after the special verdict had been prepared 55

3. Finally, Steinle's opposition to Mark Milke addressing the court regarding Scott's sentence further illustrated Steinle's apparent lack of knowledge regarding Milke's leniency recommendation and completed Steinle's attempt to preclude the sentencing court from considering that information during Scott's sentencing 59

C. Scott was prejudiced by Steinle's failures and this Court should remand this case for resentencing as a result 63

1. Mark Milke's request for leniency is the type of mitigation evidence that could have made a difference to reasonable sentencing body and the state court's finding otherwise constitutes an objectively unreasonable application of Strickland 66

2. In addition, because the state court's determination did not include consideration of the additional mitigating circumstance found by the Arizona Supreme Court on direct review, its determination that Scott was not prejudiced by its previous failure to consider Milke's statements is fatally flawed 71

II. The District Court erred in concluding that Scott's additional claims of ineffective assistance of counsel were procedurally defaulted 73

A. The District Court erroneously concluded that all but one of Scott's IAC claims were procedurally defaulted 74

B. The District Court erroneously concluded that the IAC claims were unexhausted 79

III. The District Court erred in holding (1) that Scott could not assert a constitutional right to the effective assistance of post-conviction counsel, or in the alternative, (2) that the gross incompetence of Scott's state post-conviction attorney did not excuse his failure to exhaust his various claims of trial and appellate ineffective assistance of of counsel 81

Conclusion 85

Certificate of compliance 87

Statement of related cases 88

Certificate of service 89

TABLE OF AUTHORITIES

FEDERAL CASES

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001) 59, 66, 69

Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) 2

Allen v. Woodford, 366 F.3d 823 (9th Cir. 2004) 2

Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007) 78

Angelone v. Duetscher, 500 U.S. 901 (1991) 64

Argersinger v. Hamlin, 407 U.S. 25 (1972) 46

Atkins v. Virginia, 536 U.S. 304 (2002) 40, 84

Beck v. Alabama, 447 U.S. 625 (1980) 84

Bell v. Cone, 535 U.S. 685 (2002) 63

Booth v. Maryland, 482 U.S. 496 (1987) 44, 45

Bryan v. Mullin, 335 F.3d 1207 (10th Cir. 2003) 48

Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005) 48

Caro v. Calderon, 165 F.3d 1223 (9th Cir. 1999) 52

Clark v. Mitchell, 425 F.3d 270 (6th Cir. 2005) 48

Clark v. Murphy, 331 F.3d 1062 (9th Cir. 2003) 2

Cone v. Bell, 243 F.3d 961 (6th Cir. 2001) 63

Correll v. Ryan, 465 F.3d 1006 (9th Cir. 2006) 49, 53, 66

Cristin v. Brennan, 281 F.3d 404 (3d Cir. 2002) 80

Cuyler v. Sullivan, 446 U.S. 335 (1980) 47

Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989) 64

Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003) 52, 71

Dugger v. Adams, 489 U.S. 401 (1989) 75

Evitts v. Lucey, 469 U.S. 387 (1985) 83, 85

Florida v. Nixon, 543 U.S. 175 (2004) 48, 49

Ford v. Georgia, 498 U.S. 411 (1991) 75

Gardner v. Florida, 430 U.S. 349 (1977) 84

Gerlaugh v. Stewart, 129 F.3d 1027 (9th Cir. 1997) 63

Gideon v. Wainwright, 372 U.S. 335 (1963) 46, 47

Gilmore v. Taylor, 508 U.S. 333 (1993) 64

Gregg v. Georgia, 428 U.S. 153 (1976) 84

Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003) 48

Harris v. Reed, 489 U.S. 255 (1988) 76, 77

Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) 59

Insyxiengmay v. Morgan, 403 F.3d 657 (9th Cir. 2005) 80

Johnson v. Mississippi, 486 U.S. 578 (1988) 75, 81

Johnson v. Zerbst, 304 U.S. 458 (1938) 47

Jones v. United States, 526 U.S. 227 (1999) 39

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002) 59

Kellogg v. Scurr, 741 F.2d 1099 (8th Cir. 1984) 63

Kirby v. Illinois, 406 U.S. 682 (1972) 46

Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007) 53, 54, 70

Lockett v. Ohio, 438 U.S. 586 (1978) 62, 64, 71, 72

Lockhart v. Fretwell, 506 U.S. 364 (1993) 67, 68

Lopez v. Schriro, 491 F.3d 1029 (9th Cir. 2007) 1

McMann v. Richardson, 397 U.S. 759 (1970) 47

Payne v. Tennessee, 501 U.S. 808 (1991) 45

Pennsylvania v. Finley, 481 U.S. 551 (1987) 82

Powell v. Alabama, 287 U.S. 45 (1932) 46, 47

Reece v. Georgia, 350 U.S. 85 (1955) 47

Ring v. Arizona, 536 U.S. 584 (2002) 3

Rompilla v. Beard, 545 U.S. 374 (2005) 48, 68

Roper v. Simmons, 543 U.S. 551 (2005) 84

Schriro v. Summerlin, 542 U.S. 348 (2004) 3

Scott v. Illinois, 440 U.S. 367 (1979) 46

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) 2

Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994) 75, 78

Stankewitz v. Woodford, 365 F.3d 706 (9th Cir. 2004) 52, 54, 71

Strickland v. Washington, 466 U.S. 668 (1984) . . . . . *passim*

Summerlin v. Schriro, 427 F.3d 623 (9th Cir. 2005) 70

Trop v. Dulles, 356 U.S. 86 (1958) 84

United States v. Span, 75 F.3d 1383 (9th Cir. 1996) 63

United States v. Tucker, 716 F.2d 576 (9th Cir. 1983) 63

United States v. Wade, 388 U.S. 218 (1967) 46

Wiggins v. Smith, 539 U.S. 510 (2003) 48

Williams IV v. Turpin, 87 F.3d 1204 (11th Cir. 1996) 81

Williams (Terry) v. Taylor, 529 U.S. 362 (2000) 66, 67

Wright v. West, 505 U.S. 277 (1992) 67

STATE CASES

State v. Bolton, 896 P.2d 830 (Ariz. 1995) 83

State v. Glassel, 116 P.3d 1193 (Ariz. 2005) 45

State v. Milke, 865 P.2d 779 (Ariz. 1993) 6, 23

State v. Scott, 865 P.2d 792 (Ariz. 1993) . . . . . *passim*

State v. Styers, 865 P.2d 765 (Ariz. 1993) 6, 23

State v. Williams, 904 P.2d 437 (Ariz. 1995) 45

FEDERAL STATUTES

18 U.S.C. § 3599 38

21 U.S.C. § 848 38

28 U.S.C. § 1291 1

28 U.S.C. § 1651 1

28 U.S.C. § 2241 1

28 U.S.C. § 2254 . . . . . 1, 4, 44

FEDERAL RULES

Fed. R. App. P. 32 87

Fed. R. Civ. P. 60 . . . . . 1, 4, 40, 41

Fed. R. Evid. 201 advisory committee notes 78

STATE STATUTES

A.R.S. § 13-703 (1990) 19, 21, 56, 60

A.R.S. § 13-704 (1993) 34

STATE RULES

Ariz. R. Crim. P. 11 10

Ariz. R. Crim. P. 32. . . . . 76, 82, 83

MISCELLANEOUS

Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings,* 91 Cornell L. Rev. 1079 (2006) 83

Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel,* 2003 Wis. K. Rev. 31 83

The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) . . 20, 24, 33, 48, 51

The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) 20, 24, 33, 48, 49, 51

JURISDICTIONAL STATEMENT

Roger Mark Scott ("Scott") is an indigent death row prisoner in the custody of the Arizona Department of Corrections. On March 3, 2005, the United States District Court for the District of Arizona entered a final order denying Scott's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ER 23.) The district court had jurisdiction over Scott's habeas petition pursuant to 28 U.S.C. §§ 2241 and 2254.

Following the denial of his motion to alter or amend the judgment, Scott filed a timely notice of appeal on July 1, 2005. (ER 226.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291, 1651 and 2253. Following appointment of new counsel, Scott filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6) on March 12, 2007. (ER 153.) The district court denied Scott's Rule 60(b) motion on May 2, 2007. (ER 1.) Scott filed a timely notice of appeal from the district court's denial of his Rule 60(b)(6) motion on May 22, 2007. (ER 151.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 1651. By order dated July 23, 2007, this Court directed that "the district court's denial of the Rule 60(b)(6) motion and its denial of the underlying habeas petition will be briefed in one set of briefs under this case number, 05-99012."

STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of habeas relief. *Lopez v.*

Schriro, 491 F.3d 1029 (9th Cir. 2007); *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). It reviews the district court's factual findings for clear error. *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003). Claims alleging ineffective assistance of counsel are mixed questions of law and fact, and are reviewed *de novo*. *Allen v. Woodford*, 366 F.3d 823, 836 (9th Cir. 2004), *amended by* 395 F.3d 979 (9th Cir. 2005); *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Certified Issue

I. Did the District Court err in rejecting Scott's claim that he received ineffective assistance of counsel at sentencing in violation of the Sixth Amendment to the United States Constitution when his trial attorney failed to present mitigating evidence concerning the victim's father's recommendation that he be treated leniently by the court?

Uncertified Issues

II. Did the District Court err in concluding that Scott's various claims of ineffective assistance of counsel were procedurally defaulted?

III. Did the District Court err in holding (1) that Scott could not assert a constitutional right to the effective assistance of post-conviction counsel, or in the alternative, (2) that the gross incompetence of Scott's state post-conviction attorney did not excuse his failure to exhaust his various claims of trial and appellate ineffective assistance of counsel?

STATEMENT OF THE CASE

This appeal arises from the district court's denial of a petition for a writ of habeas corpus in a capital case. Scott was sentenced to death by the trial court following his conviction of first-degree murder on an accomplice liability theory.[1] Scott also received a life sentence and a consecutive 22-year sentence for his convictions for conspiracy to commit first-degree murder and kidnapping, respectively.

The Arizona Supreme Court affirmed Scott's convictions and sentences on direct review. *State v. Scott*, 865 P.2d 792 (Ariz. 1993). Pursuant to Arizona procedure, the state supreme court automatically filed a notice of post-conviction relief on Scott's behalf in the trial court. (Trial Docket "Tr. Dkt." 520.) The trial court subsequently denied the three-page, one-issue post-conviction petition filed on Scott's behalf. (ER 73.) The Arizona Supreme Court denied Scott's petition for review of this ruling on October 20, 1997. (ER 70.)

---

[1]The United States Supreme Court subsequently held that the Arizona statute under which Scott was sentenced violated the Sixth Amendment to the United States Constitution because it permitted the trial judge, rather than the jury, to find facts that made defendants eligible for the death penalty. *Ring v. Arizona*, 536 U.S. 584 (2002). Despite the indisputably unconstitutional nature of his death sentence, however, Scott remains under that sentence because of the Supreme Court's refusal to apply *Ring* retroactively to death row prisoners whose cases, like Scott's, were already on collateral review when *Ring* was decided. *See Schriro v. Summerlin*, 542 U.S. 348 (2004).

On July 25, 1997, Scott filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (District Court Docket ("Dist. Ct. Dkt.") 1.) The district court ultimately dismissed that petition with prejudice on March 3, 2005. (ER 23.) Scott timely appealed that ruling to this Court.

On March 12, 2007, Scott filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6). (ER 153.) That motion was filed pursuant to a February 22, 2007, order of this Court, directing the district court to entertain Scott's Rule 60(b)(6) motion. The district court denied Scott's Rule 60(b)(6) motion on May 2, 2007. (ER 1.) Scott filed a timely notice of appeal. (ER 151.) Scott's appeal of the district court's denial of his Rule 60(b)(6) motion was subsumed under the existing appeal of the denial of his habeas corpus petition.

STATEMENT OF THE FACTS

A. INTRODUCTION

With a likelihood bordering on near certainty, the three judges of the panel to which this appeal is assigned will be the final jurists to review the merits of Scott's case before he is executed. The Antiterrorism and Effective Death Penalty Act ("AEDPA"), and the myriad cases attempting to decipher AEDPA's provisions, anticipate that this Court's role will be a limited one. Under the normal circumstances envisioned by AEDPA's scheme, this Court is presented with claims

previously addressed on the merits by the state courts and is charged simply with assuring that those merits decisions do not lie in the outer fringe of judicial reason; namely, that they are not contrary to, nor involve an unreasonable application of, clearly established federal law, and that they are not based on an unreasonable determination of the facts in light of the evidence presented. AEDPA rests on the foundational principles that, except in rare circumstances, state courts are capable of protecting the constitutional rights of criminal defendants, and in those rare instances were the state courts reach unreasonable decisions, the federal courts can remedy the error through the conscientious use of the writ of habeas corpus.

Scott's case, however, does not fit neatly into the judicial review process contemplated by AEDPA. This capital case reaches the Court with only one issue certified for appeal, and remarkably, that issue is the *sole* issue addressed by the district court on the merits. Scott's case is one in which critical claims of constitutional error have gone unaddressed in both state and federal court due to a lethal combination of judicial error and attorney neglect, indifference and inexperience. As Scott demonstrates in the following pages, this Court will be able to remedy some of these errors simply by properly applying longstanding habeas corpus doctrines such as exhaustion and fair presentment. Others errors, however, will require the Court to look at the theoretical underpinnings of AEDPA itself to

determine whether the Act's provisions – specifically, its prohibition on relief for the ineffectiveness of post-conviction counsel – comport with the dictates of the Constitution.

B. THE CRIME

On December 2, 1989, James Styers shot and killed four-year-old Christopher Milke in the desert outside of Phoenix. *See State v. Styers*, 865 P.2d 765, 769 (Ariz. 1993). Styers killed Christopher at the request of Christopher's mother, Debra Milke, who was Styers' roommate. *See State v. Milke* , 865 P.2d 779, 782 (Ariz. 1993). Milke had confided in Styers her desire to have Christopher killed, and she and Styers discussed the plan on several occasions. *Id.*

Scott's role in Christopher's death was more peripheral. The record is clear that Scott was with Styers the afternoon he killed Christopher and that he assisted Styers in attempting to cover up the crime after it occurred. The record is less clear, however, concerning the degree to which Scott was aware of – and was an active participant in – the plan to murder Christopher. Admittedly, some of the confusion regarding Scott's role in the crime stems from inconsistencies in his account of the events. At all times, except for in comments made to Phoenix police officers after eighteen hours of interrogation, Scott has maintained that, although he knew Milke and Styers had discussed killing Christopher, he never believed Styers would in fact

do so. (ER 551-52; ER 507.)

