ATTACHMENT C

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** FILED UNDER SEAL **

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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

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

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

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

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

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

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

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

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

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

A second reason that Section 13-4013 funds requests should

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

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

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

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

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

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

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

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

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

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

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

Dated this _____ day of March, 1995.

By_____
Robert Doyle

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

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

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

By:_____

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** FILED UNDER SEAL **

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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

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

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

ATTACHMENT D

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted this _____ day of May, 1995.

By_____
Robert Doyle
Counsel for Petitioner

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

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

by: _____

ATTACHMENT E

MEMORANDUM

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

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

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

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

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

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

AFFIDAVIT OF RUSSELL STETLER

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

Summary of Opinions

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

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

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

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

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

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

Background and Qualifications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Standard of Care in Capital Mental Health Evaluations

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

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[4]During the operative years of the New York death penalty statute (1995 to 2004), for example, the Capital Defender Office offered the testimony of historical experts in several cases. A school psychologist who had tested a client routinely as part of mandated triennial review for Special Education explained the significance of his borderline intellectual functioning (FS IQ 76-81). People v. George Davis Bell (Ind. 128-97, Judge Cooperman, Queens County, N.Y., 1999). In another case, a different school psychologist explained the impact of learning disabilities (at age 11, reading just above a second grade level; at 14, just above fourth grade; and at 17, just above fifth grade). People v. José J. Santiago (Ind. 1210/99, Judge Bristol, Monroe County, N.Y., 2000). In a third case, a psychiatrist had treated the client's mother after her suicide attempt when the client was nine – 30 years before the capital trial. From the records, the psychiatrist testified to the history of mood disorders and suicidality in the maternal lineage, as well as family dysfunction, including fights over promiscuity, gambling, and drinking. From her current perspective, the psychiatrist opined about the devastating impact on the children of the mother's mood disorder, suicidality, and psychiatric removal from the family. People v. John F. Owen (Ind. 547-99 cons. with 414-99, Judge Egan, Monroe County, N.Y., 2001). *See* Russell Stetler, *The Mystery of Mitigation : What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237, 258 (n. 92) (2007-08).

for pragmatic reasons, capital defense counsel are well advised not to rely on expert testimony without the corroborative lay witnesses whose identity and potential evidence can only be discovered through life-history investigation. However, it is equally important to offer well-prepared expert testimony to explain the effects of life experiences on an individual's functioning and behavior. Lay witnesses on their own are unlikely to understand the significance of the symptoms and behaviors they describe, and only an expert is likely to be able to provide an overview of the factors that shaped the client over the course of his life and to be able to offer an empathic framework for understanding the resultant disorders and disabilities.[5] Expert testimony is essential for placing the factual details elicited from lay witnesses into an interpretive context that explains how various life events shaped the capital client's brain and behavior.

31. The proper standard of care for a competent mental health evaluation also requires an accurate medical and social history as its foundation. Because psychiatrically disordered or cognitively impaired individuals are by definition likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client (for clinical, not simply forensic, reasons). Additional components of a reliable evaluation will include a thorough

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[5]It has long been recognized that lay and expert testimony must be harmonized to be credible to the trier of fact. As one capital defense lawyer pointed out in 1988, "[T]estimony about the psycho-social development of the defendant explains the psychological diagnosis in human terms that the jury can understand." He continued, "Typical psychological testimony on sanity, competency, or diminished capacity sounds like it comes out of a textbook. Despite the best efforts of the mental health professional and the attorneys, most of this type of testimony is incomprehensible to a lay juror. There is also an unfortunate tendency to get caught up in technical terms that bore the jurors and do nothing to humanize the client. It makes little sense to spend several days putting on the testimony of relatives and friends of the defendant about the human characteristics of the defendant, and then put on a psychologist or psychiatrist who immediately turns this around by making the person sound like a casebook study out of some obscure and arcane psychology textbook." David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988), at 34, 38.

physical examination (including neurological examination) and appropriate diagnostic testing. The standard mental status examination cannot be relied upon in isolation for reliable clinical assessments any more than the expert can be relied upon in isolation in the courtroom context.

32. Except when clients exhibit such florid symptomatology that immediate clinical intervention is patently warranted, capital defense counsel are well advised to conduct a thorough social history investigation before retaining mental health experts. Only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kind of culturally competent expert is appropriate to the needs of the case, what role that expert will play, and what referral questions will be asked of the expert. Psychiatrists and psychologists have different training and expertise, and within each profession are numerous subspecialties including neuropsychology, psychopharmacology, and the disciplines which study the effects of trauma on human development. The potential roles of experts include consultants; fact gatherers needed to elicit, or assess the credibility of, client disclosures; and testifying witnesses, to name but a few. To make informed decisions about the kind of experts that may be needed and the referral questions they will address, counsel first needs a reliable social history investigation.

