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

No. 12-99001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL VILLEGAS LOPEZ

Appellant-Petitioner

v.

CHARLES RYAN, ET. AL

Appellee-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

REPLY BRIEF OF SAMUEL VILLEGAS LOPEZ

(ORAL ARGUMENT GRANTED)

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Sam Lopez's Rule 60(b) motion involves a rare and extraordinary situation for equitable relief: *Martinez* overturned decades of settled Ninth Circuit precedent, dramatically altered the equities in this habeas proceeding, all the while demonstrating clear error in this Court's prior judgment. This Article III court has both the power and duty to do equity. It should do so here, especially where Appellee does not dispute the critical facts that: Lopez has never received a merits adjudication of the compelling ineffectiveness claim now before this Court;[1] *Martinez* overturned settled Ninth Circuit precedent; Lopez sought relief under *Martinez* within three weeks; and this Court's prior ruling essentially proves post-conviction counsel's deficient performance under *Martinez*.

Lopez's 60(b) motion is not a second habeas petition, and the District Court clearly erred in weighing the equities. Even Appellee agrees that comity interests are *not* offended if an uncorrected, erroneous judgment would prevent any adjudication of a valid constitutional claim, like Lopez's. Not only is his claim to equity even stronger than that in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987), his entitlement to equitable relief aligns precisely with *Nedds v. Calderon*, 2012 U.S.App.Lexis 9148 (9th Cir. 2012), decided last week. This Court should reverse.

[1] This brief, and all other pleadings, refer to the underlying claim which was presented, but not decided on the merits, as IAC sentencing. Lopez is not attempting to expand his claim. He relies on the same arguments and evidence that were before this court in the original habeas appeal to support his IAC Sentening claim. The only new evidence is offered to show that he received IAC in post-conviction as well. Thus Lopez is not presenting a new substantive claim.

I. APPELLEES CONTINUE TO MISUNDERSTAND THE HOLDING OF *GONZALEZ* WITH THE COURT'S *APPLICATION* OF ITS HOLDING TO THE *SPECIFIC FACTS* OF *GONZALEZ'S* CASE

"Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). Appellees seem to believe that *Gonzalez* held that any motion under 60(b)(6) alleging change in the law, whether the change was substantive or procedural, is the equivalent of a second or successive petition. That is not the holding of *Gonzalez*.

The Court in *Gonzalez* contrasted 60(b)(6) motions raising changes in substantive law (which are the equivalent of a second or successive petition), 545 U.S. at 531, from 60(b)(6) motions raising changes in habeas procedural law, which attack the integrity of the federal of the federal proceedings, and are therefore not second or successive. 545 U.S. at 533.

> A motion can… be said to bring a "claim" if it attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.

Gonzalez v. Crosby, 545 U.S. 524, 532 (U.S. 2005)(emphasis in original). Here, Lopez did not receive an adjudication on the merits of his underlying IAC at sentencing claim. This Court and the lower court ***barred*** an adjudication on the merits for procedural reasons. As such, Lopez is not seeking a second review on the merits of a claim previously adjudicated. He is only seeking an initial review of a claim which was *not* adjudicated on the merits based on misapplication of federal procedural law. That is precisely what *Gonzalez* allows – consideration of a "nonmerits aspect of the first federal habeas proceeding." *Id.* at 534.

Indeed, Lopez has never received a merits determination of the ineffective assistance at sentencing claim contained in his amended federal habeas petition. That claim is powerful, well-supported, and involves allegations that counsel ineffectively failed to investigate evidence of Lopez's traumatic life history, cognitive impairments, psychiatric impairments, and neurological deficits and to present the results of those findings to his psychiatric expert so that the expert could render an accurate and reliable opinion:

> counsel failed to furnish Dr. Bendheim with a broad range of biographical data and family and social history that were necessary for a proper diagnosis . This information included the abandonment of Lopez's family by this father, his family's extreme poverty, Lopez's history of substance abuse and exposure to toxic substances, and his low education level. . . . [A]n investigation into his personal history was necessary for Dr. Bendheim to establish a base line for his cognitive functioning, compare his functioning when intoxicated with the base line, determine if intoxication exacerbated any underlying

> psychiatric problems, assess him for any addictive disease, determine any neurologic deficits and the effects of intoxication on such deficits, and evaluate any other influences on his behavior or thought processes during the murder.