To understand the nature of Scott's involvement in Christopher's death and the apparent inconsistencies in his accounts of that involvement, it is critical first to have an understanding of Scott himself. Unfortunately, as will become evident, the trial judge in this case lacked this critical understanding of the man he sentenced to death.

C. SCOTT'S HISTORY

Scott was 41 in December 1989. *State v. Scott*, 865 P.2d 792, 795 (Ariz. 1993). An alcoholic, he had been unemployed for years and, except for a brief and unsuccessful marriage, had resided with his mother his entire life. *Id.* Emotionally, socially and economically adrift, Scott led a life limited to drinking, caring for his elderly and ill mother in the small apartment they shared, and spending time with his friend, Jim Styers. Scott had known Styers for more than 20 years, but saw him only sporadically throughout that time. *See Scott*, 865 P.2d at 795. (ER 513-14.) He ran into Styers again in early 1989, having not seen him for more than five years, and the two men resumed their friendship. (ER 514.) Because Scott neither owned nor had access to a vehicle, however, his contacts with Styers were largely dependant on Styers' willingness to come to Scott's apartment or to provide him with a ride. (ER 514.)

A psychologist who conducted a pretrial competency evaluation of Scott later

observed that Styers "was one of the very few people that Scott had any kind of close, long-lasting relationship with, if he was not his only friend," and he was very much an "authority figure" in Scott's life. (ER 228 at B.1.c.-d.) The psychologist observed that Scott would have been "extremely loathe to do anything that might provoke [someone like Styers] to reject or abandon him." (ER 228 at B.1.b.)

1948 to 1988

Abandonment was not new territory for Scott. Born on June 4, 1948, in Omaha, Nebraska, Scott was the second son of Clifford and Wilma Scott. (ER 471.) Scott's only other sibling was his older brother, Dennis, who was institutionalized at an early age because of mental retardation. (ER 349; ER 573, 574; ER 588.) Scott's father, an alcoholic, left the family when Scott was five and, five years later, Wilma moved the family to Phoenix in the hopes of alleviating Scott's asthma. (ER 349; ER 573; ER 587, 588.)

Although early elementary school records demonstrate that Scott was initially an average student, his academic performance continued to decline until he dropped out of school in the tenth grade. (ER 471.) Scott's intellectual abilities may well have been affected by head injuries he sustained after being struck by a car while in the seventh grade. (ER 164.) Due, however, to the failure of Scott's trial, post-conviction and prior habeas attorneys to develop an adequate record of the

considerable mitigation in Scott's case, more specific information regarding this serious accident, although extant, is not part of the record in this appeal.

Although Scott's career prospects as a high school dropout would necessarily have been limited, the reality proved far worse than might have been expected. In fact, Scott was simply unable to hold a job for any meaningful length of time, and by 1977, he had fallen out of the workforce entirely. (ER 471.) Thus, although Scott had worked sporadically as a mechanic, maintenance worker, and wallpaper hanger while in his twenties, by 1989, he had been unemployed for more than a decade. (ER 471.)

One explanation for Scott's inability to adapt to adult, societal expectations may have been the combined effect of head injuries he sustained in a series of automobile and motorcycle accidents. As mentioned above, Scott was struck by an automobile when he was in the seventh grade. Then, in both 1971 and 1972, he was involved in automobile accidents in which he was rendered unconscious and, two years later, he collided with a car while driving his motorcycle, which again rendered him unconscious for several minutes. (ER 164; ER 349; ER 587.)[2]

There is no question that Scott sustained some degree of brain damage as a

---

[2]Once again, due to failures of Scott's prior attorneys to develop the mitigation record in this case, more specific information regarding these accidents, although available, is not part of the record on appeal.

result of these accidents. Scott told his trial counsel in early 1990 that "he had head injuries which caused brain shrinkage." (ER 599; ER 595.) Indeed, a CT scan performed on Scott in 1987, two years before the crime in this case, revealed the presence of unusual brain atrophy. (ER 163.) Scott began suffering seizures in 1983, for which he was prescribed Dilantin. (ER 472.) Remarkably, although trial counsel was aware of both the head injuries and Scott's seizures, he failed to retain an expert in neuropsychology or neurology to evaluate Scott to verify the existence of brain damage. Rather, trial counsel merely asked the court to order a run-of-the-mill competency evaluation to ascertain Scott's "mental condition." (ER 599; ER 595.) *See* Ariz. R. Crim. P. 11.

Finally, additional blame for Scott's failure to function in society lies with his alcoholism. At one point during the 1970s, Scott was drinking approximately two fifths of whiskey daily. (ER 576.) At the time of his sentencing in 1991, Scott informed the writer of his pre-sentence report that he had not had any difficulties with alcohol in the preceding nine years. (ER 472.) Yet, a witness who saw Scott with Styers several times in the weeks before Christopher's death, testified that Scott "always had liquor on his breath." (ER 555-56.)

1989

Whether Scott's intellectual and emotional difficulties were attributable to his

brain injuries, his alcoholism, his seizure disorder, or a combination of these factors, even the grossly minimal record created by Scott's prior attorneys raises serious doubts as to whether the damaged man who rode with Styers out to the desert on the afternoon of December 2, 1989, was a knowing and willing participant in Milke's and Styers' plan to kill Christopher. Denise Pickinpaugh, Debra Milke's sister, was "well acquainted" with Scott and thought he was "a relatively 'dumb' individual who was simply not capable of hurting anyone or developing a conspiracy of this nature." (ER 469.) Pickinpaugh believed "Scott was 'sucked into this'" crime by Milke and Styers and that he "just 'followed along'." (ER 469.)

Approximately one week before Styers murdered Christopher, he told Scott of the plan Milke had devised. *Scott*, 865 P.2d at 795. (ER 518-19.) Scott responded that Milke, who was then residing with Styers, was "a very sick person" and that Styers should tell her to move out as soon as possible. (ER 520.) He told Styers that he did not want to hear from him again until Milke had moved out. (ER 521.) The next day, however, Styers told Scott that he had informed Milke that "there was no way that he was going to help her in this way, and that if she wanted it, she could do it herself." (ER 521.) During the remainder of his contacts with Styers that week, Scott had the impression that Styers had "turned against" Milke and that he had told her to move out. (ER 524, 528.)

D. SCOTT'S ROLE IN THE CRIME

On the morning of Christopher's murder, Styers told Scott in a telephone conversation that Milke was packing and that he wanted to get out of the house and go for a ride. (ER 525.) Styers, accompanied by Christopher, picked Scott up in Debra Milke's car and the three ran errands, stopping at two drugstores and eating lunch at a pizzeria. *Scott*, 865 P.2d at 795. (ER 525.) Following lunch, Styers began to drive to the desert northwest of Phoenix. Scott testified at trial that he believed that he, Styers and Christopher were going to watch gliders at a gliding school they had previously visited. (ER 526-27.) When asked at trial if there had been discussion that day about killing Christopher, Scott responded:

> No, everything was just fine between Jim and Chris. From what I had seen, he had more or less turned sour towards Debbie and her thoughts, and he was being very good to Chris for approximately three days beforehand. He had told [Milke] to just move or – I don't believe exactly what he told me, but any way he more or less told her to get out, according to what he told me.

(ER 528.)

Eventually, as they drove west of Phoenix, Styers told Scott to take over the driving. (ER 529.) Scott testified that he continued driving to the gliding school until told by Styers to pull over, apparently under the pretense that Styers needed to "relieve himself." (ER 529.) Christopher accompanied Styers into the desert. (ER

530.) Scott remained sitting in the parked car until he became concerned that, because the vehicle was sitting in a dip in the road, other traffic might not be able to see it. Accordingly, Scott drove the car up and down the road a couple of times, waiting for Styers. He heard three gunshots while he was driving. Scott then saw Styers standing on the side of the road without Christopher. When Styers climbed into the car, he stated, "Come on, let's get out of here. That little bastard will never bother me again." (ER 532.)

As Scott drove, stunned by what had just occurred, Styers disposed of the shells from his gun by throwing them out of the car window. *Scott*, 865 P.2d at 795. Then, while he changed his shoes, Styers instructed Scott to drive to a busy Phoenix shopping mall. *Id.* (ER 534-35.) Once there, Styers placed the gun in the glove compartment and both men entered the mall. *Id.* Inside, Styers and Scott separated and Styers told mall security that Christopher was lost somewhere in the building. *Scott*, 865 P.2d at 795.

Later that afternoon, Styers, accompanied by a mall employee, saw Scott and said, "Oh, there's one of my neighbors." (ER 554.) Approaching Scott, Styers first asked him if he had seen Christopher, and then asked him how he had gotten to the mall. When Scott did not respond, Styers asked, "Well, did Phil bring you down?" (ER 540.) Under the pretext of looking for Christopher in the parking lot, Styers and

Scott returned to Milke's car, where Styers gave Scott his gun and his shoes and told Scott to dispose of them. *Scott*, 865 P.2d at 795. (ER 537-38.) Scott threw Styers' shoes into a planter, but was too nervous to dispose of the gun. 865 P.2d at 795. (ER 538.) He took a bus back to his apartment, where he hid Styers' gun in a box in his closet. *Scott*, 865 P.2d at 795-96.

E. SCOTT'S INTERROGATION

Scott spent the evening of December 2nd at home with his mother, struggling over the events of the day. (ER 542-43.) Unable to tell his mother what had happened, he intended to wait until his mother went to bed, leave her a note, and then go to the police station. (ER 542-43.) In Scott's mind, he "figured it would be a lot better if [he] went to [the police.]" (ER 543.) Scott pretended to go to bed, hoping that this would convince his mother that she too was tired, which would permit Scott to go to the police station without having to explain the situation to his mother. (ER 542-43, 544.)

At approximately 1:00 a.m., however, the police came to Scott. (ER 542.) Shortly before, Styers had mentioned to the police for the first time after hours of questioning that Scott had in fact been with him and Christopher at the pizzeria earlier in the day. (ER 560-61.) In response to this new information, the police drove Styers to Scott's apartment.

In Styers' presence, a Phoenix police officer questioned Scott at his apartment. (ER 562; ER 541-42.) Scott confirmed that he had been with Styers and Christopher that morning. Styers again mentioned "Phil" and, in response, Scott told the police that Phil was an old high school friend with whom, after being dropped off by Styers earlier in the day, he had coincidentally gone to the same shopping mall where Styers later reported Christopher missing. (ER 542.)

The police left Scott's apartment with Styers, but returned approximately one hour later and again questioned Scott. (ER 558.) They then transported him to the police station where, over the next 19 hours, he was interrogated by various police detectives. *See Scott*, 865 P.2d at 796.

Serious questions exist concerning the constitutionality of the interrogation to which Scott was subjected. Reason would suggest that a detailed recounting of that lengthy interrogation (which included, among other things, failing to timely Mirandize Scott and depriving him of sleep, food and his seizure medication) would be appropriate at this point in the brief. Sadly for Scott, however, those facts would be irrelevant to the issues actually before this Court because, remarkably, his federal habeas counsel failed to raise any constitutional claim pertaining to the interrogation in Scott's habeas corpus petition, despite the fact that the issue had been fully exhausted in Scott's direct appeal to the Arizona Supreme Court. *See Scott*, 865 P.2d

at 797-98.

With this gaping void in the preservation of Scott's case, it is sufficient for purposes of this brief to note that, after many hours of interrogation, Scott told the police that Styers had killed Christopher and he described Milke's involvement in the murder. He led the police to Christopher's body, to the shoes Styers had worn, and to the gun Styers had used to kill Christopher, which was still sitting in the box in Scott's closet.

F. STATE COURT PROCEDURAL HISTORY

Scott, Styers and Milke were subsequently indicted for first-degree murder, conspiracy and kidnapping.[3] (ER 601.) Scott pled not guilty to the charges against him and Roland Steinle of the Maricopa County Public Defender's Office was appointed as his attorney. (Tr. Dkt. 33.)

The Plea Offer

The State offered Scott a plea agreement to second-degree murder in exchange for his testimony against Styers and Milke. (ER 595-98; ER 235.) Concerned, however, that Scott's brain injuries and medical condition "affected his ability to understand the nature and consequences of his acts," and that these conditions thus might prevent him from "freely and voluntarily" accepting the plea, Steinle requested

[3]Milke and Styers were also charged with child abuse. (ER 601.)

that the trial court order Scott to receive a competency evaluat 11 of the Arizona Rules of Criminal Procedure. (ER 599; ER 59 agreed to the competency evaluation, but withdrew the pl concerns, apparently premised on Steinle's assertions, that Scot comply with its terms "at this time." (ER 597-98.)

The Competency Evaluation

The prosecution and Steinle stipulated that psychiatrist Alexander Don, M.D., and psychologist Donald Tatro, Ph.D., would evaluate Scott's mental condition. (Tr. Dkt. 127.) The evaluations conducted by Drs. Don and Tatro were expressly limited to determining Scott's competency to stand trial, his competency to enter into a guilty plea, his "probable mental condition at the time of offense," and the relationship between any mental disease or defect to offenses with which Scott was charged. (Tr. Dkt. 167.)

In preparation for his evaluation of Scott, Dr. Don reviewed Scott's county jail medical file and the police reports, including transcripts of some of Scott's interrogations. (ER 511.) Dr. Tatro reviewed nothing in preparation for the evaluation, "other than the accounts [he] had read in the newspaper and other media." (ER 508-09.) Remarkably, Scott's attorney, despite knowing of Scott's history of head injuries and seizures, did not provide any material or information to the two

doctors. (ER 235-36.) Both doctors concluded that Scott was competent to stand trial. (ER 580-81; ER 591-92.)

Trial and Sentencing

With the second-degree murder plea offer withdrawn by the prosecution, Scott proceeded to trial in January 1991. The court's first order of business was to conduct a voluntariness hearing. The prosecution called two of the six detectives who interrogated Scott during the many hours he was held at the Phoenix police station. *See* Dist. Ct. Dkt. 54, at 32-35. Steinle, in turn, advised Scott not to testify, called no witnesses, and presented no evidence. (ER 566-67.) Not surprisingly, the court found Scott's statements to be voluntary and found no violation of *Miranda*. (ER 563-64.) Clearly, Scott's statements to the police were the *sine qua non* of the prosecution's case against Scott, Styers and Milke. Inexplicably, however, Steinle presented no meaningful opposition whatsoever to the prosecution's use of these questionably obtained, but unquestionably damning, statements.