33. The importance of independently corroborated social history data was also well recognized among mental health practitioners as early as the 1980s. A leading psychiatric text in that period described an accurate and complete medical and social history as the "single most valuable element to help the clinician reach an accurate diagnosis." H. KAPLAN AND B. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 837 (4th ed. 1985). The same text noted that the individuals being evaluated are often poor historians: "The past personal history is somewhat

distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan & Sadock at 488. Thus, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id.* This problem is particularly acute in the forensic context, as two other leading authorities pointed out in 1980:

> The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980). Capital defense lawyers also appreciated this need: "A psychologist armed with all of the records of the client's history is much better equipped to present a sympathetic and truthful explanation of the client's psychological make-up and of how the crime occurred." David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988) at 34, 37.

Postconviction Duties

34. As the Chief Investigator at the California Appellate Project from 1990 to 1995, I was intimately familiar with the prevailing professional norms in the area of postconviction mitigation investigation since my own work was exclusively in postconviction cases in that period. *See* ¶ 7, *supra*. I was personally involved in numerous cases that won relief in this period as a result of thorough investigation, and I taught at numerous continuing legal education

seminars on postconviction investigation and prevailing standards. I have also published articles in this specific area. *See* Russell Stetler, *Postconviction investigation in death-penalty cases*, THE CHAMPION (August 1999) at 41; and Mark E. Olive and Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction,* 36 HOFSTRA. L. REV. 1067 (2008).

35. The ABA Guidelines have always emphasized the quality of legal representation during "all stages" of the case (*see* Guideline 1.1 in both the 1989 and 2003 editions). The extensive Commentary to Guideline 10.15 .1 (Duties of Post-Conviction Counsel) in the 2003 revision draws on the national experience litigating these cases in the 1990s and is instructive:

> Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments—those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal—are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system. Because an appreciable portion of the task of post-conviction counsel is to change the overall picture of the case, Subsection E(3) requires that they keep under continuing review the desirability of amending the defense theory of the case, whether one has been formulated by prior counsel in accordance with Guideline 10.10.1 or not.
>
> For similar reasons, collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case. That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.
>
> Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but

> also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.
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> 30 HOFSTRA L. REV. 913, 1085-86 (2003); citations omitted.

36. In an article entitled *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, Chief Judge Helen G. Berrigan of the United States District Court for the Eastern District of Louisiana has also noted the critical importance of mitigation investigation in postconviction review: "A mitigation specialist on postconviction can investigate and gather the evidence that was available but failed to be developed at the trial stage." 36 HOFSTRA L. REV. 819, 821 n. 13 (2008).

Review of the Samuel Villegas Lopez Case

37. At the request of counsel for Mr. Lopez, I have reviewed the following transcripts and documents from the Maricopa County Superior Court file of *State of Arizona v. Samuel Villegas Lopez*, No. CR 163419 (all before the Hon. Peter T. D'Angelo, Judge): Reporter's Transcript of Proceedings (*hereinafter*, "Tr."), Presentence Hearing, June 19, 1987; Tr., Sentencing, June 25, 1987; Sentencing Memorandum, submitted June 24, 1987, and filed June 25, 1987; Special Verdict, filed June 25, 1987; Tr., Presentence Hearing, July 13, 1990, with Tr. of Videotaped Deposition of Dr. Otto Bendheim, July 11, 1990; Tr., Sentencing, August 3, 1990; Defendant's Post-Hearing Memorandum Concerning Aggravating and Mitigating Factors under A.R.S. Sec. 13-703, filed July 19, 1990; Supplemental Sentencing Memorandum submitted by County Attorney July 23, 1990; Special Verdict, filed August 3, 1990; Petition for Post-Conviction Relief, submitted December 19, 1994, with forty exhibits; Memorandum re Transmittal of file documents to postconviction counsel from Arizona Capital Representation

Project, May 2, 1995; Supplemental Petition for Post-Conviction Relief, submitted May 3, 1995; Motion to Extend Time for a Supplemental Petition, filed May 3, 1995; and ghostwritten Motion for an Extension of Time Pursuant to Ariz. R. Crim. 32.4(c) and 32.6(d), not filed. I have also been briefed by current counsel about the procedural history and other aspects of Mr. Lopez's case.

Mr. Lopez's first sentencing proceeding in 1987

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

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

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

39. On June 24, 1987, Mr. Brown filed a Sentencing Memorandum consisting of three pages, plus notifications of service. The Memorandum pointed out – correctly – that Mr. Lopez's

prior conviction for resisting arrest did not involve the use or threat of violence, and thus did not constitute an aggravating factor under Arizona law. (The Arizona Supreme Court later agreed.) The rest of the slight Memorandum argued from the trial record that Mr. Lopez was impaired on the night of the capital offense by virtue of intoxication. Two young women had testified that they had been talking to Mr. Lopez on the evening of the murder; he left them and returned a few minutes later heavily intoxicated. He was "totally changed" according to the witnesses. Mr. Brown concluded, "Defendant's diminished capacity at the time of the offense, considered along with the fact that he is still a very young[6] man without a prior history of assaultive behavior demonstrates enough mitigating factors so as to mandate a sentence of life imprisonment."