Lopez v. Ryan, 630 F.3d 1198, 1204-1205 (9th Cir. 2011)(recounting the declaration of Dr. George Woods, M.D.).[2] This Court, however, refused to address this claim on the merits, concluding that Lopez was "barred from seeking relief" on his claim under 28 U.S.C. §2254(e) because he "failed to develop" the factual basis of this specific claim in state court. *Lopez*, 630 F.3d at 1205-1206.

[2] Claims such as those raised by Lopez in his first petition have routinely caused the United States Supreme Court to reverse a capital sentence. *See Williams v. Taylor*, 529 U.S. 420 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 130 S.Ct. 447 (2009); *Sears v. Upton*, 130 S.Ct. 3259 (2010). Appellees will no doubt retort with the oft-used argument that the facts of this case are so awful, no amount of mitigation would have made a difference. While the argument has some rhetorical appeal, it is not true. All murder is horrible, not all murderers deserve the death penalty. This is a single-aggravator case. Mr. Lopez has no prior history of violence. Dr. Woods opinion is well-supported by documents and witness statements. The underlying facts of the other cases reversed by the Supreme Court are far more aggravating than those here. In a home invasion Williams ordered both victims to remove their clothes, held them captive while ransacking the home, raped one of his victims, and then forced them from their homes into a thicket where they were shot. *Williams v. Taylor*, 529 U.S. at 424-425. Wiggins beat, drowned, and poured lye or ammonia over the body of his 77 year old victim. *Wiggins v. State*, 352 Md. 580, 585-586 (Md. 1999). Rompilla, who had a prior for rape, stabbed and set his victim on fire. *Commonwealth v. Rompilla*, 539 Pa. 499, 505-506 (Pa. 1995). Porter stalked his victim, shot her, and pointed his gun at the victim's daughter, saying "Boom, boom, you're going to die." *Porter v. State*, 564 So. 2d 1060, 1061-62 (Fla. 1990). Sears abducted his victim from a parking lot armed with brass knuckles, handcuffed her, drove her across state lines, raped her, and despite her pleas for life, repeatedly stabbed her five hours later. *Sears v. State*, 270 Ga. 834 (Ga. 1999). In each of these cases, the Court found that the mitigation which demonstrated cognitive impairment was reasonably probable to result in a sentence of life.

This Court's refusal to address Lopez's claim on the merits presents a prototypical "defect in the integrity of the federal habeas proceedings" under *Gonzalez* , 545 U.S. at 532. Under *Gonzalez*, Lopez may proceed under Fed.R.Civ.P. 60(b)(6), because his motion properly "asserts that a previous ruling which precluded a merits determination was in error." *Id.* Indeed, he has not raised a new challenge to the state court judgment, but rather, he asserts that the federal court process was defective because it unfairly denied him the opportunity for federal review of his IAC at sentencing claim.

In fact, under similar circumstances, the Sixth Circuit has concluded that a Rule 60(b) motion challenging the denial of an evidentiary hearing is not a second or successive habeas petition. *Mitchell v. Rees*, 261 Fed.Appx. 825 (6th Cir. 2008). As the Sixth Circuit explained:

> Here, Mitchell's Rule 60(b) motion argues that I erroneously denied him an evidentiary hearing and requests that the district court reopen the case and grant the hearing. This is not a "claim" because it does not assert an error in the state conviction and would not constitute a federal basis for relief. Respondent argues that this case is distinguishable from cases in which a limitations bar applies because here the court actually decided Mitchell's original claim on the merits. While this may be true, the focus of the inquiry is not on whether the court reached the merits of the original petition but on whether the Rule 60(b) motion contains a claim. If it does not contain a claim, it is not a habeas petition, successive or otherwise. *See Gonzalez*, 545 U.S. at 530. Because Mitchell's Rule 60(b) motion challenges only the judgment on the evidentiary hearing, it does not make a claim but rather asserts an error in the federal habeas proceeding. Therefore,

> Mitchell's Rule 60(b) motion is not subject to the provisions of 28 U.S.C. §2244(b).

Mitchell, 261 Fed. Appx. at 829. Here, Lopez's motion alleges that he received IAC of PCR counsel which is cause for his failure to exhaust (and develop) his IAC sentencing claim, which is not an attack on the underlying state court conviction and is not an independent claim on which he could receive relief. *Martinez* made that clear. *MartinezI*, 132 S.Ct. at 1320 (*Martinez* does not establish a constitutional right to post-conviction counsel). Lopez's motion is thus proper under Fed.R.Civ.P. 60(b).