In the memorandum of law in support of Scott's petition for writ of habeas corpus, Scott's prior counsel details Steinle's additional failings during the guilt phase of the trial. (Dist. Ct. Dkt. 54, at 35-36.) Those failings were considerable, but once again, a detailed recounting of them here would not aid the Court in its resolution of this appeal because, as is discussed below, the district court found that

Scott's state post-conviction counsel raised no claims of guilt-phase ineffective assistance of counsel.[4] Accordingly, although Scott's federal habeas counsel alleged that Steinle provided Scott constitutionally ineffective assistance of counsel during the guilt phase of his trial, the district court found the claims to be procedurally barred. (*See* Dist. Ct. Dkt. 54 at 35-36; ER 58.)

On February 7, 1991, the jury convicted Scott of all counts in the indictment. (ER 504.) Because the prosecution had previously indicated its intent to seek the death penalty against Scott, the trial court conducted a sentencing hearing on April 5, 1991, pursuant to Ariz. Rev. Stat. § 13-703 (1990), for purposes of determining aggravating factors and mitigating circumstances relevant to the death sentence. Steinle did not call a single witness at the hearing. Instead, he submitted letters from the sheriff's department, Scott's mother, and Scott's neighbor; a redacted report by Dr. Tatro; and a document hand-written by Scott, describing his life. (ER 498-502.) The State elected to "rely[] on what occurred during the trial for purposes of aggravation," but did call Dr. Don as a rebuttal witness to rebut Tatro's report. (ER 497.)

There can be little doubt that Steinle's preparation for, and presentation at, the

---

[4]Indeed, Scott's first post-conviction counsel, Neal Bassett, told the state court that he believed Steinle "did a super job in representing Mr. Scott." (ER 418.)

mitigation stage of Scott's trial was grossly inadequate. For example, despite having been on notice for more than one year prior to sentencing that Scott had sustained several head injuries, that he suffered from a seizure disorder, and that, in Scott's words, he had "brain shrinkage," Steinle did not have Scott evaluated by an expert qualified to assess his condition, nor did he even attempt to obtain then-existing medical records that would have confirmed that Scott indeed did suffer from brain atrophy.

The version of *The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* in effect at the time of Scott's trial required that defense counsel seek the immediate assistance of experts in preparation of the defense. *The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.4.1(D)(7) (1989) ("1989 ABA Guidelines").[5] Had Steinle exerted even minimal effort in attempting to uncover mitigating evidence concerning Scott's brain injuries, he would have been able to present the trial court with valuable information relevant to whether a death sentence was appropriate in Scott's case.

In the Kafkaesque nightmare that is this case, however, the district court

---

[5]Steinle's performance should be also be examined in light of the 2003 ABA Guidelines. *See, e.g.*, n.27, *infra*.

concluded that Scott is precluded from seeking federal habeas relief for his trial counsel's constitutionally insufficient performance at sentencing because his state post-conviction counsel presented only one, narrow sentencing-phase claim before the state court. That claim is argued, *infra*, as Scott's sole, certified issue on appeal.[6]

Sentencing occurred on April 22, 1991. (ER 98.) Concerning aggravating factors, the court found beyond a reasonable doubt that Scott committed murder (under an accomplice theory) in expectation of receiving a specific sum of money, that the murder was committed in an especially heinous and depraved manner, and that Scott was an adult and the victim was below the age of fifteen. *See* A.R.S. § 13-703 (F)(5)(6) and (9) (1990). (ER 129-36; ER 108-14.)

The court found the following mitigating circumstances: Scott's cooperation with police, his conduct while incarcerated and during trial, his "bond of love" with his mother, and his psychological history.[7] (ER 139-43; ER 114-21.) The court noted that "there is evidence to suggest that [Scott] has a history of alcohol abuse;" however,

---

[6]Scott argues as an uncertified issue, *infra* at Section II, that the district court erred in concluding that he was procedurally barred from obtaining federal habeas relief for other instances of Steinle's deficient performance.

[7]The court observed that "there is some nexus between the defendant's psychological characteristics and his involvement in this scheme" but that it did "not ris[e] to the level of the mitigating circumstance set forth in § 13-703 (G) (1)." (ER 142-43, 145-46; ER 120, 123.)

"the evidence fails to establish the necessary link between the condition in question and [Scott]'s role in these events." (ER 141; ER 119.) The court concluded that the mitigating circumstances were not sufficiently substantial to outweigh the three aggravating factors, and accordingly, it imposed the death sentence for Scott's first-degree murder conviction. (ER 146.)

Direct Appeal

Pursuant to Arizona law, an automatic appeal was then filed with the Arizona Supreme Court. (ER 464.) The appeal was assigned to Garrett Simpson, a colleague of Steinle's at the Office of the Maricopa County Public Defender. (Direct Appeal Docket "DA Dkt." 4.) Simpson subsequently moved to withdraw from representing Scott because the office already represented Debra Milke in her direct appeal. (DA Dkt. 7.) Interestingly, however, Simpson then filed two supplements to the motion to withdraw, identifying at least three possible instances of ineffective assistance of counsel on his colleague's part. (ER 459; ER 457.) Given that, under Arizona law, claims of ineffective assistance of counsel are raised in post-conviction proceedings, not on direct appeal, it is significant that Simpson elected to make a record of Steinle's ineffectiveness before Simpson was replaced by another lawyer. In his supplemental pleadings, Simpson noted Steinle's failure to have Scott testify at the voluntariness hearing, his failure to seek suppression of the gun seized from Scott's

apartment, his failure to present any mitigation witnesses (a failing that "deeply concerned" Simpson), and his failure to develop and present mitigation concerning Christopher's father's belief that Scott should not receive a death sentence. (ER 459; ER 457.)

In December 1991, the state court appointed John Rood as Scott's appellate counsel. (DA Dkt. 13.) Rood ultimately filed a brief on Scott's behalf raising fourteen claims. (DA Dkt. 20.) On December 21, 1993, the Arizona Supreme Court affirmed Scott's convictions and sentences. *Scott*, 865 P.2d 792, 795. The same day, the supreme court issued separate opinions affirming the death sentences imposed on Styers and Milke. *State v. Styers*, 865 P.2d 765; *State v. Milke*, 865 P.2d 779.

Post-Conviction Proceedings

The Arizona Supreme Court filed a Notice of Post-Conviction Relief for Scott in the Maricopa County Superior Court on October 24, 1994. (ER 456.) On January 27, 1995, following an almost three-month delay, the superior court appointed Neal W. Bassett to represent Scott in his post-conviction proceedings. (ER 454.)

On May 31, 1995, without conducting any investigation, hiring any expert witnesses, retaining a mitigation specialist or a fact investigator, or contacting anyone

involved with the case (ER 304),[8] Bassett filed a three-page Petition for Post-

---

[8]In fact, Bassett has admitted under oath that he:

> did not conduct any investigation external to the record such as (a) speaking with Petitioner's former attorneys, (b) speaking with the attorneys for Petitioner's co-defendants, Debra Milke and James Styers, (c) reviewing any portion of their trial records; (d) obtaining and reviewing any of the trial exhibits or other documents not in the record; (e) interviewing any of the witnesses; or (f) seeking to find new or additional evidence which was not introduced at trial or sentencing.

(ER 304.) These actions are in direct contravention of the 1989 and 2003 ABA Guidelines, which require much more from attorneys in capital post-conviction proceedings. *See The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 10.15.1(C) (2003) ("2003 ABA Guidelines") ("Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review."); 2003 ABA Guidelines 10.15.1(E) ("Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to: 1. maintain close contact with the client regarding litigation developments; and 2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position; 3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and 4. continue an aggressive investigation of all aspects of the case."); 1989 ABA Guidelines 11.9.3(B) ("Postconviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsel's files."); 1989 ABA Guidelines 11.9.3(C) ("Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.").

Conviction Relief. (ER 451.) This petition raised only one claim, arguing that trial counsel failed to argue that the leniency recommendation made by Mark Milke, the victim's father, constituted a mitigating circumstance and thus the sentencing court failed to consider that recommendation in imposing sentence on the first-degree murder charge. (ER 451.) The fact section regarding this claim consisted of two sentences (ER 451), and the legal analysis itself was less than two pages long and cited only one case and one statute.[9] (ER 451-53.) On June 28, 1995, Bassett filed a supplement to the petition for post-conviction relief citing two out-of-state cases supporting his claim that a victim's recommendation for leniency is a mitigating factor.[10] (ER 449.)

On July 20, 1995, the court received a letter from Scott attempting to remove Bassett from his case as of June 25, 1995. (ER 447.) According to Scott, Bassett refused to answer his letters and failed to follow through on promises to contact Scott. (ER 447.) Scott asked the court to assist him in finding a new lawyer "that will do his job." (ER 447.)

---

[9]In comparison, the State's Opposition to the Petition for Post-Conviction Relief, which argued that Scott's sole claim was precluded, was seventeen pages long. (Tr. Dkt. 549.)

[10]In the supplement, Bassett noted that the two cases included were given to him by a lawyer with the Arizona Capital Representation Project. (ER 449.)

The State responded to the petition for post-conviction relief on August 18, 1995 (Tr. Dkt. 548), and Bassett filed a reply on August 30, 1995. (ER 440.) The reply was seven pages long. (ER 440-46.)

On November 8, 1995, the court rejected the State's preclusion argument and scheduled oral argument on the merits of Scott's claim. (Tr. Dkt. 566.) On December 5, 1995, the court received a second letter from Scott dated October 12, 1995. (ER 436.) In this letter, Scott asked the Clerk of the Court to provide him with the name of his post-conviction attorney, as Scott had previously informed Bassett (and the post-conviction court) that Bassett was "FIRED." (ER 436.) Scott further stated: "'Lack of dilligence' is the way to decribe 'Neal W. Bassett.'"[11] (ER 436.) The text of this letter compels the inference that Scott had not communicated with Bassett since at least June 25, 1995 (the date of Scott's previous letter), some five-and-a-half months prior, and that Scott was unaware that Bassett had not raised Scott's actions in "firing" him with the court or that the court had not acted on Scott's request for a new attorney. (ER 436.)

When the oral argument was held on December 7, 1995, Bassett revealed his lack of knowledge about the cases of Scott's co-defendants, as well as his complete

---

[11]Throughout this brief, Scott's letters are quoted exactly as written. All misspellings exist in the original letters.

lack of preparation when the court asked him what, if anything, Mark Milke had said when Debra Milke or James Styers was sentenced. (ER 411.) Bassett stated:

> All I know about those cases, Judge, is that when he spoke at Mr. Scott's sentencing, he said that - - he requested that of the other two people and they had gotten it and that was sufficient for him and he didn't think it was necessary. I don't know what he said at the other two cases, other than he requested death for the people.

(ER 411.) In addition, despite the fact that the State's preclusion argument had been raised in its opposition to the petition for post-conviction relief filed some four months earlier (Tr. Dkt. 548), when the subject arose during oral argument, Bassett stated that he was not "really up to speed in this preclusion argument," blaming his lack of preparation on a missed fax from the State.[12] (ER 417.) The court took the issue under advisement at the end of the argument, and also gave Bassett a further opportunity to respond to the State's renewed preclusion argument.[13] (ER 427-28.)

On January 19, 1996, the court ruled that Scott's sole claim was properly before the court. (ER 431.) On that same date, the Clerk of the Court received a second letter from Scott, dated December 12, 1995. (ER 430.) In that letter, Scott

---

[12]In reality, the "missed fax" was simply the State's motion to reconsider the court's preclusion ruling of November 8, 1995. (Tr. Dkt. 572.) This motion was not substantially different from the arguments contained in the Opposition to the Petition for Post-Conviction Relief. (Tr. Dkt. 548.)

[13]Bassett filed the response, which consisted of approximately two pages of argument, on December 14, 1995. (ER 432.)

mentions receiving a letter from the Clerk sent November 6, 1995, informing him that Bassett would be arguing Scott's post-conviction claim on December 7, 1995. (ER 430.) Scott had apparently still not received any communication from Bassett, and informed the Clerk, "My problem is that my lawyer wont visit or wright so i have had to ask you what was going on in my case befor & now i have to ask you again!" (ER 430.) Scott also asked the Clerk to keep him informed about what was happening in his case, again indicating that Bassett had not been in contact with him. (ER 430.)

On March 21, 1996, the court held an "informal conference" in chambers. (Tr. Dkt. 595.) This conference was not transcribed, but the minute entry following the conference affirmed an evidentiary hearing date of April 16, 1996. (Tr. Dkt. 595.) On April 8, 1996, the State filed a pre-hearing memorandum (Tr. Dkt. 599); Bassett did not file any memoranda or pleadings on Scott's behalf.

At the evidentiary hearing on April 16, 1996, the court observed that it had received the State's pre-hearing memorandum but had not received anything from Bassett. In response to the court's inquiry regarding the lack of filing, Bassett responded:

> MR. BASSETT: No, Judge; as I understand it, we are not going to have a hearing today.
>
> THE COURT: We are not?

> MR. BASSETT: No. There is not going to be any witnesses called by either side.

(ER 400-01.) Bassett further noted that, due to a relative's medical issues, he had not had time to respond to the State's pre-hearing memorandum. (ER 401.) Bassett proceeded to ask the court for "a week or two" to respond to the State's pleading, and then asked the court to simply rule on the pleadings instead of holding a hearing. (ER 401.) Bassett stated that he did not want to call any witnesses because he was "real satisfied with the state of the record as it exists right now" and because he believed that it was "up to the prosecutor to bring in the defense attorneys to show there was any tactical basis for continuing [sic] to pursue the Defendant's [sic] request for leniency." (ER 401.)

Following this incredible display of Bassett's fundamental misunderstanding of the burden of proof in post-conviction ineffectiveness claims, the court attempted to follow-up on Bassett's statements.

> THE COURT: You don't think, under Strickland, there is a basic showing that the Defense must make before any burden shifts?
>
> MR. BASSETT: I've made it by the statements in the presentence report and the statement the victim's father gave to the Court.
>
> That's a prima fascia [sic] showing of ineffective assistance of counsel being able to pursue that and argue that, and that's all I need at this point. All the prosecutor has to do is show there was some sort of tactical basis for it and he has failed to do that.

> What I would like to do, Judge, is respond to his memorandum in writing and have the Court rule on it at that time.

(ER 401-02.) The State responded to Bassett's arguments by stating:

> I would like to clear up that the State has no burden. That because this is a PCR proceeding and Mr. Scott's conviction is presumed valid at this point, he has a burden of going forward and showing the Strickland prongs. That Mr. Steinle acted unprofessionally and that his failure to argue the plea for leniency as mitigation would have affected the outcome of Mr. Scott's sentencing.
>
> It is the State's position that unless Mr. Scott presents the testimony of Mr. Steinle and shows that he had no recent [sic] basis for arguing Mark Milke's plea as mitigation, then he has failed of his proof and that his claim of ineffective assistance of counsel, if that's what he determines it is, that fails and this Court should find in favor of the State.