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

> THE COURT: At the time of trial the court was concerned over the lack of any evidence presented on behalf of the defendant. I believe I so expressed to counsel, either formally or informally. . . .
>
> The court is now concerned with the fact that but for the sentence memorandum received just yesterday, the defense failed to present any mitigating circumstances to the court at the hearing, pursuant to A.R.S. 13-703B.
>
> If it does not violate any attorney-client privilege, I'd like the defense counsel to state on the record what effort his office made to determine any mitigating circumstances as might have reflected in favor of the defendant. (Tr. 2-3, July 25, 1987.)

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

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[6]Youth as a mitigating factor was unlikely to be given significant weight by Judge D'Angelo, who had sentenced Mr. Lopez's nineteen-year-old brother to death a year earlier. *See* ¶ 58, *infra.*

MR. BROWN: Your Honor, after the trial in this matter, our office did hire Dr. Otto Bendheim to go to the jail to examine Mr. Lopez, for the purpose of a presentence matter pursuant to Rule 26.5. Our office paid for that. That was done. . . .

Additionally, I have, last Friday, at the time of the hearing, I told the court that I was having trouble contacting family members. I was able to contact both his mother and his brother, Frank. They were both fully aware of this setting. I told them at the last setting I had asked the court if that was possible that I could contact these people later, I would like the opportunity to present them today.

Both people were fully aware of the time, location. I gave them my number. Mr. Lopez, Frank, I spoke to him as recently as yesterday afternoon. He gave me every indication that he would be here today.

I can tell you that I talked to his mother. His mother gave me indications that she may not appear, that she was having some sort of problems. I've talked to Mr. Lopez about this. I think Mr. Lopez will tell you he's strongly opposed to me subpoenaing those people in, either his mother, his brother, or any other persons. I think Mr. Lopez can tell the court that he strongly opposed me actually having those people subpoenaed in.

Is that true?

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

41. The prosecution then seized the opportunity to invite Mr. Brown to disclose more privileged confidential information in order to eliminate any lingering doubt about Mr. Lopez's guilt. The deputy county attorney noted that the defense had hired its own experts to examine the physical evidence, but chose not to call them as witnesses. The deputy county attorney concluded, "I was not afforded their reports, but it's my assumption that the reports merely would have verified the State's witnesses." No question was pending, but the deputy public defender responded anyway:

MR. BROWN: Your Honor, that's true.

Just referring to the post-trial matters, we've retained, that was, our office actually did, an expert in California, at the Institute of Forensic Science in Oakland. The blood samples that were produced into evidence were all analyzed, those pertaining to Mr. Lopez and the victim. The semen samples were analyzed. We retained an expert from Tucson, Mr. Chuck Rolf. He was retained at our office's expense to examine the fingerprints that were introduced into evidence. He did come up and examined the prints prior to trial. (*Id.* at 5-6.)

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

> THE COURT: What other efforts has your office made to determine the existence of any mitigating circumstances?
> MR. BROWN: Your Honor, offhand, those are [sic] only ones I thought of.
> THE COURT: Is the State aware of any mitigating circumstances?
> MR. AHLER: Absolutely none. (*Id.* at 8.)

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

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

Mr. Lopez's second sentencing proceeding in 1990

43. George M. Sterling, Jr., was appointed to represent Mr. Lopez on his direct appeal to the Arizona Supreme Court. The appeal succeeded in striking the prior violent felony aggravator because the prior conviction for resisting arrest did not involve the use or threat of violence,[7] and the case was remanded to the trial court for resentencing. *State v. Samuel Villegas Lopez*, 163 Ariz. 108, 786 P.2d 959 (1990). The appellate lawyer remained on the case and represented Mr. Lopez at the resentencing only six months after the January 16, 1990, appellate decision. Unfortunately, the appellate lawyer simply recycled what was already in the file in terms of mitigation. There is no evidence that he made any attempt to gather life-history records or to interview potential mitigation witnesses. Mr. Sterling instead seemed to focus on challenging the remaining aggravating factor – the allegation that the offense was "especially heinous, cruel, or depraved," under A.R.S. § 13-703(f)(6). At the presentence hearing before Judge D'Angelo on July 13, 1990, the appellate lawyer offered the testimony of Dr. Phillip E. Keen, medical examiner of Yavapai County, in an attempt to establish that the multiple stab wounds to the victim were all directed at vital areas in an inept attempt to kill her, rather than with the sadistic intent to inflict unnecessary pain and suffering. (Tr. 8-24, July 13, 1990, morning session.)

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[7]There was no evidence before the court concerning the underlying facts of the prior conviction. The court held, "Because one can commit the crime of resisting arrest under A.R.S. § 13-2508(A) without using or threatening violence, a conviction under it does not qualify as a statutory aggravating circumstance under A.R.S. § 13-703(F)(2). Accordingly, the trial court's finding must be set aside." 163 Ariz. at 114, 786 P.2d at 965.