II. THE DISTRICT COURT CLEARLY ERRED IN WEIGHING THE EQUITIES

While the District Court erred in concluding that Lopez's 60(b) motion was a second habeas petition, it also clearly erred when considering the equities of this situation. In particular, both the District Court and Appellee misapprehend the equities, for contrary to Appellee's contentions, Sam Lopez *was* diligent in seeking relief – much more diligent than the movant in *Gonzalez* and much more diligent than the movant in *Ritter* – who was granted equitable relief. When all the equities are appropriately considered, Lopez is entitled to equitable relief.

A. THE STATE HAS NO COMITY INTEREST IN ENFORCING AN ERRONEOUS LEGAL JUDGMENT WHERE THE STATE PROVIDED INEFFECTIVE POST-CONVICTION COUNSEL

Appellees write, "The *Phelps* court determined that principles of comity are not upset when an erroneous legal judgment, if left uncorrected, "would prevent the true merits of a petitioner's constitutional [claim] from ever being heard." Ans. Brf. at 22, *citing Phelps v. Alameida*, 569 F.3d 1120, 1140 (9th Cir. 2009). Exactly. Indeed, it was this very principle that drove the equitable decision in *Martinez*. It is precisely the equitable principle here.

Comity dictates that the state courts be given a first opportunity to correct a constitutional violation. *O' Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). When given that opportunity in Lopez's case, however, the state court provided woefully deficient process by appointing him a constitutionally ineffective attorney. Having provided ineffective counsel which prevented Lopez from "vindicating a substantial ineffective-assistance-of-trial-counsel claim," *Martinez*, 566 U.S. at ___ 132 S.Ct. 1309, 1312, the state cannot now claim that as a matter of comity, its judgment should be respected. *Martinez* makes clear that under such circumstances, no such respect is due.

B. LOPEZ DILIGENTLY SOUGHT RELIEF

Appellees attempt to contrast Lopez from *Phelps* is unavailing. Indeed Appellees rely on the very facts that establish that Lopez's PCR counsel was ineffective under *Martinez* to argue that Lopez was not diligent in exhausting the facts of his IAC sentencing claim. " 'Lopez was not diligent in presenting the new

evidence in issue,' and presumably could have obtained the information from his family members without court order and with minimal expense." Ans. Brf. at 23, quoting this Court's opinion in *Lopez v. Ryan*, 630 F.3d at 1206, which barred the IAC sentencing claim at issue. [3] But the overriding thrust of Appellees brief is tethered to their argument that Lopez should have raised his *Martinez* argument earlier, as in before it existed, when it would undoubtedly have been futile to do so.[4] An analysis of *Gonzalez v. Crosby*, U.S. 524 (2005) and *Ritter v. Smith*, 811 F.3d 1398 (11th Cir. 1987), defeat this argument.

The petitioner in *Gonzalez* pled guilty. He did not appeal. He waited twelve years before initiating post-conviction proceedings. He had two state-post convictions and then sought habeas relief in 1997. He did not raise an IAC claim,[5] but only that his plea was not knowing and voluntary. He was dismissed as time-barred under existing circuit precedent, but on an issue which the Supreme Court had never weighed in on. He sought a COA on appeal, but was denied by a single

[3] Appellees weakly try to lay the blame at Lopez's feet. Yet, they fail to even acknowledge, let alone address the affidavits of previous counsel that Mr. Lopez was cooperative. Mr. Lopez did not put restrictions on his counsel. Mr. Lopez did not interfere with the investigation. No counsel has ever said that Mr. Lopez prevented them from doing their job. Not wanting your family to be served with a subpoena by court officers, particularly this family, is not the same as impeding investigation.

[4] Appellees ignore the impact that such a ruling would have on this Court and other Courts. The onslaught of over-sized briefs and frivolous appeals would be staggering. Lawyers faced with a Rule 11 sanction would retort that she had no choice but to raise the clearly frivolous claim because someday it might not be frivolous anymore. Such a rule is unworkable.

[5] *Martinez* is concerned only with claims of ineffective counsel because the right to counsel is a bedrock principle of our constitution. *Martinez*, 132 S.Ct. at 1312.