(ER 402-03.) Despite this clarification of the burden of proof in post-conviction proceedings, Bassett did not reconsider his statement that the State bore the burden of proof or his decision not to call any witnesses or present any further evidence on Scott's behalf. Bassett readily agreed with the court's request that he forego filing a response to the State's pre-hearing memorandum in favor of filing proposed findings of fact and conclusions of law that could not exceed ten pages,[14] and told the court he had nothing more to present. (ER 404-05.) In approximately six pages of transcript, the hearing on Scott's sole post-conviction claim was concluded.

---

[14]The court did note that Bassett could include "brief argument that doesn't repeat what's been said in previous pleadings." (ER 404.)

Approximately three weeks after the hearing, both Bassett and the State filed their proposed findings of fact and conclusions of law. (ER 391; ER 382.) Bassett's pleading contained only one paragraph regarding his erroneous argument that the State bore the burden of proving that Steinle had "some conceivable tactical reason for not arguing the leniency request as a mitigating circumstance." (ER 387.) On June 13, 1996, the court issued a minute entry order dismissing the post-conviction petition.[15] (ER 73.)[16] Bassett did not file a motion for reconsideration of the court's order. (ER 367.)

On June 14, 1996, the next day, the post-conviction court received a copy of a letter from Scott to Bassett dated June 11, 1996.[17] (ER 375.) In this letter, Scott stated:

As soon as my Automatic Appeals are exhausted, I plan to invoke Rule

---

[15]While the court found that Mark Milke's leniency recommendation was both admissible and mitigating, and was not presented to the court as mitigation at sentencing, the court did not address the deficient performance element of *Strickland*. (ER 73-75.) The court also found that Scott had not proven prejudice because the additional mitigating circumstance would not have changed its previous conclusion that the mitigating circumstances were not sufficiently substantial to call for leniency. (ER 75.)

[16]Scott apparently never received a copy of the order dismissing his petition from Bassett. The record contains three letters from Scott asking the Clerk to send him a copy. (ER 371; ER 372; ER 373.)

[17]This letter was not filed until July 1, 1996. (ER 375.)

> 6.1(c) of the Arizona Rules of Criminal Procedure and Represent, my self.
>
> This by having the courts withdraw you as counsel, and waiving all other Appeals, and Requesting the courts to move to the execution phase of this case.
>
> Please do not force me to suffer any longer by representing me I've, made my decision to let the suffering END, thank you.
>
> At my request, please do not motion the courts, for a reconsideration of my case, Thank you.

(ER 375.)

On June 24, 1996, Bassett filed a motion to withdraw from the case, citing Scott's letter asking to "move to the execution phase" as cause. (ER 380.) He stated that Scott had the right to represent himself, and that were it not for Scott's request that Bassett withdraw, Bassett would be filing the petition for review of the court's decision in the Arizona Supreme Court. (ER 380.) He informed the court that he would like to file the petition for review despite Scott's request to end his appeals, but also stated that "[a]lternatively, this court might want to appoint different counsel, who might be able to keep the defendant in a more upbeat state of mind during these post-conviction proceedings."[18] (ER 381.) Bassett did not request that the court

---

[18]Because the record reflects that Bassett was entirely unresponsive to Scott's repeated attempts to contact him and failed to keep Scott even minimally apprised of the post-conviction proceedings, it seems likely that alternate counsel could hardly have failed to improve Scott's "state of mind." Bassett's actions in this regard are in

appoint a mental health expert to evaluate Scott's competency to waive his appeals and proceed to execution, did not request a hearing on the voluntariness of Scott's waiver and did not request an evaluation of whether Scott was competent for execution.

On June 27, 1996, the court granted Bassett's motion to withdraw without requesting a response from the State, without appointing replacement counsel to represent Scott, without scheduling a hearing on the voluntariness of Scott's waiver, and without *sua sponte* ordering a mental health expert to evaluate Scott's competency to waive his appeals. (ER 379.) To its credit, *the State* filed a motion for reconsideration of Bassett's motion to withdraw and was the only entity to request that Scott's competency be evaluated and that a hearing be held on the waiver issue.

---

direct violation of both the 1989 and 2003 ABA Guidelines. *See* 2003 ABA Guidelines 10.15.1 (E) ("Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to: 1. maintain close contact with the client regarding litigation developments; and 2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position . . . ."); 1989 ABA Guidelines 11.9.5(C) ("Counsel should continually monitor the client's mental, physical and emotional condition to determine whether any deterioration in the client's condition warrants legal action."); *see also* 2003 ABA Guidelines 10.15.1 cmt. ("Collateral counsel has the same obligation as trial and appellate counsel to establish a relationship of trust with the client. But by the time a case reaches this stage, the client will have put his life into the hands of at least one other lawyer and found himself on death row. Counsel should not be surprised if the client initially exhibits some hostility and lack of trust, and must endeavor to overcome these barriers.").

(ER 377.) The State further requested that the court determine whether Scott was competent to be executed. (ER 377.)

On July 10, 1996, the court received a *pro se* motion from Scott asking that Bassett be withdrawn from his case so Scott could represent himself. (ER 354.) In this motion, Scott details his belief that he was suffering cruel and unusual punishment by being forced to choose his own form of death[19] and that accordingly there was no reason for counsel to pursue his appeals. (ER 355.) On July 17, 1996, the court scheduled a second "informal conference" on the State's motion, and stayed its order allowing Bassett to withdraw.[20] (ER 374.)

During the informal conference, the court scheduled a hearing on Scott's request to represent himself and appointed Dr. John DiBacco to conduct a psychological evaluation of Scott.[21] (Tr. Dkt. at 1-2) Prior to the hearing, the court received several other letters from Scott detailing his problems with Bassett, asking

---

[19]Scott presumably refers to the statutory change in Arizona making lethal injection the method of execution in the state, but allowing prisoners convicted before November 23, 1992, the option of choosing lethal gas if desired. A.R.S. § 13-704(B) (1993).

[20]Because this proceeding was "informal," it was not transcribed.

[21]The court also ordered the Clerk to send Scott a copy of the order denying his post-conviction petition, apparently in response to Scott's repeated requests. (Tr. Dkt. 617 at 2.)

that his appeals be continued and requesting cancellation of the competency hearing. (ER 359; ER 357.) One of the letters details the severe medical problems he was experiencing at the Department of Corrections and Bassett's refusal to intervene on Scott's behalf. Scott stated:

> Mr. Bassett wont answer letter's. Mr. Bassett wont send copys of court proceedings. Mr. Bassett has shown a hatered since i met him and wants no corospondence at all with me. . . . I have tried every thing to get him droped from my case that i know or can find out but nothing worked. Mr. Bassett drove me to the extent of wanting to die, rather than be forced to have him handle my life, and drive me out of my mind. Please forget my plea to move to the execution stage, and let me go on with my appeals.

(ER 357.) The court took no action on Scott's motion or letters.

The hearing was held on September 20, 1996. (ER 360.) At the hearing, Scott clarified that he did not want to represent himself; he simply wanted a different attorney appointed on his behalf. (ER 363.) Rachel Yosha, an attorney with the Arizona Capital Representation Project, also appeared at the hearing, and after conferring with Scott, indicated both her willingness to be appointed to the case and Scott's willingness to accept her appointment. (ER 364, 366.) Over the State's objection, the court appointed Yosha to represent Scott and granted Yosha thirty days "within which to take [her] next action in this case." (ER 368.)

On October 25, 1996, Yosha filed a Motion to Vacate Order Denying Post-

Conviction Relief and a Motion for Extension of Time and Leave to File a Motion for Rehearing Nunc Pro Tunc and Amended Petition for Post-Conviction Relief. (ER 341; ER307.) In the first motion, Yosha argued that the court should vacate its order denying the post-conviction petition and allow Scott to file an amended petition raising additional claims. (ER 341.) Yosha based this argument on Bassett's ineffective assistance of counsel during the post-conviction proceedings and that the thirty-day period for filing a Petition for Review of the court's order denying Scott's petition had passed during the substitution-of-counsel proceedings. (ER 343, 344.)

In the second motion, Yosha asked the court to extend the time in which to file a motion for re-hearing and an amended petition for post-conviction relief. (ER 307.) Yosha further discussed Bassett's performance and appended an affidavit from Bassett in which Bassett verified his failure to take any action beyond reviewing the record from trial and direct appeal. (ER 304.)[22] Yosha outlined the numerous steps she had taken in establishing a relationship with Scott, reviewing the record, and interviewing Bassett and co-defendants' counsel (ER 310-11), and included twenty-three additional claims for post-conviction relief she had identified just during her brief representation of Scott, noting that more would likely follow as she completed

[22]While the affidavit attached to this pleading was signed, it was not notarized. Yosha filed a notarized version when she received it from Bassett some weeks later. (ER 304.)

her investigation of the case. (ER 311-32.) Finally, Yosha argued that these additional claims were not precluded and that amendment was supported by good cause. (ER 332-37.)

The court ordered the State to respond to Yosha's filings (Tr. Dkt. 638), but on December 13, 1996, it denied all the motions in one minute entry because the court believed that it did not have the authority to grant any of the relief requested. (ER 71.) According to the court, the relief requested was "contrary to the underlying purpose of Rule 32 and inconsistent with its procedures." (ER 72.)

On January 27, 1997, Yosha filed a Petition for Review in the Arizona Supreme Court along with a Request to Exceed Page Limitation for Petition for Review.[23] (ER 256; Tr. Dkt. 648) In this petition, Yosha argued both that the court had incorrectly denied the sole claim raised by Bassett during the post-conviction proceedings, but also that it erred in deciding that it did not have the authority to re-open the proceedings and allow Yosha to file an amended petition. (ER 256.) Accompanying this filing was an appendix containing numerous documents in support of Yosha's arguments, including a copy of the amended petition Yosha had previously attempted to file in the superior court that raised an additional twenty-three

[23]While the Arizona Supreme Court usually limits petitions to twenty pages, Yosha's initial Petition for Review was forty-eight pages long. (ER 256.)

claims. (*See* ER 307.)

Subsequently, the Arizona Supreme Court denied Yosha's request to exceed the twenty-page limit for petition for review, and Yosha filed a compliant petition on March 31, 1997, raising the same claims as the previous petition. (ER 238.) She noted that this petition was likewise supported by the appendix filed on January 27, 1997, which contained the arguments proposed for the amended petition for post-conviction relief, and a supplemental appendix filed on March 31, 1997, as well. (ER 238.) The State filed an Opposition to the petition for review on April 22, 1997 (Ariz. Sup. Ct. Doc. 2), and Yosha replied on May 9, 1997. (ER 604.) On October 20, 1997, the Arizona Supreme Court summarily denied Scott's Petition for Review. (ER 70.)

G. FEDERAL HABEAS CORPUS PROCEEDING

1. DISTRICT COURT PROCEEDINGS

Scott filed a *pro se* petition for writ of habeas corpus in the United States district court on July 25, 1997. (Dist. Ct. Dkt. 1.) The court appointed Robert Hirsh and Carla Ryan as federal habeas counsel pursuant to 21 U.S.C. §§ 848(q)(4)(B) and 848(q)(8).[24] (Dist. Ct. Dkt. 2, 8.) On April 28, 1998, Hirsh and Ryan filed an

---

[24]In 2006, Congress recodified 21 U.S.C. §§ 848(q)(4)(B) and 848(q)(8) as 18 U.S.C. §§ 3599(a)(2) and 3599(e).

amended petition for writ of habeas corpus. [25] (Dist. Ct. Dkt. 53, 54.) With one exception, the district court found the claims raised in the amended petition to be procedurally barred because, according to the district court, Scott's state post-conviction counsel failed to present them to the highest state court. (ER 48.)

On July 13, 2000, Hirsh and Ryan filed a merits brief on the only issue the district court found preserved for habeas review: trial counsel's ineffectiveness in failing to develop and present mitigating evidence concerning Christopher's father's belief that Scott did not deserve the death penalty. The district court denied this remaining claim on March 3, 2005. (ER 23.) It subsequently granted Scott a certificate of appealability on this sole issue. (ER 12.)

2. PROCEEDINGS BEFORE THIS COURT

Hirsh withdrew as Scott's counsel soon after the district court dismissed Scott's habeas petition. (Dist. Ct. Dkt. 150, 151.) On October 31, 2005, Scott's remaining counsel, Carla Ryan, filed under seal with this Court an *ex parte* request to withdraw as counsel. In the withdrawal motion, Ryan maintained, among other things, that she and Hirsh had not provided Scott with competent representation in his federal habeas proceedings, resulting in their failure to "raise several exhausted, independent

---

[25]On July 26, 1999, counsel filed a second amended petition alleging one additional ground for relief. The new claim alleged a Sixth Amendment violation premised on *Jones v. United States*, 526 U.S. 227 (1999).

constitutional claims." (ER 173-74.) She attributed their failings to inexperience. (ER 173-74.) Ryan requested that the Court remove her from the case and appoint new counsel to determine "whether this appeal should be requested to be held in abeyance in order to litigate additional exhausted issues in the District Court." (ER 175.) This Court granted Ryan's request to withdraw and, on November 9, 2005, the Office of the Federal Public Defender appeared as counsel on Scott's behalf.

On April 14, 2006, undersigned counsel moved for an extension of time to file Scott's opening brief to permit them to have Scott tested for mental retardation. Counsel set forth in that motion their good faith belief that Scott might have a viable claim for relief pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court granted Scott's motion on May 12, 2006.

On September 27, 2006, counsel informed the Court that testing had revealed that Scott's overall IQ, although subaverage, did not fall in the range of mental retardation. Counsel requested, however, that the Court stay the briefing schedule until the district court had ruled on Scott's request for it to entertain his motion for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (*See* Dist. Ct. Dkt. 173.) Scott's Rule 60(b)(6) motion was premised on the fact that the integrity of his federal habeas proceeding had been grossly compromised by Hirsh's and Ryan's failure and/or inability to provide meaningful

assistance in litigating Scott's constitutional claims.

This Court granted the motion to stay on October 12, 2006. On October 23, 2006, the district court declined to entertain Scott's Rule 60(b)(6) motion. (Dist. Ct. Dkt. 176.) On February 22, 2007, this Court remanded the Rule 60(b)(6) issue to the district court and directed the court to address the motion on the merits. The district court did so and denied Scott relief. (ER 1.) It also denied Scott a certificate of appealability on the issue. (Dist. Ct. Dkt. 190.)