44. The appellate lawyer also introduced the videotaped deposition of Otto Bendheim, M.D., the psychiatrist who had examined Mr. Lopez on behalf of the public defender's office in 1987. Dr. Bendheim was unavailable on the date of the presentence hearing, so he was deposed at his office from 10:45 A.M. to 11:41 A.M. on July 11, 1990. (Deposition of Otto Bendheim, M.D., 1, 36, July 11, 1990.) Dr. Bendheim testified that he had interviewed Mr. Lopez at the request of the public defender's office on June 8, 1987; "these examinations are usually an hour and a half to two hours"; and he had not seen Mr. Lopez since. *Id.* at 4. Before the interview he had been provided no social history data, only police reports, a record of Mr. Lopez's criminal history, and the statement of a witness quoted in a police report. *Id.* at 3. Based on his brief encounter with Mr. Lopez, he found the "possibility" of a rare condition called "pathological intoxication." *Id.* at 4. The "differentiating point" in this condition "is that the person who reacts 'pathologically' reacts in a fashion which is unusual for all people." The reaction to alcohol, regardless of the amount consumed, is "unexpected, unpredictable and characterized frequently by extreme violence." *Id.* at 5. Dr. Bendheim emphasized that this was a "hypothesis," not a "definitive diagnosis." *Id.*

45. Appellate counsel had also provided Dr. Bendheim with no social history records or mitigation interview reports. There is no evidence that counsel had obtained any social history records or interviewed any mitigation witnesses. However, appellate counsel did provide the psychiatrist with a presentence investigation report from 1985 and a police report from an uncharged sexual assault incident that occurred on November 3, 1986. *Id.* at 8. These reports gave Dr. Bendheim additional evidence of criminal behavior under the influence of intoxicants (not just alcohol, but other intoxicants). He offered the opinion that this condition diminished

Mr. Lopez's capacity "to resist impulses," "judgment formation," and "constraints against unethical, immoral, unlawful behavior." *Id.* at 9. On cross-examination, the prosecutor asserted that the appellate lawyer had also had Mr. Lopez tested by a psychologist, but Dr. Bendheim said he had not been provided any information about the results. *Id.* at 16. He said he had been told by the original deputy public defender that there were "many character witnesses" who would describe Mr. Lopez as a mild person except when under the influence, but he admitted that he had no confirmation of that information. *Id.* at 16-17. He also conceded that he had no evidence that Mr. Lopez had any of the predisposing factors for reduced tolerance of alcohol. *Id.* at 22.

46. At the presentence hearing on the afternoon of July 13, 1990, the prosecution offered the testimony of a rebuttal expert before the court had had an opportunity to review the videotape or transcript of Dr. Bendheim deposition. The rebuttal expert, psychiatrist Robert T. Dean, Jr., M.D., was the co-founder of the Maricopa Council on Alcoholism. He testified that the condition known as pathological intoxication is so rare that he had never seen it in twenty-five years of practice. Tr. 17-18, 25, July 13, 1990, afternoon session. He enumerated numerous predisposing conditions that did not seem to apply to Mr. Lopez: epilepsy and temporal lobe spikes, trauma, disease (such as encephalitis), strokes, Alzheimer's disease, and organic brain damage. *Id.* at 27, 54.

47. Five additional pieces of evidence were introduced at the presentence hearing: Department of Corrections records on Mr. Lopez's prior incarcerations, a *Washington Post* editorial on the cost of the death penalty, two tape recorded interviews that the deputy public defender had conducted in 1987 with witnesses who had observed Mr. Lopez drinking on the night of the alleged offense, and the testimony of a classification counselor from the Maricopa

County Sheriff's Department. *Id.* at 6, 10, 11. The classification counselor, Rick Bailey, testified that Mr. Lopez had had no disciplinary write-ups since returning to the Maricopa County Jail, where he has been an exemplary prisoner. *Id.* at 57. On cross-examination, he said that he sees Mr. Lopez only once a week, for about ten minutes each time, and he had no idea how Mr. Lopez behaved in prison. *Id.* at 58. Defense counsel also put on the record that he had put on some mitigation out of his obligations under *State v. Carriger*, 132 Ariz. 301, 645 P.2d 816 (1982), "and I'm not trying to make a record or anything, just my client and I have not seen eye to eye on what mitigating factors to present or what position to take on this thing, so I have been guided by my obligation under *State versus Carriger* independent of his instructions." *Id.* at 59. A post-hearing memorandum submitted on July 19, 1990, foreshadowed the arguments counsel would make at sentencing.

48. At the sentencing hearing on August 3, 1990, defense counsel first argued that the remaining aggravating factor should be dismissed. He stressed that Mr. Lopez had no training in hand-to-hand combat, had not planned the murder, and had only the inefficient weapons of opportunity that he found at the victim's home. He meant only to kill the victim, not to inflict needless pain. (Tr. 4-18, August 3, 1990.) Turning to mitigation, Mr. Sterling continued:

> As to the mitigation, I think a very important thing must be done before I go into this. At the first trial, and at the first sentencing, there was no mitigation offered. I'm stuck with the trial record in this case, where the defense offered no witnesses, no testimony.
>
> But on remand, we have presented to the court *as much as I can find*, so that this court knows this defendant. (Emphasis added.) *Id.* at 18.