11th Circuit judge. He did not seek rehearing or any further review, even though the exact issue on which he later relied was then pending in the Supreme Court and he could have filed certiorari. Seven months after his COA was denied, the Supreme Court decided *Artuz v. Bennett,* 531 U.S. 4 (2000), clarifying for the first time what constitutes a "properly filed" petition for post-conviction relief for purposes of AEDPA tolling. *Gonzalez* took nine more months (a total of sixteen months after his COA was denied) before filing his 60(b) motion. It was that factual scenario where the Court found a lack of diligence. *Gonzalez,* 525 U.S. at 526-527.

Compare *Gonzalez* with *Ritter v. Smith,* 811 F.2d 1398 (11th Cir. 1987). There, the Alabama habeas petitioner won relief and Alabama was ordered to resentence Ritter within 180 days. The warden did not appeal the district court's order. Ultimately, the reasoning of the court in the *Ritter* case was overturned by *Baldwin v. Alabama,* 472 U.S. 372 (1985). But the Warden in *Ritter* did not seek immediate relief upon the grant of certiorari in *Baldwin. Ritter,* 811 F.2d at 1404-1405.

Here is the Ritter timeline: Certiorari was denied on October 1 and the mandate of the 11th Circuit issued. The case was remanded and the district court mandate issued on December 3. The State of Alabama then had 180 days to resentence Ritter. Four months later, the warden moved to stay the 180 day order, pending the outcome of *Baldwin*. He did not file any other motion for relief.

Baldwin was decided on July 18. The Warden filed its 60(b) motion three weeks later, nine months after certiorari was denied and the 11th Circuit mandate issued. There, the Court found that the warden acted with diligence and was reasonable in waiting to raise his claim until after *Baldwin* was decided because to do so earlier, would have been futile. *Id*.

> We conclude that the state did not behave unreasonably in failing to seek relief immediately upon the decision to grant certiorari in *Baldwin*. The mere decision of the Supreme Court to hear the issues presented in *Baldwin* did not provide a substantive basis for changing the district court's December 3, 1984 judgment implementing our mandate. **It is clear that any motion to alter the district court's December 3, 1984 order, or any appeal therefrom, would have been futile**; it is well established that the grant of certiorari has no precedential value. The Supreme Court's grant of certiorari in *Baldwin* did, however, provide a basis for seeking an extension of time for the resentencing of Ritter. That extension was sought once the need for it became evident, i.e., when it became clear that the Baldwin decision would not come down prior to the expiration of the 180 days allotted for Ritter's resentencing. **Therefore, it cannot be said that the state was dilatory in its actions; it simply declined to file a futile, and unjustified motion for relief.** Instead, it made a timely motion for an extension of time for resentencing Ritter, and then filed its Rule 60(b)(6) motion within the extended time and promptly after the Supreme Court's judgment in Baldwin.

Id. (emphasis added). It is critical to note that *Ritter* reached this conclusion, even though the Warden had not appealed the decision of the district court to the 11th Circuit.

> Though the state did not appeal the district court's order, this is not a case like those in which Rule 60(b) relief is sought merely as a substitute for timely appeal. See, e.g., *Ackermann v. United States*, 340 U.S. 193, 95 L. Ed. 207, 71 S. Ct. 209 (1950); *Parks v. U.S. Life & Credit Corp.*, 677 F.2d 838 (11th Cir. 1982). The state here did not purposefully or negligently avoid an appellate remedy which was available; on the contrary, it sought the only form of relief possible -- an extension of time followed by a Rule 60(b) motion. **Neither *Ackermann* nor *Parks* require a party to file a groundless appeal merely to preserve their Rule 60(b) rights**.

Id. n.9.

Compared to the Warden in *Ritter*, Lopez was diligent. Certoriari was not granted in *Martinez* until after this Court's opinion. The law of the case and the law of this Circuit was that IAC of PCR counsel was not cause to excuse a procedural default. Before the mandate issued, Lopez raised the pendency of *Martinez* in his petition for certiorari, which was his first opportunity to raise such a claim. SER 23. The mandate of this Court issued on November 17, 2011. *Maples v. Thomas* was decided on January 18, 2012. There the Supreme Court, relying on *Coleman v. Thompson*, 501 U.S. 722, 753, wrote, "Negligence on the part of a prisoner's postconviction attorney does not qualify as "'cause.' … We do not disturb that general rule." *Maples v. Thomas*, 132 S.Ct. 912, 922 (2012).