SUMMARY OF THE ARGUMENT

In his first claim, Scott argues that his trial counsel, Roland Steinle, provided Scott with ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), when he failed to develop and present readily-available mitigation evidence to court at sentencing. In the court-ordered pre-sentence report, Mark Milke, the victim's father, recommended leniency for Scott on the first-degree murder charge. Despite his assertion of having read the report, Steinle did not develop or present this powerful mitigation evidence to the court even though reliance on the pre-sentence report for presentation of mitigation evidence is clearly deficient performance. In addition, Steinle closed all other avenues for the court to learn of the leniency recommendation when he persuaded the court not to read the pre-sentence report itself prior to determining Scott's sentence on the first-degree murder charge

and prevented Milke from addressing the court until immediately prior to the pronouncement of the special verdict.

As a result of Steinle's failures, the sentencing court was never given the opportunity to consider Milke's leniency recommendation in mitigation of Scott's crime. This existence of this crucial evidence, which the state court conceded was mitigating and never presented to the court, undermines confidence in the outcome of Scott's sentencing proceedings and the state court's finding otherwise constitutes an objectively unreasonable application of *Strickland*. In addition, when holding that the evidence of Milke's leniency recommendation would not have changed the outcome at sentencing, the court unconstitutionally failed to consider the additional mitigating circumstance of Scott's lack of prior felony convictions that was held to be established by the Arizona Supreme Court on appeal. Between the state court's application of an incorrect and unreasonable standard and its failure to consider all the evidence presented in mitigation, the outcome of Scott's sentencing proceeding is not only uncertain, it is fundamentally flawed and Scott is entitled to resentencing on the first-degree murder charge.

Scott is likewise entitled to relief on two issues that were not certified by the district court. The district court erroneously concluded that the ineffective assistance of counsel claim addressed above was the sole claim that Scott had fairly presented

and fully exhausted in state court. Acknowledging that Scott had unsuccessfully attempted to file an amended post-conviction petition, the district court mistakenly found that the state court had invoked a state procedural rule to preclude him from filing the amended petition and that, as a result, the additional claims Scott hoped to raise were procedurally barred. (ER 58.) The district court also erroneously found that Scott failed to exhaust the additional claims by presenting them to the Arizona Supreme Court in a procedurally appropriate manner. (ER 58.)

The state court, however, did not clearly and expressly rely on an established and regularly applied state procedural rule when it rejected Scott's attempt to amend his post-conviction petition. Rather, although the court recognized that it had the authority to permit a defendant to amend a post-conviction petition for good cause, it mistakenly believed that it lacked the inherent authority to vacate its prior order denying Scott post-conviction relief to allow for the amendment. The state court's erroneous belief that it lacked the authority to vacate one of its own orders is not a ruling premised on a state procedural bar and therefore cannot serve as the basis for procedurally default. Moreover, even if the state court had clearly and expressly invoked a state procedural rule that precluded a defendant from amending a post-conviction petition after the court had denied relief, such a rule could not result in procedural default in this case because, as Scott demonstrates in Issue II, *infra*, even

if such a rule exists in Arizona, it is not consistently applied by the state courts.

Scott is also entitled to relief on his claim, discussed in uncertified Issue III, *infra*, that, as an Arizona capital defendant, he has a cognizable constitutional right to the effective assistance of state post-conviction counsel. As Scott explains, this right emanates from the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and that, to the extent the AEDPA precludes relief of on this claim, *see* 28 U.S.C. § 2254(i), the statute is unconstitutional.

ARGUMENT

Certified Issue

I. SCOTT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE DISTRICT COURT ERRED IN FINDING OTHERWISE.

In both his state and federal post-conviction proceedings, Scott argued that he received ineffective assistance of counsel because his trial counsel, Roland Steinle, failed to present Mark Milke's recommendation for leniency as a mitigating circumstance for purposes of Scott's capital sentencing proceedings.[26] (ER 451; ER

[26]As an initial matter, it is important to clarify that while in most circumstances today Arizona courts could not consider a victim's sentencing recommendation in a capital case pursuant to *Booth v. Maryland*, 482 U.S. 496, 508 (1987) (holding that admission of a victim's family members' characterizations and opinions about the crime, the defendant and/or the appropriate sentence in a capital sentencing

239; Dist. Ct. Doc. No. 112 at 36-40; Dist. Ct. Doc. No. 129.) The district court determined that this part of Scott's habeas petition was properly exhausted, had been fairly presented to the state courts and was ripe for review. (ER 48.) The state court failed to address the merits of Scott's deficient performance argument, and thus the district court was required to conduct an independent review of trial counsel's actions. (ER 32-33.) The state court did address the merits of Scott's claim that he was prejudiced by Steinle's deficient performance, and accordingly the district court

---

proceeding violates the Eighth Amendment unless that information is directly related to the circumstances of the crime), *overruled in part on other grounds by Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (holding that a state may allow the admission of evidence regarding the impact of the murder on the victim's family); and *State v. Glassel*, 116 P.3d 1193, 1215 (Ariz. 2005) (holding that the Eighth Amendment prohibits consideration of a victim's sentencing recommendation in a capital case even when the victim requests leniency), the statements at issue here require a different analysis.

At the time of Scott's post-conviction proceedings, the Arizona Supreme Court had recently clarified the state law regarding a victim's request for leniency in a capital proceeding (as opposed to a request for imposition of a death sentence) by holding that a request for leniency by a member of the victim's family in a capital case must be considered as mitigation *so long as the request is based on the defendant's character or the circumstances of the offense* . *See, e.g., State v. Williams*, 904 P.2d 437, 454 (Ariz. 1995) (stating that a victim's recommendation for leniency is only mitigating if it is directly related to the defendant, his character or the circumstances of the offense). This position was consistent with the United States Supreme Court's holding in *Booth*, and the state court correctly held in Scott's post-conviction proceedings that Milke's statements were related to the circumstances of the crime and the assistance Scott provided during the investigation, and thus were both admissible and mitigating. (ER 74-75.)

evaluated the reasonableness of the state court's finding pursuant to *Strickland v. Washington*, 466 U. S. 668 (1984). (ER 35-36.) The district court ultimately held that Steinle's actions were not deficient and that the state court reasonably found that Scott was unable to demonstrate prejudice. (ER 35, 38.) The district court's denial of this claim was in error because Steinle's performance as Scott's counsel was constitutionally deficient and Scott was prejudiced as a result. The state post-conviction court's holding otherwise constituted an unreasonable application of *Strickland* and Scott is entitled to relief.

A. SCOTT WAS CONSTITUTIONALLY ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS CAPITAL SENTENCING PROCEEDINGS.

Scott, threatened with a loss of life and liberty in a criminal proceeding, had a constitutional right to the assistance of counsel. *See Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Kirby v. Illinois*, 406 U.S. 682, 688 (1972); *United States v. Wade*, 388 U.S. 218, 224-25 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Powell v. Alabama*, 287 U.S. 45, 73 (1932). In *Powell*, the Court recognized that the accused in a criminal proceeding was entitled to the "guiding hand of counsel" to assist him in preparing and presenting defenses. 287 U.S. at 69. The United States Supreme Court has made clear that assistance of counsel, if inadequate, does not satisfy the Sixth Amendment's requirements. *See*

Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Reece v. Georgia*, 350 U.S. 85, 89-90 (1955); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938); *Powell*, 287 U.S. at 71. The failure to provide effective assistance is a fundamental constitutional error that undermines the entire adversarial process. *See Strickland*, 466 U.S. at 685-87; *Gideon*, 372 U.S. at 343-45; *Johnson*, 304 U.S. at 462-63. The denial of effective assistance threatens not only a defendant's Sixth and Amendment rights (right to counsel and right to a fair trial), but the Eighth Amendment (right to individualized sentencing) and Fifth and Fourteenth Amendment (right to due process) rights are at stake as well.

B. STEINLE PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO PRESENT READILY-AVAILABLE MITIGATION EVIDENCE AT SCOTT'S CAPITAL SENTENCING PROCEEDINGS.

In *Strickland*, the Court outlined the standard for determining when counsel has provided ineffective assistance. As described by the Court, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Under *Strickland*, counsel is ineffective if: (1) "representation fell below an objective standard of reasonableness;" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Id.* at 669. Effective assistance of counsel is ultimately concerned with the fundamental right to a fair trial, "a trial whose result is reliable." *Id.* at 687.

Further, as discussed earlier, the American Bar Association ("ABA") promulgated a set of guidelines in 1989 that plainly set forth the obligations of defense counsel in death penalty cases. 1989 ABA Guidelines. These Guidelines were revised and updated in 2003. 2003 ABA Guidelines. Recent cases from the United States Supreme Court and federal circuit courts of appeals have made clear that, although the 1989 Guidelines were in place at the time of Scott's trial, Steinle's performance should be examined in light of the 2003 Guidelines.[27]

---

[27]For example, in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), the Court cited and discussed the 1989 ABA Guidelines. Since *Wiggins,* other courts and circuits have repeatedly referenced the ABA Guidelines, and in several cases have referenced and analyzed the 2003 ABA Guidelines in cases occurring long before the 2003 Guidelines were published. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (applying the 1989 and 2003 ABA Guidelines to assess a lawyer's performance in a 1988 trial); *Clark v. Mitchell*, 425 F.3d 270, 286 n.5 (6th Cir. 2005) (applying the 2003 ABA Guidelines to assess a lawyer's performance in a 1984 trial); *Canaan v. McBride*, 395 F.3d 376, 384-85 (7th Cir. 2005) (applying 2003 ABA Guidelines to assess a lawyer's performance in a 1986 trial); *Hamblin v. Mitchell*, 354 F.3d 482, 487 n.2 (6th Cir. 2003) (applying the 2003 Guidelines to assess a lawyer's performance in a 1983 trial); *Bryan v. Mullin*, 335 F.3d 1207, 1238 n.6 (10th Cir. 2003) (applying 2003 Guidelines to assess a lawyer's performance in a 1994 trial).

In *Florida v. Nixon* , 543 U.S. 175, 191 (2004), the Supreme Court twice referred to the 2003 ABA Guidelines in its decision that capital defense counsel's performance was not ineffective. In *Nixon*, which went to trial in July 1985, defense counsel admitted defendant's guilt and "urged the jury to focus on the penalty phase." 543 U.S. at 181-82. The Court cited with approval the 2003 ABA Guidelines in

The Supreme Court has recognized the 2003 ABA Guidelines as instructive in assessing the reasonableness of attorney representation that occurred as far back as 1985. *Id.* Accordingly, the 2003 Guidelines must be used to assess counsel's conduct in Scott's case. As laid out below, Steinle did not satisfy these standards and Scott received ineffective assistance of counsel during his sentencing.

The inquiry under the deficiency prong is "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. Performance is deficient when the attorney fails to render the performance of a reasonably competent attorney. *Id.* at 687. Although defense counsel has broad discretion when making strategic decisions, those decisions must be reasonable and informed. *Id.* at 691; *see also Correll v. Ryan*, 465 F.3d 1006, 1015-16 (9th Cir. 2006) (holding that an "uninformed strategy" is "no strategy at all"). In this case, Steinle's representation fell well below the level of a reasonably competent attorney.

1. THE COURT-ORDERED PRE-SENTENCE REPORT CONTAINED CRUCIAL EVIDENCE IN MITIGATION OF SCOTT'S SENTENCE THAT STEINLE FAILED TO DEVELOP AND PRESENT TO THE SENTENCING COURT.

Although the court-ordered pre-sentence report contained crucial facts that

---

determining that counsel's decision was reasonable. *Id.* at 191. The Court directly cited the commentary to 2003 ABA Guideline 10.9.2 in support of counsel's actions. *Id.* at 191 n.6.

Steinle should have both further investigated and presented to the court in mitigation, he failed to do either. Most importantly, several of the victim's family members who knew Scott personally spoke to the pre-sentence report writer and recommended some form of leniency for Scott on the first-degree murder count based on Scott's cooperation with law enforcement officials and his assistance in finding the victim's body.[28] Mark Milke, Christopher's father, told the probation officer that:

> [T]here is little question in his mind that his former wife initiated the conspiracy to have his son killed and that codefendant Styers was equally responsible for causing the son's death. Although Mr. Milke acknowledges Mr. Scott's involvement in this matter as an atrocious act, he does feel that, of the three defendants, Scott should be shown some leniency, as he did lead police to his son's body and was instrumental in solving this case. Mr. Milke commented that if his son's remains were never found, this incident would have proven to be an even greater tragedy.

(ER 468.)[29] Steinle made no attempt to develop this information or to ensure that the

---

[28]Mark Milke's statements here are especially notable in that he specifically requested imposition of the death penalty for both Debra Milke and James Styers based upon their respective roles in the crime. (ER 383; ER 73.) Scott was the only one of the three for whom Milke recommended any form of leniency in sentencing.

[29]Although Scott's post-conviction counsel failed to include this information in Scott's Petition for Post-Conviction Relief, Mark Milke was not the only member of the victim's family who believed Scott deserved leniency. The pre-sentence report contained information about two additional family members of Christopher who made statements recommending leniency in sentencing for Scott. Denise Pickinpaugh, the victim's maternal aunt (and Debra Milke's sister), stated that:

> [S]he has become well acquainted with Roger Scott over the years and

sentencing court was aware of the victims' belief that Scott should receive some measure of leniency in sentencing. This information was not presented to the sentencing court in any manner. In fact, Steinle presented no witness testimony at all at the aggravation-mitigation hearing, instead submitting only letters from the sheriff's department, Scott's mother and Scott's neighbor, a redacted version of Dr. Tatro's report, and a hand-written description of Scott's life.[30] (ER 498-503.)

Steinle's failure to develop and present this powerful mitigation evidence

---

> has come to know him as a relatively "dumb" individual who was simply not capable of hurting anyone or of developing a conspiracy of this nature. There is little doubt in her mind that Mr. Scott was "sucked into this" by her sister and Styers, and that Scott just "followed along." She does not feel that Mr. Scott should be subject to the death sentence in this matter.

(ER 469.)

In addition, Ilse Milke, Christopher's paternal grandmother, also recommended leniency for Scott, stating to the probation officer that "[a]lthough she feels that the defendant should receive a significant period of confinement in this matter, she is not requesting the death sentence because he was instrumental in recovering her grandson's body." (ER 469.)