He emphasized that he had introduced the interviews of the young women who had reported the abrupt change in Mr. Lopez under the influence of intoxicants. *Id.* at 19. He had introduced Mr.

Lopez's entire prison file ("I know it's three and a half inches because I had to go through it too"), but pointed to the very portions of the file that suggested that Mr. Lopez was a potentially dangerous rule-breaker in prison because of his continuing access to alcohol. According to Mr. Sterling, ". . . they search the cell block for stills, illegal stills for the production of alcohol, he's getting written up because he's drunk, in prison." *Id.* at 21. Nonetheless, Mr. Sterling argued that the records establish that Mr. Lopez "has shown a steady progress towards becoming an acceptable inmate, a model inmate, if you will." *Id.* at 22. The remainder of the argument stressed the cost of "endless" appeals "with no real hope of an execution." *Id.* at 22-24.

49. The prosecution briefly pointed out that the remaining aggravating factor had already been found unanimously by the Arizona Supreme Court. *Id.* at 26. The prosecutor framed the case as depending entirely on the aggravating factor because there was no mitigation – and defense counsel concurred, although also maintaining that a life sentence would be cheaper for the taxpayers. Here is the bizarre exchange between prosecutor Paul Ahler and Mr. Sterling:

> MR. AHLER: . . . Where is there any mitigation in this man's life, either past, present or future, that is in any way socially redeeming? There is none. There's no mitigation here. There is extreme aggravation.
>
> If this court cannot find especially cruel, heinous and depraved under these facts, I submit, that you can't find them anywhere. We would ask this court to sentence this man to the most severe penalty society can exact, because this crime deserves it. We would ask that you sentence him to death.
>
> THE COURT: Anything further, Mr. Sterling?
>
> MR. STERLING: Yes, your Honor. There's nothing societally redeeming in the defendant's background. I wish we could all argue with Paul on that. Probably can't. *Id.* at 27.

50. To make matters worse, defense counsel ended by implying that Mr. Lopez *wanted* the death penalty, as did some other defendants, because death row offered single cells, better

televisions, and meals delivered to them in their cells. *Id.* at 32-33. The court inquired as to whether counsel really meant for this to be part of his record, and Mr. Sterling replied:

> Yes, your Honor, I'd like it to be. I would like the reality of what goes on. I think the court should evaluate this case and sentence this defendant to life, not to death, because that's the sentence that is warranted. And even if he wants the death penalty because of the privileges, the temporal privileges that it will provide him, the law is the law. The law determines what punishment is to be executed. . . . *Id.* at 33.

51. Judge D'Angelo responded that he had been practicing law since 1957, prosecuting and defending murder cases, and trying them as a judge. He said, "I have never seen one as bad as this one." *Id.* at 33-34. Once again, the court found no mitigation, affirmed the aggravating factor, and imposed a sentence of death. Once again, trial counsel's failure to conduct a thorough mitigation investigation constituted deficient performance under the prevailing professional norms of 1990.

The state petition for postconviction relief filed in 1995

52. An appeal was filed by the public defender's office, and the Arizona Supreme Court affirmed Mr. Lopez's new death sentence in 1993. *State v. Samuel Villegas Lopez*, 175 Ariz. 407, 857 P.2d 1261 (1993). The United States Supreme Court denied certiorari on April 18, 1994. *Lopez v. Arizona*, 511 U.S. 1046 (1994). Attorney Robert W. Dole was appointed to represent Mr. Lopez in state postconviction in August 1994, and four months later, on December 19, 1994, he filed a Petition for Post-Conviction Relief in Judge D'Angelo's court. Once again, appointed counsel conducted no mitigation investigation, but merely recycled what was in trial counsel's file. Although he alleged ineffective assistance of trial counsel, postconviction counsel merely claimed that trial counsel had failed to prepare his expert, Dr. Bendheim, by providing

him with the transcripts of interviews and trial testimony of the two witnesses who had observed Mr. Lopez in an intoxicated state on the night of the alleged capital offense. In a seven-sentence affidavit filed with the petition, Dr. Bendheim stated that these new transcripts "make my earlier tentative diagnosis of pathological intoxication more probable than previously expressed" and that he can now "make a more certain diagnosis of pathological intoxication."

53. On May 3, 1995, Mr. Doyle filed a Supplemental Petition, but included nothing related to the failure to investigate mitigating evidence or to prepare Dr. Bendheim by providing him with the independently corroborated social history information required for a reliable mental health assessment in death penalty cases. The Supplemental Petition provided an excerpt from the trial record in support of a claim that the court failed to exclude a stricken juror and included as exhibits the presentence investigation reports of Mr. Lopez's brothers, George and Jose, who had been tried before Judge D'Angelo a year before him. These reports were offered in support of a claim that trial counsel failed to request a change of judge.