No habeas lawyer reading the Court's decision in *Maples* could foresee the decision two months later in *Martinez.* Within hours of the *Martinez* decision, Lopez filed a motion to defer ruling on the Warrant Request so that the Lopez

could pursue relief under *Martinez.* ER 351.The state opposed and the warrant was issued. Lopez promptly informed the federal district court that he intended to seek relief under *Martinez*.[6] D.E. 235. The Motion was filed on April 9, five months after the mandate issued and three weeks after *Martinez* was decided. Lopez has been diligent– as was the movant in *Ritter*.

C. EQUITY ESTABLISHES THAT LOPEZ ACTED PROPERLY IN RAISING HIS *MARTINEZ* ARGUMENT ONCE *MARTINEZ* OVERRULED THIS CIRCUIT'S PRECEDENT, NOT BEFORE

Appellee also makes the erroneous assertion that, as a matter of equity, Lopez should now be punished with the loss of his life because he should have futilely challenged entrenched Ninth Circuit precedent which categorically held that post-conviction counsel's failures are always attributable to the petitioner. First, *Ritter* made clear the error in this argument, for as *Ritter* held, a 60(b) movant is not required to file a futile appeal in order to "preserve" the right to equity once existing law is overturned, as it was here. *See Ritter*, 811 F.2d at 1405 & n. 9; p. 10, *supra*. Second, as this Court just held last week, equity demands that Sam Lopez not be faulted for "relying on Ninth Circuit precedent that is later

[6] Lopez originally informed the Court that he would file his 60(b) motion on March 30, 2012. However, on March 30, while editing the motion, lead counsel in the case received a phone call that her father had died suddenly and her mother was distraught and being admitted to the hospital in Blue Springs, Mo. The only living child of her mother, counsel flew from her home in Nashville to Missouri and handled all of the arrangements. The court and counsel for the state were informed of the unavoidable delay and did not raise any objection. Ultimately, the 60(b) motion was filed on April 9. ER 98.

overturned by the Supreme Court." *Nedds v. Calderon*, 2012 U.S.App.Lexis 9148 (9th Cir. Mar. 4, 2012). Because the District Court concluded otherwise when weighing the equities, the District Court clearly erred.

Again, a historical perspective on this is enlightening. For over two decades since the decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court consistently held that the failures of post-conviction counsel were always attributable to the habeas petitioner. This Court's unbroken line of cases spanned decades. *Finley v. Attorney General*, 1992 U.S.App.Lexis 8571 (9th Cir. 1992); *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993); *Burns v. Burns*, 1993 U.S.App.Lexis 2695 2(9th Cir. 1993); *Tachibana v. Waihee*, 1993 U.S.App.Lexis 4120 (9th Cir. 1993); *Tran v. Maass*, 1993 U.S.App.Lexis 7153 (9th Cir. 1993); *Harris v. Lewis*, 1994 U.S.App.Lexis 15530 (9th Cir. 1994); *Moran v. McDaniel*, 80 F.3d 1261, 1271 (9th Cir. 1996); *Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998); *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998); *McCarthy v. Maass*, 1998 U.S.App.Lexis 9788 (9th Cir. 1998); *Poland v. Stewart*, 169 F.3d 573, 588 (9th Cir. 1998); *Nillo v. Woods*, 1998 U.S.App.Lexis 28406 (9th Cir. 1998); *Bonner v. Crabtree*, 1998 U.S.App.Lexis 30068 (9th Cir. 1998); *Ameen v. Rhode*, 1999 U.S.App.Lexis 8466 (9th Cir. 1999); *Otero v. Benzler*, 1999 U.S.App.Lexis 10649 (9th Cir. 1999); *Bargas v. Burns*, 179 F.3d 1207, 1215 (9th Cir. 1999); *Charles v. Lewis*, 1999 U.S.App.Lexis 13501 (9th Cir. 1999); *Loveland*

v. Hatcher, 231 F.3d 640, 644 n.4 (9th Cir. 2000); *Bremer v. Klauser*, 100 Fed.Appx. 618 (9th Cir. 2004); *Smith v. Idaho*, 392 F.3d 350 (9th Cir. 2004); *Custer v. Hill*, 378 F.3d 968 (9th Cir. 2004); *Widmer v. Belleque*, 256 Fed.Appx. 112 (9th Cir. 2007); *Smith v. Baldwin*, 510 F.3d 1127 (9th Cir. 2007); *Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008); *Robinson v. Schriro*, 366 Fed.Appx. 801 (9th Cir. 2010); *Woods v. Sinclair*, 655 F.3d 886 (9th Cir. 2011). As even the Warden now recognizes, *Martinez* overturned this unbroken line of precedent.