[30]This description of Scott's life was prepared by Scott himself, and should not be construed as the result of any investigation by Steinle into Scott's personal and family history as required by both the 1989 and 2003 ABA Guidelines. Although Steinle utterly failed to perform any of the required investigation and presentation of the readily available mitigation evidence in this case, the district court incorrectly found that claim precluded due to the failure of Scott's post-conviction counsel to raise it during the post-conviction proceedings. (ER 56-60.) *See* Issue II, *infra*.

constituted deficient performance. *Stankewitz v. Woodford*, 365 F.3d 706, 716, 720 (9th Cir. 2004) (holding that counsel's duty to conduct a thorough investigation at the penalty phase "is not discharged merely by presenting some limited evidence[]" and that "tantalizing indications" in the record should have led counsel to investigate further). "When it comes to the penalty phase of a capital trial, '[i]t is imperative that all relevant mitigation information be unearthed for consideration.'" *Douglas v. Woodford*, 316 F.3d 1079, 1088 (9th Cir. 2003) (quoting *Caro v. Calderon,* 165 F.3d 1223, 1227 (9th Cir. 1999)). Only after a thorough investigation can a less-than-complete presentation of mitigating evidence ever be deemed reasonable, and only to the extent that a reasonable strategy supports such a presentation. *Id.* (citing *Wiggins,* 539 U.S. at 527-28 and *Stankewitz,* 365 F.3d at 719). Despite Steinle's supposed knowledge that these statements regarding leniency had been made,[31] he made no effort to further investigate and develop this evidence and he failed to even mention this evidence to the sentencing court. These failures were significant, and deprived Scott of the effective assistance of counsel.

Further, if Steinle were relying on the pre-sentence report itself to provide

---

[31]During the April 5, 1991 hearing, Steinle claimed to have read the report. (ER 483 (stating "I've gone through the pre-sentence report").) However, as discussed *infra*, his statements and actions regarding the information in the report seem to belie his assertion of having read the document.

information about the victims' statements to the court, that approach is both flawed and forbidden. This Court has already made clear that an attorney is not relieved of his or her duty to present all relevant mitigating evidence to the court for use in sentencing by relying on information presented in a pre-sentence report. In *Correll*, the court noted that the trial attorney chose to rely on information presented in the admittedly "one-sided" and incomplete pre-sentence report during the penalty phase and did not present any other evidence in mitigation of Correll's crime. 465 F.3d at 1016. The report itself included numerous, incredibly damaging allegations and characterizations of the crime and Correll himself, which the Court stated were "hardly the words of mitigation, and no competent capital defense counsel would have relied upon the report as providing mitigation evidence, much less the sole source of mitigation evidence." *Id.* Like *Correll*, the pre-sentence report in this case also includes many damaging allegations and recommendations and could not properly be considered a document prepared in mitigation of Scott's crime.

Likewise, in *Lambright v. Schriro*, 490 F.3d 1103, 1120 (9th Cir. 2007), this Court further emphasized the unreasonableness of counsel's decision to rely almost entirely on the pre-sentence report and court-appointed psychologist for presentation of mitigation evidence. In that case, despite his knowledge of Lambright's history of mental health problems, suicide attempts, military service in Vietnam and history

of drug abuse, trial counsel conducted virtually no investigation and presented only one short memorandum listing potential mitigating circumstances (not including those described above) and called one witness to testify about Lambright's good conduct in jail. *Id.* at 1118-19.

While the district court in Lambright's case concluded that trial counsel was not deficient, this Court disagreed, noting:

> As this court has often made clear, counsel's duty . . . to provide the sentencing court with a full presentation of the evidence that might lead the sentencer to spare his client's life is not discharged merely by conducting a limited investigation of these issues or by providing the sentencing court with a cursory or "abbreviated" presentation of potentially mitigating factors.

Id. at 1120 (quoting *Stankewitz*, 365 F.3d at 716 ("[C]ounsel's duty to conduct a thorough investigation . . . is not discharged merely by presenting some limited evidence.")). The Court further clarified that "[c]ounsel may not rely for the development and presentation of mitigating evidence on the probation officer and a court appointed psychologist." *Id.* at 1120 (citing *Correll*, 465 F.3d at 1012). "The responsibility to afford effective representation is not delegable to parties who have no obligation to protect or further the interests of the defendant." *Id.* at 1121. Accordingly, Steinle's failure to develop and present information regarding Mark Milke's request for leniency was not cured by the information contained in the pre-

sentence report and was unreasonable in light of the inherent value of Milke's statements.

2. STEINLE COMPOUNDED HIS FAILURE TO DEVELOP AND PRESENT MILKE'S STATEMENTS REGARDING LENIENCY BY ENSURING THAT THE COURT DID NOT READ THE PRE-SENTENCE REPORT UNTIL AFTER THE SPECIAL VERDICT HAD BEEN PREPARED.

Even if Steinle's reliance on the pre-sentence report to present Mark Milke's statements to the court were reasonable in some way, Steinle then inexplicably took further action that ensured that the court could not consider Milke's statements in mitigation of Scott's crime. At the April 5, 1991 motions hearing, Steinle argued that the pre-sentence report should be sealed based on the prejudicial nature of the document and that the court should not use the report in preparing its special verdict on the first-degree murder charge. (ER 482-96.) Under normal circumstances, this argument would be absolutely correct and above reproach. Under the unique circumstances of this case, however, Steinle's actions only serve to illustrate his utter lack of knowledge regarding the contents of the report and made certain that the victims' statements were not before the court during its deliberation concerning Scott's sentence on the first-degree murder charge.

At the hearing, Steinle's arguments were based on the correct premises that the only factors the court could have considered in aggravation of Scott's crime were

those ten enumerated in A.R.S. § 13-703 (1990), which had to be proven beyond a reasonable doubt in compliance with the rules of evidence, and that victim recommendations as to sentence could not be considered in aggravation of the crime. (ER 483-84, 488.) Steinle then proceeded to argue, however, that "[i]t could be mitigating if members of the family were to say that they wanted something other than death, because mitigation is wide open, and mitigation isn't subject to the Rules of Evidence." (ER 484.) Steinle's statements are remarkable, because of course members of the Christopher's family *did* say that they wanted Scott to be sentenced to "something other than death." As discussed above, Mark Milke specifically recommended leniency for Scott in the pre-sentence report, basing his statements on Scott's limited participation in the crime and his cooperation with police during the investigation. Steinle's statement above illustrates his knowledge that such a statement would be mitigating, but he utterly fails to acknowledge the existence of such statements in the report here, or to ensure that the court itself was aware of the statements in any way.

The court tried to clarify Steinle's argument regarding its consideration of the information contained in the pre-sentence report, giving Steinle another chance to place the leniency recommendations before the court:

THE COURT: You may have thought that my question about reading

the presentence report after making the findings regarding aggravation but before making them on mitigation was facetious. It was not meant to be facetious at all, and let me tell you why. I have had the experience of not knowing about mitigating circumstances until I read the presentence report.

So I really have to ask you that question again. Are you saying or is it part of your argument that it would be proper for the Court to see the presentence report after aggravating circumstances have been either found or rejected, depending on the case, but before mitigation is considered?

MR. STEINLE: Judge, in that regard, see, I think we're just – see, how do I open the thing up and argue certain things about the problems that I see in this presentence report?

THE COURT: I don't want you to do that.

MR. STEINLE: I understand. But see, if you are going to say that you are going to make your findings in terms of aggravation and then read it, and I have some concerns about information contained in there, because when you get to mitigation what you have to do is look at the whole picture.

THE COURT: Sure.

MR. STEINLE: You may decide something isn't quite so mitigating based upon what you see in the report, but if I have some questions about what that information is, how do I do it?

And so in other words, what I would have to do is, we would have to hold the aggravation hearing, the Court would have to make its findings, and then we would have to open the presentence report up and me say to the Judge, okay, I object to the following things in the presentence report for the following reasons and I ask that the Court not consider it in terms of deciding mitigation because I don't think that they are accurate or reliable or proper.

> So I think what we are doing is we are opening Pandora's box.
>
> I can indicate to the Court that one of the reasons I am so extensive in my mitigation memo is what I like to do is point out to the Court what I consider to be mitigation one way or the other, and so in effect -- and I've gone over the presentence report, and I just would find it very hard to say to the Court, okay, well, don't consider it, but then go ahead and look at it, because in this case I have some real concerns about what's contained in the report.

(ER 489-91.) The court concluded by stating that it considered Steinle's position to be that it should not read the pre-sentence report until after the special verdict had been prepared. (ER 496.)[32]

As discussed *supra*, Steinle did not include any information about the victims' leniency recommendations as part of his mitigation presentation during the aggravation-mitigation hearing. Moreover, he took affirmative steps to ensure that the court itself did not read the pre-sentence report prior to sentencing. As a result, the victims' statements regarding leniency for Scott as outlined in the pre-sentence report were not considered during the court's deliberation regarding the sentence on the first-degree murder count. Even apart from his deficient performance in failing to present this mitigation evidence to the court independent of the pre-sentence report, Steinle's additional steps to prevent the court from considering critical evidence in

---

[32]The court later confirmed that it had not read the pre-sentence report until after the special verdict had been written and the court was considering the sentences to impose on the remaining counts. (ER 73.)

mitigation of Scott's crime are also enough, standing alone, to constitute deficient performance. *See, e.g., Karis v. Calderon*, 283 F.3d 1117, 1135, 1140 (9th Cir. 2002) ("Counsel's failure to present . . . substantial mitigating evidence [regarding Karis's abusive family] was woefully inadequate and kept crucial information from the jury faced with sentencing Karis to life or death."); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) (finding counsel's penalty phase performance constitutionally deficient when counsel "failed to adequately investigate, develop, and present mitigating evidence to the jury even though the issue before the jury was whether [the defendant] would live or die."); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) (finding counsel ineffective in failing to investigate and present mental health mitigation evidence and concluding that there was no evidence that counsel "made a strategic choice that obviated the need to investigate.").

3. FINALLY, STEINLE'S OPPOSITION TO MARK MILKE ADDRESSING THE COURT REGARDING SCOTT'S SENTENCE FURTHER ILLUSTRATED STEINLE'S APPARENT LACK OF KNOWLEDGE REGARDING MILKE'S LENIENCY RECOMMENDATION AND COMPLETED STEINLE'S ATTEMPT TO PRECLUDE THE SENTENCING COURT FROM CONSIDERING THAT INFORMATION DURING SCOTT'S SENTENCING.

Incredibly, Steinle's deficient performance regarding the victims' statements at the aggravation-mitigation hearing continued during the final opportunity for the court to hear Mark Milke's recommendation for leniency, when the State noted at the

end of that hearing that Milke wanted to address the court regarding Scott's sentences.

> MR. STEINLE: Judge, this is [an A.R.S. § 13-]703 hearing and only has application to Count 1. If he's asking to be heard as to Counts 2 and 3, I ask that the Court reserve that until after the Court's done its special finding. It's not the appropriate time, it has nothing to do with any of the aggravating circumstances in this case, and therefore, I'm objecting.
>
> THE COURT: Under Booth and some of the other cases that have been decided, would it not be more appropriate to follow Mr. Steinle's -- I will treat it as a suggestion, and hear anything regarding Count 2 and 3 after findings have been made on Count 1? That seems like an appropriate balance to strike.
>
> MR. LEVY: Well, that would be fine by the state, but in talking to Mr. Milke, he says he highly doubts if he could come back, which is the problem.
>
> THE COURT: As much sympathy as I may have for the father of the young child, and believe me, it's an incredible degree of sympathy, I've got to tell you that I've got to be concerned about following the law. And if I think there's any chance of any taint, I've got to do everything I can to prevent that, and I think I need to be concerned about treating Count 1 separately from Count 2 and Count 3.
>
> If the state wishes to confer with Mr. Milke, and perhaps even present to the Court another date on which we might do sentencing, that's something to consider. I am not saying I will grant that, but I really think Mr. Steinle's got a good point when he suggests that I treat Count 1 separately from the other two counts. If you would like to speak to him and then let me know what you want to do, that would be fine with me.

(ER 477-79.)

No legitimate strategic reason existed for Steinle to object to Milke's statements being considered on the first-degree murder charge, because had Steinle read the pre-sentence report, he would have known that Milke was recommending leniency for Scott and did not think that Scott should be sentenced to death based on Scott's cooperation with the investigation and his assistance in locating the Christopher's body. Instead, Steinle specifically argued that the court could not consider Milke's statements while it decided Scott's sentence, despite the powerful mitigating effect of those statements.[33]

Although Mark Milke did appear at the sentencing proceeding and addressed the court just before it read the special verdict and sentenced Scott, the mitigating value of his statement was lost by that time because the court had already prepared the special verdict and decided Scott's sentences. Despite the late nature of the opportunity, as Steinle should have anticipated, Milke used his time addressing the court to urge leniency for Scott, stating, "Sir, as to the three counts, up until now I think the score is fairly even; two heads for two hearts. This is a one-on-one matter, and I would like to see consecutive sentences run. That's all." (ER 128.) Immediately after this statement was delivered, the court began reading its already-

---

[33]The state court itself later acknowledged that Milke's statements were mitigating and that it was not aware of Milke's statements until after the special verdict had been prepared. (ER 73.)

prepared special verdict on the first-degree murder charge and proceeded to sentence Scott on the non-capital convictions as well. As a result of Steinle's actions, the court had no opportunity to amend its verdict or to include the leniency recommendation in its deliberations as to the appropriate sentence. Despite the inherent value of Mark Milke's repeated statements regarding leniency on Scott's behalf, the court was never given the opportunity to consider this evidence. Scott's sentence thus cannot be considered the product of an individualized consideration of his mitigation, as required by the Eighth Amendment. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). To the contrary, Steinle completely precluded the court from considering this mitigation evidence at sentencing.

Steinle's actions in this regard were entirely incomprehensible, but regardless of the explanation, Steinle plainly did not provide Scott with the effective assistance of counsel at sentencing. Steinle took no steps to develop or present the victims' statements regarding leniency to the court, despite his claims to have read the pre-sentence report. As discussed above, if he were relying on the report itself to provide the court with this crucial evidence in mitigation, that reliance alone constituted deficient performance. Steinle's later actions, however, call even this patently deficient performance into doubt, as he then took affirmative steps to ensure that the court did not read the pre-sentence report and did not hear from Mark Milke himself

until after the sentence had been decided. While the district court labeled Steinle's actions "strategic" (ER 34), an attorney's deficient performance is not immunized from the Sixth Amendment simply by attaching the label of "trial strategy." *United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996) (quoting *Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984)). Rather, "[c]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." *United States v. Tucker*, 716 F.2d 576, 586 (9th Cir. 1983); *see also Cone v. Bell*, 243 F.3d 961, 878-79 (6th Cir. 2001), *rev'd on other grounds*, *Bell v. Cone*, 535 U.S. 685 (2002). Under these circumstances, Steinle could not reasonably have been following any strategy whatsoever and his actions were clearly deficient.