54. On the same date that the Supplemental Petition was filed, Mr. Doyle filed a Motion to Extend Time for a Supplemental Petition. He termed his request "unusual," but requested "a reasonable extension of time to finish the investigation in this matter and to file a further supplemental petition should circumstances warrant." Mr. Doyle stated in his Memorandum of Points and Authorities that he had "diligently searched the record and available sources of information" to prepare the original and supplemental petitions, and "[v]olunteer lawyers, working separately from Petitioner's counsel, have developed significant leads to potentially important new information."

55. Mr. Doyle explained that these volunteer lawyers had approached him three months earlier and proposed doing further investigation. "Counsel had no objection at the time," he said, and they "solicited and received hundreds of documents for counsel's consideration," including some that were attached to the Supplemental Petition. However, there were two areas where the volunteers' work was not complete. One concerned potential juror misconduct, but the main area of unfinished investigation related to mitigation. On the one hand, Mr. Doyle acknowledged the potential importance of the unexplored mitigation, but on the other hand he implied that the family was to blame not only for earlier failures to investigate Mr. Lopez's life history but also for the present failure to complete the investigation. This is what he told the court:

> Every lawyer that counsel has spoken to has noted Petitioner's unusual family circumstance. Of the eight Lopez brothers, four of the five eldest have only minimal criminal histories; the three youngest brothers (Samuel, Jose, and George) have all been convicted of homicide. Over the years, attempts to contact and learn more from family members has [sic] met with resistance. No members of the family came forward to help attorney Joel Brown before sentencing in 1986. No members of the family offered evidence when attorney George Sterling conducted the second sentencing in 1990. In the past several months, volunteers have made contact with several of Mr. Lopez's brothers, his mother, and a close friend who was involved in this case. For the first time, these people have expressed willingness to discuss Mr. Lopez, his background, and his current situation with counsel. Unfortunately, as of the date of this motion, none of them are willing to commit to signing affidavits. Due to the unusual circumstances of the Lopez family, this information could be vitally important in finally understanding this situation. (Supplementary Petition, 2-3, May 3, 1994.)

56. I will discuss in detail the red flags that would have prompted reasonable attorneys at every stage of represesntation in state court to conduct additional investigation. Suffice it to say at this point, that despite the efforts of the volunteers who tried to assist him in the ninety days between February and May 1995, postconviction counsel simply failed to conduct a thorough

mitigation investigation and provided the court with no new reasons to spare Mr. Lopez's life. Mr. Doyle himself had done no investigation outside the trial record at all.

Red flags that should have prompted additional investigation

57. All of Mr. Lopez's lawyers in state court knew that two of his brothers had been convicted, yet none displayed any curiosity about his childhood and family background. Joel Brown was a staff attorney in the same public defender's office that represented Samuel Lopez's brother Jose. After his case was assigned to the same trial court that had sentenced his two brothers, Samuel Lopez asked his public defender to consider a Motion for Change of Judge. *See* Petition for Post-Conviction Relief at 4. A reasonable attorney would have immediately sought the presentence investigation reports on the two brothers to see what information they contained about their family background.

58. The Presentence Report for Jose and George Lopez were eventually obtained and attached to the Supplemental Petition for Post-Conviction Relief on May 3, 1995, as Exhibits 1 and 2. They were readily available at the time of Samuel Lopez's arrest. Jose Lopez, then twenty-one, was sentenced on April 2, 1986, following an *Alford* plea. (Presentence Report for Jose Lopez at 8.) He had been arrested on October 7 for a murder that occurred two days earlier. *Id.* at 2. The probation officer reported that Jose appeared to be "estranged from his family" and provided little background information. *Id.* at 7. Dysfunction, however, was evident: Jose and his codefendant brother George were described in the Presentence Report as transients "living at times out of a car and at other times in a graveyard." *Id.* George Lopez, then nineteen, was sentenced on April 25, 1986. (Presentence Report of George Lopez, face sheet.) The victim in

this case died from multiple stab wounds inflicted with a small knife ("one-half-inch wide knife blade, approximately three inches in length"). (Presentence Report of Jose Lopez at 1.) The probation officer in George Lopez's case concluded that "it was apparent from the condition of the victim's body and the wounds inflicted that force far in excess of what was necessary to accomplish their 'task' was used." (Presentence Report of George Lopez at 4.) Both brothers were in custody at the time of Samuel Lopez's arrest and could have easily been interviewed about their family background. The history of their cases is also informative about how quickly capital cases could go to trial before this judge and the likelihood of the court's finding that excessive force was sufficient to establish the "especially cruel, heinous, and depraved" aggravating factor.