But the remedy for that is not to punish Lopez for relying on that precedent, but rather to grant him equitable relief because he relied on that precedent in good faith. This was the essence of this Court's ruling last week in *Nedds v. Calderon*, ___ F.3d ___, 2012 U.S.App.Lexis 9148 (9th Cir. May 4, 2012) which held that as a matter of equity a habeas petitioner is fully entitled to rely on the pronouncements of this Court when presenting his case in habeas. That is exactly what Lopez did. Just as this Court granted Nedds equitable relief (in the form of equitable tolling), this Court must also grant Lopez equitable relief.

In *Nedds*, the habeas petitioner filed his habeas petition by "relying on Ninth Circuit precedent that [was] later overturned by the Supreme Court." *Nedds*, ___ F.3d at ___, 2012 U.S.App.Lexis 9148 *8. As this Court explained, because he presented his case by relying on settled Ninth Circuit precedent that was then overturned, equity demanded judicial intervention. Indeed, "these are precisely the

circumstances in which equitable principles justify" equitable relief. *Id., quoting Harris v. Carter*, 515 F.3d 1051, 1056 (9th Cir. 2008). Where Nedds "relied in good faith on then-binding circuit precedent in making his tactical decision" about filing his habeas petition, this Court recognized that Nedds' presenting his case "consistent with later overturned precedent qualif[ies] as an 'extraordinary circumstance.'" which justified tolling. *Nedds*, *10-11.

Nedds makes manifest that the district court clearly erred in weighing the equities. Lopez did not futilely tilt against decades of settled Ninth Circuit precedent to claim that post-conviction counsel's failures were not attributable to him. That was unquestionably a fool's errand. Instead, he justifiably, and in good faith, relied on this Court's unwavering precedent when he framed his arguments before this Court. This cuts in Lopez's favor in the balance of equities – not against him as the district court believed.

Now that *Martinez* has changed the law – showing that twenty-odd years of this Court's precedent is wrong and this Court erred in attributing post-conviction counsel's failures to Lopez under 2254(e)– *Nedds* makes clear that the equities favor Lopez because of his justifiable reliance on this Court's post-*Coleman* precedent. To be sure, Nedds involves "equitable tolling," but the important point is that it decides a question of equity. As such, it informs the equities in this case. The Supreme Court's overturning of decades of precedent is, to use *Nedds'* words

"an extraordinary circumstance" warranting equitable relief here. This Court couldn't have said it any better.

Nedds is not an outlier on the matter of equity. Before *Nedds*, this Court held in *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008) that when a petitioner "relie[s] on controlling circuit precedent" in making a "strategic decision" about presenting his habeas case, "The Supreme Court's subsequent overruling of our controlling precedent constitutes the type of extraordinary circumstance that justifies" equitable relief, in that case, equitable tolling. *Id.* at 1257.

Similarly, the Eighth Circuit has found that in habeas proceedings, the overruling of settled circuit precedent qualifies, as a matter of equity, an "extraordinary circumstance external to [the petitioner] and not attributable to him." *Riddle v. Kemna*, 523 F.3d 850, 857 (8th Cir. 2008)(en banc) . Again, that is precisely the situation here. *See also Streu v. Dormire*, 557 F.3d 960 (8th Cir. 2009). Likewise, the Sixth Circuit has held that as a matter of equity in habeas proceedings, a habeas petitioner cannot be faulted for litigating his case based upon settled circuit precedent which informed his litigation decisions. *Sherwood v. Prelesnik*, 579 F.3d 581, 588-589 (6th Cir. 2009); *Henderson v. Luoma*, 302 Fed.Appx. 359 (6th Cir. 2008)(petitioner justifiably relied on binding precedent when he acted).

The District Court's weighing of the equities, however, flies in the face of *Nedds* and the equitable principles it espouses. *Nedds* makes clear that the District Court clearly erred in failing to credit to Lopez's account the extraordinary overturning of this Court's settled precedent, having instead unfairly penalized Lopez for justifiably relying on that precedent – an outcome that equity does not countenance.