C. SCOTT WAS PREJUDICED BY STEINLE'S FAILURES AND THIS COURT SHOULD REMAND THIS CASE FOR RESENTENCING AS A RESULT.

"There is no more important hearing in law or equity than the penalty phase of a capital trial." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1050 (9th Cir. 1997) (Reinhardt, J., concurring & dissenting). The Eighth Amendment demands that all relevant evidence bearing on a defendant's character, propensities, and record be considered by the sentencer in determining the appropriateness of the penalty. If the sentencer is deprived of this evidence due to the Sixth Amendment failings of counsel, the sentencing proceeding is unfair, the sentence itself is suspect and one cannot have

"confidence in the outcome of the proceedings." *See, e.g., Lockett*, 438 U.S. at 605.

Depriving the sentencer of significant mitigation evidence is an affront to the Eighth Amendment reliability requirement imposed on a capital sentencing proceeding. "The Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). In assessing prejudice, the Court is required to employ the most heightened level of scrutiny. "Although we do not presume prejudice in a case such as this, we must be *especially cautious* in protecting a defendant's right to effective counsel at a capital sentencing hearing." *Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989) (emphasis added), *rev'd on other grounds sub nom Angelone v. Duetscher*, 500 U.S. 901 (1991).

At sentencing in this case, the trial court found that the State had proven three aggravating circumstances beyond a reasonable doubt, making Scott eligible for the death penalty. (ER 129-36.) While Steinle presented some limited evidence in mitigation of Scott's crime,[34] the court concluded that the mitigating circumstances

---

[34]The court eventually found that Scott had established the following mitigating circumstances: cooperation with the police, good conduct while incarcerated and during trial, his "bond of love" with his mother, and his psychological history. (ER 139-43.) Although the court conceded there was evidence that Scott had a history of alcohol use, it did not find this history mitigating because Scott "fail[ed] to establish the necessary link between the condition in question and his role in these events." (ER 141.)

presented were not sufficient to call for leniency and sentenced Scott to death on the first-degree murder charge. (ER 146.) On direct appeal, the Arizona Supreme Court found that Scott had proven the existence of an additional non-statutory mitigating factor not found by the trial court regarding his lack of prior felony convictions. *Scott*, 865 P.2d at 806. Despite this additional mitigating evidence, the court concluded that this additional mitigating circumstance was entitled to minimal weight and thus affirmed Scott's convictions and sentences. *Id.*

During Scott's post-conviction proceedings, his counsel raised Steinle's failure to argue Mark Milke's recommendation for leniency in mitigation of Scott's crime as the only claim in the post-conviction petition. The court concluded that "Milke's comments constitute a mitigating circumstance separate and apart from the mitigating circumstances set forth in the Special Verdict." (ER 75.) The court concluded, however, that Milke's comments, although mitigating, "would [not] have altered this court's conclusion that the mitigating circumstances were not sufficiently substantial to call for leniency." (ER 75.) This finding constituted an unreasonable application of *Strickland* because Scott was prejudiced by Steinle's failures. In addition, the post-conviction court's finding is further flawed because, during the re-weighing process, the court failed to consider the additional mitigating circumstance found by the Arizona Supreme Court.

1. MARK MILKE'S REQUEST FOR LENIENCY IS THE TYPE OF MITIGATION EVIDENCE THAT COULD HAVE MADE A DIFFERENCE TO REASONABLE SENTENCING BODY AND THE STATE COURT'S FINDING OTHERWISE CONSTITUTES AN OBJECTIVELY UNREASONABLE APPLICATION OF *STRICKLAND*.

To satisfy the prejudice prong, Scott must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* This Court must analyze how the mitigation evidence bears on the "development of the person who committed the crime," how it affects "the individualized sentence required by the Constitution," and how it "might well have influenced the [sentencer's] appraisal of . . . moral culpability." *Ainsworth*, 268 F.3d at 878; *Terry Williams v. Taylor*, 529 U.S. 362, 398 (2000). Moreover, although the prejudice analysis is defined as an independent review, there is often a substantial overlap between the deficient performance and the prejudice prong. *Correll*, 465 F.3d at 1018. As the Ninth Circuit recently acknowledged, "[the] deficient performance and prejudice questions may be closely related." *Id.*

The Supreme Court has further explained the language in *Strickland* and emphasized that the prejudice analysis does not depend on whether the outcome of the proceeding would have been different. "[T]he (outcome determinative) standard

is not quite appropriate." *Strickland*, 466 U.S. at 694. Rather, Scott must show "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). *Lockhart*, however, did not modify or supplant the *Strickland* analysis by imposing an additional prong of unfairness in all cases. *Williams (Terry)*, 529 U.S. at 391.

As the Court has emphasized, while there are cases when fundamental fairness may affect the analysis, the *Strickland* analysis provides sufficient guidance for resolving virtually all ineffective assistance of counsel claims. *Id.* For example, sixteen years after *Strickland*, the Court observed:

> It is past question that the rule set forth in *Strickland* qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States." That the *Strickland* test "of necessity requires a case-by-case examination of the evidence," *Wright* [*v. West,* 505 U.S. 277, 308 (1992)] (Kennedy, J., concurring), obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court.

Williams (Terry), 529 U.S. at 391. A sentencing proceeding infected by constitutionally deficient investigation and presentation of mitigation establishes prejudice because the reviewing court cannot have "confidence in the outcome" of such a proceeding. *Strickland*, 466 U.S. at 669.

When a state court professes to give no weight at all to evidence as powerful as a victim's reasoned and well-supported request for leniency, that finding is not reasonable and cannot be the basis for upholding a death sentence under circumstances like those here. As the Supreme Court stated in *Rompilla*, 545 U.S. at 393, "[A]lthough we suppose that [the sentencer] could have heard it all and still have decided on the death penalty, that is not the test." Steinle's failure to introduce the evidence in question here did undermine confidence in the outcome of Scott's sentencing determination, and pursuant to *Strickland*, that is the test the state court should have applied in assessing the evidence's value.

Had the court properly considered the victims' leniency recommendations, coupled with the additional mitigating factor of Scott's lack of prior felony convictions and the four mitigating circumstances previously found in the special verdict, it would be objectively impossible for the court to reasonably hold that there was "no basis whatsoever, much less a reasonable probability" that the result of Scott's sentencing proceeding would have been different. (ER 75.) As discussed *supra*, the Supreme Court has made clear that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Fretwell*, 506 U.S. at 369.

As the court found in the special verdict, Scott cooperated with police, even

leading police to Christopher's body. (ER 139.) He exhibited good behavior while in jail and during trial. (ER 142.) He had a close and loving relationship with his mother (ER 142), and suffered from psychological disorders that mitigated his participation in the crime. (ER 143.) Finally, and perhaps most importantly, the victim's father had both the generosity of spirit and perspective to evaluate Scott's actions and decide that Scott merited some degree of leniency on the first-degree murder charge. (ER 468.) Milke was in no way excusing Scott's actions, and in fact still urged the imposition of consecutive sentences. (ER 128.) Based on Scott's cooperation with the police investigation and his efforts to lead police to Christopher's body, however, Milke believed that Scott deserved a lesser sentence than the sentence Milke had advocated for Scott's two co-defendants. Under these circumstances, the court could not reasonably say that Steinle's failure to present evidence of Milke's recommendation did not affect its assessment of Scott's "moral culpability," *Ainsworth*, 268 F.3d at 878, and did not undermine confidence in the outcome of the sentencing proceedings.

In this case, the leniency recommendation by Mr. Milke constituted crucial mitigation evidence that could have affected the sentencing determination made by a reasonable sentencing body applying the correct standard. Despite this, Steinle made no effort to bring the statements to the court's attention during the sentencing

proceedings or to emphasize the important and unique nature of such evidence. It is a rare case indeed when a murder victim recommends any degree of leniency for a defendant, and because these statements were based specifically on the individual circumstances of the crime and Scott's participation in the investigation, they are entitled to tremendous weight. For the state court to conclude that this evidence did not change the sentencing determination in any way was objectively unreasonable under the circumstances.

Furthermore, this Court has already acknowledged the incredible importance of presenting mitigating evidence after a statutory aggravating circumstance has been found. Once one aggravating circumstance was found, "[w]ithout mitigating evidence, a death sentence was virtually assured." *Summerlin*, 427 F.3d at 640 (citing *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988)). Here, when there were three aggravating factors to mitigate, it was even more imperative that the sentencing court have access to all available mitigation evidence, witnesses, and experts. *See Lambright*, 490 F.3d at 1127 ("[T]he presentation of mitigating evidence is vital even where . . . the aggravating evidence is powerful.") (citation omitted). Because Steinle denied the sentencing court the ability to properly assess Scott's personal history and Mr. Milke's recommendation for leniency against the aggravating circumstances, Steinle's deficient performance rendered the penalty phase and its outcome unreliable

and Scott is entitled to relief.

2. IN ADDITION, BECAUSE THE STATE COURT'S DETERMINATION DID NOT INCLUDE CONSIDERATION OF THE ADDITIONAL MITIGATING CIRCUMSTANCE FOUND BY THE ARIZONA SUPREME COURT ON DIRECT REVIEW, ITS DETERMINATION THAT SCOTT WAS NOT PREJUDICED BY ITS PREVIOUS FAILURE TO CONSIDER MILKE'S STATEMENTS IS FATALLY FLAWED.

Finally, the state court's determination that Mark Milke's statements regarding leniency did not change the outcome of the sentencing proceeding was further evidence of its unreasonableness and misapplication of the governing law. A reviewing court must evaluate "the totality of the evidence before the judge or jury," *Strickland*, 466 U.S. at 695, by reviewing the evidence and determining whether there is a reasonable probability that the mitigation evidence now proffered might have made a difference to at least one juror. *Stankewitz*, 365 F.3d at 718 n.6; *Douglas*, 316 F.3d at 1090. Also, it is well-established that the Eighth Amendment demands that all relevant evidence bearing on a defendant's character, propensities, and record be considered by the sentencer in determining the appropriateness of the penalty. *See, e.g., Lockett*, 438 U.S. at 605. If the sentencer is deprived of this evidence through the Sixth Amendment failings of counsel, the sentencing proceeding is unfair, the sentence itself is suspect and one cannot have "confidence in the outcome of the proceedings." *Id.*

Here, not only did the post-conviction court unreasonably apply the *Strickland* standard to the mitigating evidence of Milke's recommendation for leniency, it also failed to consider the additional mitigating circumstance found by the Arizona Supreme Court on direct review. *Scott*, 865 P.2d at 806 (reversing the trial court's finding that Scott had not established the mitigating circumstance of no prior felony convictions). In denying Scott's post-conviction petition, the post-conviction court stated:

> Considering the totality of the evidence before this Court at sentencing, there is no reasonable probability that Defendant's sentence would have been different had trial counsel urged Mr. Milke's comments as mitigation. There is no basis whatsoever, much less a reasonable probability, for concluding that the *additional mitigating circumstance* would have altered this court's conclusion that the mitigating circumstances were not sufficiently substantial to call for leniency.

(ER 75 (emphasis added).) The court's own language makes clear that it considered only the one additional circumstance of Milke's statements regarding leniency when deciding that the additional evidence would not have changed the outcome at sentencing. This failure to consider all the established mitigating circumstances violates Scott's Eighth Amendment right to an individualized consideration of all relevant evidence in mitigation. *Lockett*, 438 U.S. at 605. The district court's "presumption" that the post-conviction court was aware of this additional evidence is not appropriate in light of the state court's own language indicating that it

considered only the one additional circumstance. (ER 37.)

Scott's counsel failed to exercise the skill, judgment, and diligence expected of reasonably competent criminal defense lawyers. Many aspects of Steinle's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Thus, Scott was denied effective assistance of counsel as guaranteed by the United States Constitution and was prejudiced as a result. Accordingly, he is entitled to an order granting the writ of habeas corpus and remanding the case to state court for resentencing.

Uncertified Issues

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT SCOTT'S ADDITIONAL CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE PROCEDURALLY DEFAULTED.

In his amended habeas petition, Scott raised several claims of ineffective assistance of trial, appellate and post-conviction counsel.[35] (*See* Dist. Ct. Dkt. 54, at 24-42; ER 56-57.) The State responded that all of those claims, save for the claim argued in Issue I, *supra*, were "*never* raised . . . in state court." (Dist. Ct. Dkt. 78, at 21 (emphasis in original).) In a footnote, however, it observed, "To the extent that

[35]Scott addresses in a separate argument, *infra* at Section III, the question of whether he has a cognizable right to the effective assistance of state post-conviction counsel.

[Scott] argues that he raised particular claims in state court in the PCR filed by Ms. Yosha, he has procedurally defaulted on those claims because the state trial court found the claims precluded by prohibiting him from reopening his PCR proceeding." (Dist. Ct. Dkt. 78, at 23 n.5.)

The district court concluded that, with the exception of Issue I, Scott "did not raise any other allegations of ineffective assistance of counsel in a procedurally appropriate manner to the state's highest court." (ER 58.) The district court acknowledged Scott's attempt to amended his PCR, but held that the state court's conclusion that it had no authority to permit the amendment was an adequate and independent procedural basis to support a finding of procedural default. (ER 58.) It also held that Scott had failed to exhaust his ineffective assistance of counsel claims because he did not present them "in a procedurally appropriate manner to the state's highest court." (ER 58.) The district court's rulings were in error.

A. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT ALL BUT ONE OF SCOTT'S IAC CLAIMS WERE PROCEDURALLY DEFAULTED.

To establish procedural default, the State was required to prove that an applicable procedural rule existed, that Scott failed to comply with that rule, and that the Arizona courts have actually enforced the procedural sanction. A valid procedural bar must be both established in advance *and* strictly and regularly applied.

Ford v. Georgia, 498 U.S. 411, 424 (1991); *Dugger v. Adams*, 489 U.S. 401, 410-11 n.6 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994). Absent these conditions, there can be no valid procedural bar to federal relief.

In this case, the district court found that all but one of the claims of ineffective assistance of counsel alleged by Scott were subject to the affirmative defense of procedural bar. In truth, however, at least three additional claims of ineffective assistance of counsel alleged in his amended habeas petition were fairly presented and fully exhausted in state court. The district court erred in prohibiting merits briefing and in failing to issue merits rulings on those claims. The three additional claims are:

1. Trial counsel was constitutionally ineffective in his efforts to challenge the voluntariness of Scott's statements to the police. *See* Dist. Ct. Dkt. 54, at 32-34;

2. Trial counsel was constitutionally ineffective in investigating and presenting mitigating evidence. *See* Dist. Ct. Dkt. 54, at 36-40; and,

3. Appellate counsel was constitutionally ineffective in failing to challenge the trial court's finding that Scott committed the crime for pecuniary gain. *See* Dist. Ct. Dkt. 54, at 41.