59. The Presentence Reports and court files from Samuel Lopez's own prior cases should also have been routinely obtained by trial counsel. As the United States Supreme Court pointed out in *Rompilla v. Beard*, 545 U.S. 374, 387 (2005): "The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association's Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one . . ." (i.e., where, as here, the State intended to use a prior conviction in support of an aggravating factor). The particular prior conviction that the State alleged as involving use or threat of violence was a 1985 case in which Mr. Lopez pled to resisting arrest in a negotiated disposition. However, the underlying offense involved inhaling toxic substances (paint sniffing) – a red flag signaling the need to investigate his history of substance abuse. *See* Presentence Report of Samuel Lopez (1987) at 6.

60. Of course by the time of Samuel Lopez's resentencing in 1990, his own Presentence Report from 1987 was available to his new lawyer. (This Report is Exhibit 1 to the Petition for Post-Conviction Relief filed on December 19, 1994.) It contains his mother's name, address, and telephone number. *Id.* (face sheet). It contains Samuel's own Social Security number (useful for obtaining a Detailed Earnings Report from the Social Security Administration in order to investigate a client's employment history). *Id.* It identifies both parents by name (but, interestingly, not the same names identified in Jose Lopez's Presentence Report). *Id.* at 6; *cf.* Presentence Report of Jose Lopez at 7. The Report indicated that in 1983 a parole officer said Mr. Lopez was "having difficulty with his mother and she did not particularly want him staying with her." (Presentence Report of Samuel Lopez (1987) at 7.) However, the writer of the report did not speak with any family member and simply commented, "No one from the defendant's family has come forward to state an opinion. The defendant did not want me to contact anyone in particular. I have tried to telephone the defendant's mother but she has not been available for comment." *Id.* at 4.

61. Mr. Lopez's parents reportedly separated when he was four years old. *Id.* at 6. Even an absent father has contributed half of a client's DNA, so learning about the paternal lineage is a routine part of mitigation investigation. Two more brothers are identified by name, Steve (who reportedly served time in prison) and Frank (with whom Samuel reportedly worked in landscaping). Three of Samuel's employers are identified: Jessie Gonzalez, Phoenix Tent and Awning, and A & L Duct and Pumps. *Id.* at 6-7.

62. The Presentence Report indicates that Mr. Lopez left school after tenth grade and had juvenile arrests for curfew violations and running away, raising the question of what his home

life was like as a teenager. Was there structure and parental supervision? Was he running away from abuse? *Id.* at 4, 7. The Report simply notes, "In other presentence reports, the defendant did not mention any traumatic or serious events while he was growing up. He stated that the biggest problem within the family was financial. Juvenile records indicated that Ms. Lopez was unable to exercise control over her children." *Id.* at 7. Mr. Lopez first went to state prison as a short, slender nineteen-year-old. *Id.* at 5. The report alludes to minor rule infractions during Mr. Lopez's incarceration, but characterized his overall performance in prison as satisfactory. *Id.* at 6.

63. A brief Supplemental Report was prepared after the probation officer interviewed Mr. Lopez on May 22, 1987. Mr. Lopez was described as cooperative and "thorough in his completion of the presentence questionnaire." Mr. Lopez expressed regret over failing to complete his G.E.D. He identified three more employers: National Metals Company, Arizona Woodcraft Company, and Wise Guys Car Wash. Mr. Lopez confirmed substance abuse, but minimize its significance: "He denies that he has an alcohol or drug problem. He stated that he has used marijuana and inhaled toxic vapors in the past but did not consider himself to be a regular user nor 'hooked' on any drug. The defendant did not think that alcohol or drugs played a part in any of his prior offenses."

64. Resentencing counsel did offer Mr. Lopez's prison records, undigested, to the court and argued that they supported the view that Mr. Lopez was becoming an acceptable, model prisoner. *See* ¶ 48, *supra.*[8] The 1987 Presentence Report also indicates that Mr. Lopez had

[8]The record is ambiguous as to whether Mr. Sterling ever obtained them himself or simply received them from the Deputy County Attorney. He told the Court: "The last thing, Your Honor, I believe, do you want to – on that offer of proof do you want to offer the DOC

psychological evaluations in prison in 1981 and 1985, but neither these nor any other part of the prison file were provided to the psychiatrist on whom both sets of trial counsel – and state postconviction counsel – relied. Both the prison records and the Presentence Report document multiple incidents involving alcohol and other intoxicants. The failure to conduct a meaningful and thorough investigation of Mr. Lopez's history of substance use is glaring.