D. MARTINEZ AND 2254 (e) ARE INEXTRICABLY INTERTWINED

Appellees pretend that the equitable principles at play in *Martinez* are completely divorced from the fact exhaustion concerns of 28 U.S.C. § 2254 (e) and thus there is no "close connection" between *Martinez* and this case. But 2254 (e) is the flip side of the *Martinez* coin.[7] The holding of *Martinez* would make no sense, if the claim would be separately barred under 2254 (e)(2). Such a holding would render *Martinez* a nullity. By definition, every habeas petitioner who asserts IAC of post-conviction counsel as cause for failure to present a claim of

[7] Appellees failed to respond to Petitioner's observation in his opening brief that:

> Justices Alito and Kennedy acknowledged in *District Attorney's Office v. Osborne*, 557 U.S. 52, ___,129 S.Ct. 2308, 2325(2009)(Alito, J., concurring), in 28 U.S.C. §2254(e)(2) of the AEDPA, Congress codified the standard "cause and prejudice" test governing a habeas petitioner's entitlement to an evidentiary hearing. *Id*. at 2325 (Alito, J., concurring)("Congress subsequently codified *Keeney [v. Tamayo-Reyes]*'s cause-and-prejudice rule in AEDPA, 28 U.S.C. §2254(e)(2).")

Appellant's Opening Brief at 8.

IAC in state court will have failed to develop the claim. If the claim had been developed, the claim would have been presented. The Supreme Court would not go so far as to change the past twenty-two years of habeas law, only to have it rendered useless.

The Supreme Court has been careful to interpret AEDPA in a way that does not produce "distortions and inefficiencies." *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). The Court has always been concerned with "the implications for habeas practice," *Id.* at 945, and has taken pains to interpret AEDPA in harmony with its own caselaw, principles of equity, and the constitution. In fact, Appellee does not contest the fact that the provisions of AEDPA are subject to equitable exceptions. The Court summarized this history in *Panetti:*

> These purposes, and the practical effects of our holdings, should be considered when interpreting AEDPA. **This is particularly so when petitioners "run the risk" under the proposed interpretation of "forever losing their opportunity for any federal review of their unexhausted claims."** *Rhines v. Weber*, 544 U.S. 269, 275, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). *See also Castro v. United States*, 540 U.S. 375, 381, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003). In *Rhines* "[w]e recognize[d] the gravity of [the] problem" posed when petitioners file applications with only some claims exhausted, as well as "the difficulty [this problem] has posed for petitioners and federal district courts alike." 544 U.S., at 275, 276, 125 S. Ct. 1528, 161 L. Ed. 2d 440. We sought to ensure our "solution to this problem [was] **compatible with AEDPA's purposes**." *Id.*, at 276, 125 S. Ct. 1528, 161 L. Ed. 2d 440. And in *Castro* we resisted an interpretation of the statute that would **"produce troublesome results," "create procedural anomalies," and "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent."** 540 U.S., at 380, 381, 124 S. Ct. 786, 157 L.

> Ed. 2d 778. *See also Williams v. Taylor*, 529 U.S. 420, 437, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000); *Johnson v. United States*, 544 U.S. 295, 308-309, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005); *Duncan v. Walker*, 533 U.S. 167, 178, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001); cf. *Granberry v. Greer*, 481 U.S. 129, 131-134, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987).

Panetti, 551 U.S. at 945-946 (emphasis added). The holding of the District Court if adopted by this Court will "produce troublesome results" "create procedural abnormalities" and close the federal courthouse doors to a "class of habeas petitioners seeking review without any clear indication that such was Congress' intent." That cannot have been the intent of the Supreme Court in deciding *Martinez*.

E. APPELLEES' INTEREST IN FINALITY DESERVES LITTLE WEIGHT

Appellees here, like the Respondent in *Gonzalez*, rely heavily on the Supreme Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998). Such reliance is misplaced.

> The problem for respondent is that this case does not present a revisitation of the merits. The motion here, like some other Rule 60(b) motions in § 2254 cases, confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding. Nothing in Calderon suggests that entertaining such a filing is "inconsistent with" AEDPA.

Id, 545 U.S. at 534.

As previously discussed, 60(b) is by definition an exception to finality and so such interests hold little weight to begin with. But here, where Lopez brought his motion within weeks of the ruling in *Martinez* and timely gave notice of his intent to seek redress under *Martinez*, as explained above, the equities are even more in his favor. Moreover, Appellees' do not have an interest in carrying out an unconstitutional sentence. Lopez is in prison. He is being punished. Their interest in punishment is being served and will not be harmed by granting the motion.