Each of these claims was presented to the trial court as part of Scott's motion for leave to file an amended petition for post-conviction relief. (*See* ER 311-18, 325-26, 330-31.)

In finding procedural default for Scott's IAC claims, the district court stated that, "[a]lthough [Scott] attempted to raise many of these allegations in an amended PCR, the state court found that an amended PCR could not be properly filed under Ariz. R. Crim. P. 32."[36] (ER 58.) This is not an accurate account of the state court's ruling.

Scott asked the trial court to vacate its order denying him post-conviction relief and to permit him to file an amended petition. In denying that motion, the court did not clearly and expressly cite any established and strictly enforced state procedural rule precluding the relief Scott sought. *See Harris v. Reed*, 489 U.S. 255, 263 (1988) (for procedural default to exist, state court must clearly and expressly state that its ruling rests on state procedural bar). Rather, the court acknowledged that, although it had the authority to permit a defendant to amend a post-conviction petition for good cause, it did not believe that it had the authority to vacate its prior order denying Scott post-conviction relief. (ER 71.) *See* Ariz. R. Crim. P. 32.6(d). Thus, the trial court's

---

[36]The district court cited "Ariz. R. Crim. P. 32" as "a state procedural ruling that is regularly and consistently followed and [which] therefore constitutes an adequate and independent ground upon which procedural default can be found." (ER 58.) Rule 32, however, is in fact nine separate rules (Rules 32.1 through 32.9), none of which clearly apply to the situation with which the state court was confronted here. Scott asked the trial court to vacate its order denying him post-conviction relief so as to permit him to file an amended petition. Scott's request was not directly governed by any of the nine rules that comprise "Rule 32."

ruling denying Scott's motion to vacate was not premised on Scott's failure to comply with an established and strictly enforced procedural rule. Instead, the court denied the motion to vacate because it did not believe that it had the "*authority to grant the requested relief*." (ER 71 (emphasis added).) Specifically, it did not believe that it had the authority to vacate its prior order. Such a ruling, however, cannot provide the basis for a finding of procedural default. *Harris*, 489 U.S. at 263. The trial court's mistaken belief that it lacked the inherent authority to vacate one of its own orders is not a ruling based on state procedural bar.

Moreover, even if, in rejecting Scott's attempt to file an amended PCR, the trial court had clearly and expressly stated that it was relying on an established and strictly enforced state procedural rule that prohibited a trial court from vacating an order denying post-conviction relief to permit the defendant to file an amended petition, that "rule" could not serve as the basis for procedural default because, to the extent that such a rule exists, Arizona does not consistently and regularly apply it. For example, on June 27, 1997, only three days after it denied the petition for review in Scott's post-conviction proceeding, the Arizona Supreme Court issued an order in another capital case permitting the defendant to file a supplemental petition for post-conviction relief, even though the trial court had already denied him relief on his first petition. Specifically, the supreme court ordered

> that [post-conviction counsel] may file a supplemental petition for post-conviction relief. In that petition, she may raise any issue that, in her professional judgment, is not precluded and has merit, even though it may not have been included in her first petition for post-conviction relief.

Arizona v. Stokely, CV-97-0203-SA. Copies of the Arizona Supreme Court's order in *Stokely*, and the trial court's earlier order dismissing the post-conviction petition, are included in the Excerpts of Record at 614 through 616. This Court may take judicial notice of these court orders. *See* Fed. R. Evid. 201 advisory committee notes (distinguishing "legislative" facts from "adjudicative" facts, and concluding that no limit exists on court's ability to take judicial notice of legislative facts).

The Arizona Supreme Court's order in *Stokely* demonstrates (1) the trial court's error in this case in concluding that it lacked the authority to permit Scott to file an amended post-conviction petition; and, more importantly, (2) the district court's error in concluding that the trial court's ruling was "a procedural ruling that is regularly and consistently followed in Arizona and therefore constitutes an adequate and independent ground upon which a procedural default can be found." (ER 58.) As this Court observed in *Siripongs*, 35 F.3d at 1318, "federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." *Accord Anderson v. Sirmons*, 476 F.3d 1131, 1139-41 (10th Cir. 2007) (finding no procedural bar where

state procedural rule not consistently applied). Accordingly, no procedural default occurred with regard to (1) the claims alleging ineffective assistance of trial counsel with regard to challenging Scott's statements to the police and the investigation and presentation of mitigating evidence, and (2) the claim alleging ineffective assistance of appellate counsel for failing to challenge the trial court's finding that Scott committed the crime for pecuniary gain.

B. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE IAC CLAIMS WERE UNEXHAUSTED.

In addition to incorrectly finding Scott's IAC claims procedurally defaulted, the district court also concluded that Scott failed to present the claims to the Arizona Supreme Court in a "procedurally appropriate manner." (ER 58.) In other words, it found that Scott had not exhausted the claims. This ruling, too, was in error.

As discussed in the Statement of the Facts, *supra* at 37, Scott's second post-conviction counsel, Rachel Yosha, properly filed a petition for review with the Arizona Supreme Court in which, among other things, she challenged the trial court's refusal to permit her to file an amended petition on Scott's behalf. With her petition for review, Yosha submitted an appendix that included the motion in which she outlined the claims she wished to raise in the amended petition.[37] (*See* ER 307.)

---

[37]The appendix as a whole is not included as part of the Excerpts of Record. For the complete appendix, *see* Arizona Supreme Court PR Docket 1.

Pursuant to this Court's holding in *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005), the procedure Scott followed in this case was sufficient to exhaust his IAC claims. In*Insyxiengmay*, the state trial court prohibited the petitioner from filing a second personal restraint petition raising additional claims. Petitioner sought review from the Washington Supreme Court and attached as an appendix to his pleading a copy of the document he had attempted to file below. *Id.* at 667-68. This Court held that, by doing so, the petitioner had exhausted his claims. *Id.* at 668.

Likewise, Scott fully exhausted his IAC claims when he included his motion to vacate in the appendix accompanying his petition for review to the Arizona Supreme Court. Accordingly, the district court erred in concluding that all but one of Scott's IAC claims were procedurally barred. In truth, the three additional IAC claims discussed above were not procedurally barred.[38] Scott is entitled to return to the district court to brief the merits of those claims.[39]

---

[38]In addition, the claim discussed in Issue III, *infra*, that Scott has a constitutional right to the effective assistance of state post-conviction counsel, and that he was deprived of that right in this case, was likewise fairly presented and fully exhausted in state court. The claim was argued to the state trial court at length in the motion to vacate and was similarly presented to the Arizona Supreme Court in the petition for review. (ER 341; ER 250-54.)

[39]At the very least, Scott is entitled to an evidentiary hearing on whether his IAC claims are procedurally barred. (*See* Dist. Ct. Dkt.124, at 23-24.) *See Cristin v. Brennan*, 281 F.3d 404, 416-17 (3d Cir. 2002) ("[W]e are aware of no case in which either the *Keeney* standard or its successor, § 2254(e)(2), has been employed

III. THE DISTRICT COURT ERRED IN HOLDING (1) THAT SCOTT COULD NOT ASSERT A CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF POST -CONVICTION COUNSEL , OR IN THE ALTERNATIVE, (2) THAT THE GROSS INCOMPETENCE OF SCOTT'S STATE POST-CONVICTION ATTORNEY DID NOT EXCUSE HIS FAILURE TO EXHAUST HIS VARIOUS CLAIMS OF TRIAL AND APPELLATE INEFFECTIVE ASSISTANCE OF COUNSEL.

In his amended habeas petition, Scott identified at least sixteen instances of trial and appellate ineffective assistance of counsel. (Dist. Ct. Dkt. 54, at 21-42; ER 56-57.) He also raised an independent claim that he has a constitutional right to the effective assistance of his state post-conviction counsel. (Dist. Ct. Dkt. 54, at 42-46; Dist. Ct. Dkt. 124, 3-17.) In response to the State's contention that all but one of these claims were procedurally barred and/or non-cognizable, Scott further argued that, even absent an independent right to the effective assistance of state post-conviction counsel, he was excused from exhausting the trial and appellate IAC claims in state court because the gross inadequacy of state PCR counsel meant that

---

to limit whether an evidentiary hearing was available to evaluate whether a petitioner's procedural default may be excused."); *Williams IV v. Turpin*, 87 F.3d 1204, 1211 (11th Cir. 1996) ("[B]efore denying him an evidentiary hearing on the new evidence, the district court should have determined whether [Petitioner's] newly proffered evidence was sufficient to support a finding of cause and prejudice."). The doctrines of cause and prejudice are "federal questions" on which the federal courts have a duty to make "an independent determination." *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

there was the absence of an available state corrective process or that the circumstances of his case rendered the state corrective process ineffective to protect his rights. (Dist. Ct. Dkt. 86, at 21-29; Dist. Ct. Dkt. 124, at 18.) *See* 28 U.S.C. § 2254(b)(1)(B).

Citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and 28 U.S.C. § 2254(i), the district court summarily rejected Scott's argument that he has a constitutional right to the effective assistance of post-conviction counsel in a capital case. (ER 57.) Equating Scott's reliance on 28 U.S.C. § 2254(b)(1)(B) with a "cause and prejudice" analysis, the court concluded that, because Scott could not assert an independent right to the effective assistance of post-conviction counsel, he could not rely on PCR counsel's errors as "cause" for failure to exhaust. (ER 58-59.) Section 2254(i) notwithstanding, the district court's ruling was in error.

The status of an *Arizona capital* defendant's right to the effective assistance of post-conviction counsel is not as clear as the district court so quickly assumed. In Arizona, post-conviction review of ineffective assistance of counsel claims is an extension of a capital defendant's direct appeal. *See* Ariz. R. Crim. P. 32.3 (PCR proceeding "is part of the original criminal action and not a separate action."). For capital defendants in Arizona, post-conviction proceedings are not a "sword" used by the petitioner to upset a determination of guilt. Instead, they are a part of an

established, mandatory appellate process, initiated not by the defendant, but by the Arizona Supreme Court. *See* Ariz. R. Crim. P. 32.4(a) (upon the issuance of a mandate affirming a conviction and death sentence on direct appeal, the clerk of the Arizona Supreme court files an automatic notice for post-conviction relief); *State v. Bolton*, 896 P.2d 830, 839 (Ariz. 1995) (a Rule 32 proceeding is mandatory upon the affirmance of a death sentence).

In first appeals as of right, due process requires that defendants have the effective assistance of an attorney. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). Because the initiation of post-conviction proceedings in Arizona is automatic upon the affirmance of a death sentence, and because those proceedings are a defendant's sole opportunity to present constitutional claims regarding ineffective assistance of trial and appellate counsel, Rule 32 proceedings are appeals "as of right" for such claims. The State therefore must provide effective assistance of counsel. *See* Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1095 (2006); *see also* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel* , 2003 Wis. K.

Rev. 31.

Moreover, because the Eighth Amendment requires meaningful appellate review in death penalty cases, Scott is entitled to competent counsel in the only proceeding which allows him to enforce his Sixth Amendment right to counsel. The Supreme Court has recognized that "meaningful appellate review" is necessary in capital cases because it "serves as a check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 195, 206, (1976).

A sentencing process that offends "the evolving standards of decency that mark the progress of a maturing society" violates the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); *Atkins*, 536 U.S. at 311-12 (same); *Gregg*, 428 U.S. at 173 (same). This doctrine applies both to the substance of who may be subject to the death penalty and to the procedural safeguards states provide to protect against unjust death sentences. *See Gardner v. Florida*, 430 U.S. 349, 357 (1977) ("[T]his Court has acknowledged its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society."); *Beck v. Alabama*, 447 U.S. 625, 636-37 (1980) ("[T]he nearly universal acceptance of the rule [that a defendant is entitled to a lesser included offense instruction] as a matter of due process, in both state and federal courts establishes the value to the defendant of this procedural safeguard.").

Given that every active death penalty state except Alabama provides for the pre-filing appointment of counsel to assist indigent death-row inmates in the preparation of post-conviction petitions challenging their convictions and sentences, an overwhelming national consensus has evolved concerning the need for the assistance of post-conviction counsel in capital cases. As a consequence, when a state establishes a right to capital post-conviction proceedings, there is an Eighth Amendment right to the assistance of post-conviction counsel, and an Eighth and Fourteenth Amendment right to the effective assistance of counsel in those proceedings. *Evitts*, 469 U.S. at 393.

Because the right to effective assistance of post-conviction counsel is of constitutional dimension, providing ineffective assistance in capital post-conviction proceedings constitutes cause for any procedural default. And, of course, because a finding of ineffectiveness requires both deficient performance and prejudice, it is clear that the finding of cause (ineffectiveness) by definition encompasses proof of prejudice.

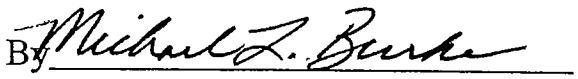
CONCLUSION

For the foregoing reasons, this Court should vacate the district court's order dismissing Scott's habeas petition with prejudice and remand the matter with instructions either to grant the writ (Issues I and III) or to permit further proceedings

on the merits of Scott's claims (Issues II and III).

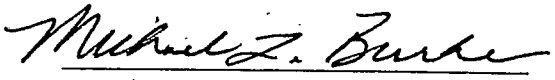
Respectfully submitted this 4th day of September, 2007.

Jon M. Sands
Federal Public Defender
Michael L. Burke
Jennifer Y. Garcia

By 
Counsel for Petitioner-Appellant

Certification of compliance pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for case number 05-99012

I certify that this opening brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is proportionately spaced, has a typeface of 14 points or more and contains 20,939 words.



Counsel for Petitioner-Appellant

Dated: September 4, 2007.

Statement of related cases

Counsel for Scott, Appellant herein, state to the best of their knowledge, that there are two related cases pending before this Court. Those cases are the appeals from the denials of habeas corpus relief to Scott's co-defendants, James Styers and Debra Milke. *See Styers v. Schriro*, 07-99003, and *Milke v. Schriro*, 07-99001.

Certificate of service

The undersigned hereby certifies that on this 4th day of September, 2007, the original and 15 copies of the Opening Brief and the original and 4 copies of the Excerpts of Record, consisting of three volumes, were sent by Federal Express to the Clerk of the United States Court of Appeals for the Ninth Circuit.

The undersigned also certifies that on this 4th day of September, 2007, two copies of the Opening Brief and one copy of the Excerpts of Record, consisting of three volumes, were mailed to J.D. Nielsen, Assistant Attorney General, Attorney General's Office, Capital Litigation Section, 1275 West Washington Street, Phoenix, Arizona 85007-2997.

Cheryl Scates
Senior Legal Secretary
Capital Habeas Unit