Lopez cannot be faulted because he defended his petition on the legal grounds that were available to him at the time. Appellee ignores its own role in sandbagging and subterfuge in the original district court proceedings. This Court never resolved whether Appellees had waived exhaustion. But it is clear that they led the Court and Lopez to believe that they had. Lopez acted in reliance on that concession for eight years. Then in a surprise move, they changed their position. Lopez made the arguments available to him under the law at the time. He lost. The law of the case is that a) his claim wasn't presented to the state court, and b) the fault lies with post-conviction counsel. That was the holding of the Court and it is supported by the affidavits in this record. But Lopez, like the Warden in *Ritter*,

cannot be "require[d]… to file a groundless appeal merely to preserve their Rule 60(b) rights." *Ritter v. Smith*, 811 F.2d at 1405, n.9.[8]

[8] *See also Panetti*, 551 U.S. at 946 ("Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, "reduc[e] piecemeal litigation," or "streamlin[e] federal habeas proceedings." *Burton v. Stewart*, 549 U.S. 147, 154, 127 S. Ct. 793, 797, 166 L. Ed. 2d 628 (2007) (per curiam) (internal quotation marks omitted).")

UNCERTIFIED CLAIMS

III. LOPEZ'S MOTION IS NOT A SECOND OR SUCCESSIVE PETITION

Petitioner presents a Motion for Relief from Judgment pursuant to Rule 60(b) because the change in federal habeas procedural law brought by *Martinez* undermines the integrity of the District Court's judgment. While, yes, ultimately, after the Judgment is reopened, the result will be for the District Court to review his previously (and now erroneously) barred IAC sentencing claim, the 60(b) motion itself seeks to establish that the judgment lacks integrity. In his motion, he made clear that he was relying on the evidence previously presented, but barred, not that he was re-raising the same claim in the motion. In sum, the motion is to reopen because the judgment of the district court and this court barring the claim from federal review lacks integrity.

Appellees argument here is based on a bald misstatement of this Court's holding in the original appeal. Appellees represent to this Court that it held that Lopez's IAC claim failed on the merits "when it found that Lopez had not supported the expanded portion of Claim 1(C) with evidence, and thus could not prevail on the merits." That was not the holding.

This Court held:

> Lopez was not diligent in developing his claim. In his post-conviction proceedings, Lopez did not allege that his attorney at sentencing was ineffective in failing to investigate Lopez's personal history and to

> furnish Dr. Bendheim with those facts, but rather complained only that counsel failed to provide the doctor with the statements and testimony of Rodriguez and Sabori. The problem, then, is not simply that Lopez failed to develop the factual underpinnings of his claim — Lopez failed to present this claim altogether.

Lopez, 630 F.3d at 1206. The Court then concluded, that due to the lack of diligence, "he is barred from seeking relief." *Id*. Barred from seeking relief is not a ruling that Lopez's claim fails on the merits. It is a holding preventing him from raising the claim in the first place. And we now know, as previously explained, that when the lack of diligence is the fault of PCR counsel, as the uncontested evidence establishes that it was, then the bar is lifted.

IV. IF RELIEF IS NOT AVAILABLE UNDER 60(b) THEN THIS COURT SHOULD TREAT PETITIONER'S MOTION AS A FIRST IN TIME PETITION

Appellees misunderstand the argument. The argument is that Petitioner's claim was not ripe for federal habeas review until the procedural impediment was removed, here, the ability to defend against procedural bar by alleging IAC of PCR counsel as cause for the default. Now that this defense is available to Lopez for the first time, is claim has ripened. The force and logical of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Panetti v. Quarterman*, 551 U.S. 930 (2007) apply with equal force here.

CONCLUSION

For all of the foregoing reasons, and those contained in Appellant's Opening Brief as well as the record in this case, this Court should reverse the decision of the district court and remand the case with instructions to either reopen the habeas petition pursuant to Rule 60(b) or, alternatively, with instructions to allow Petitioner to proceed with his IAC at sentencing claim as a first-in-time petition. This Court should grant any other remedy it deems reasonable and just.

Respectfully submitted this 10th day of May, 2012.

Kelley J.Henry
Denise I. Young

BY: /s/ Kelley J.Henry

CERTIFICATE OF COMPLIANCE

I hereby certify that appellant's opening brief contains 6,250 words and is in compliance with the Word limits imposed by the Rules of this Court.

/s Kelley J. Henry
Attorney for Samuel Lopez

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

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