65. The Presentence Report prepared in 1990 (and attached to the Petition for Post-Conviction Relief as Exhibit 2) contained a great deal of new information relevant to social history investigation. Mr. Lopez's mother had moved by then, but a new address and telephone number appeared on the first page of the report. Contrary to the misleading impression that resentencing counsel conveyed to the Court that Mr. Lopez wanted to be on death row (*see* ¶¶ 48, 50, *supra*), Mr. Lopez clearly told the probation officer that he "is requesting that the Court sentence him to a term of imprisonment rather than the death penalty, as he is already serving consecutive time for the convictions on the other counts involved in this offense and he will, most likely, die in prison before his sentences are completed." (Presentence Report (1990) at 2) attached to Petition for Post-Conviction Relief as Exhibit 2.) According to this Report, Mr. Lopez's parents separated when he was eight years old (not four, as previously reported), and he has had no contact with his biological father since then. His mother raised all eight children "through various periods of employment" and the family "did suffer great financial hardship after the abandonment of the family by the defendant's natural father." *Id.* at 5-6. The schools that Mr. Lopez attended in Phoenix are identified (Murphy No. 3 for primary school and Carl Hayden

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records? Because we had kind of talked about this, Your Honor, when I was going to call Mr. Bailey [the classification counselor from the jail] they [that is, the prosecution] were going to offer DOC records in exchange." (Tr. 10, July 13, 1990, afternoon session.)

High School). Despite completing the tenth grade, Mr. Lopez was found to have a "reading ability above the sixth grade level" based on administration of a Word Recognition Aptitude Test. *Id.* at 6. Numerous records could have been obtained to prove the financial hardship of the large Lopez family, including Social Security Detailed Earnings Report for the single parent and any welfare benefits that were received, including school lunches for the children. Local school records could have been easily obtained to identify teachers and counselors who knew the family, and to review attendance, parental supervision and cooperation, academic functioning, etc. Earnings, social service, and school records would also have disclosed whether the household was geographically stable or subject to the frequent moves that commonly accompany low income. It is also widely recognized that it is essential to visit the neighborhoods where clients lived in their developmental years, since these communities can also have toxic social and/or environmental impacts.

66. The discussion of substance use in the 1990 Presentence Report shows that Mr. Lopez was cooperative, but minimizing and lacking insight, in response to questions in this area:

> The defendant indicated he drinks alcohol occasionally and that it "cools me down." He indicated he needs no professional help for alcohol abuse. Mr. Lopez also indicated that he has experimented with marijuana in the past and did use toxic vapors, including paint and glue, beginning in 1975 and lasting until his incarceration in 1986. According to the defendant, he would only inhale toxic vapors when he did not have money for beer or marijuana. Mr. Lopez indicated that his use of toxic substances was sporadic enough that he did not suffer long-lasting mental or physical impairments. The defendant further indicated that he has never been dependent on any drug. *Id.* at 6.

This history of paint and glue sniffing from age thirteen through the time of arrest on the capital offense would have prompted a reasonable attorney to consider the high risk of brain damage from the neurotoxins.

67. This history also cried out for an investigation into Mr. Lopez's childhood to understand how and when he was first exposed to alcohol and inhalants. Who provided these substances? Where was the parent or caretaker? What was the attitude of the parent toward alcohol and other intoxicants? What behaviors were modeled? Was the now absent father an alcoholic? Did the mother drink during pregnancy? Did the mother have other males in her life who abused alcohol or other substances? Was the primary caretaker neglectful – or corrupting? Was there a historical connection between the client's substance abuse and his exposure to trauma and/or manifestations of the signs of an untreated mental disorder?[9]

68. The cross-examination of Dr. Bendheim in 1990 and the rebuttal testimony of Dr. Dean (¶¶ 45-46, *supra*) put postconviction counsel on notice about the predisposing factors that would need to be investigated to support (or rule out) Dr. Bendheim's hypothesis of paradoxical intoxication, including brain damage, head trauma, and diseases like encephalitis. However, postconviction counsel did not attempt to obtain birth or childhood medical records for Mr. Lopez or to arrange a neuropsychological assessment to evaluate potential brain damage. Postconviction counsel did not provide Dr. Bendheim with any additional records, but merely furnished the testimony and interviews of the two young guilt-phase witnesses who had observed Mr. Lopez on the night of the capital offense. *See* Affidavit of Dr. Bendheim, appended to Petition for Post-Conviction Relief as Exhibit 3.

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[9]*See Cooper v. Secretary*, 646 F.3d 1328 (11th Cir. 2011) (counsel found ineffective for failing to investigate mitigation, including drug history). Mr. Cooper's sister testified that "she believed drugs were Cooper's escape from [his brother's] cruelty." 646 F.3d at 1345. A psychologist testified that Cooper began to use alcohol and marijuana at age eleven as "to some extent, a form of self-medication." Substance abuse escaled to brain-damaging volatile inhalants. *Id.* at 1346.

69. On May 2, 1995, the so-called "volunteer lawyers" from the nonprofit Arizona Capital Representation Project delivered the documents they had collected during the three months that they were attempting to assist state postconviction counsel. Mr. Doyle signed a receipt for documents pertaining to the trial, the client, and eight other members of his family (Concha Villegas Lopez; Arcadio Lopez, Jr.; Eddie Lopez; Frank Lopez; Steve Lopez, Jose Lopez; George Lopez; and Gloria Lopez). The Project had also drafted a proposed Motion for Extension of Time that was substantially different from the one that Mr. Doyle actually filed the following day. The draft outlined eleven areas of ongoing investigation requiring more time to provide support for potential claims. Three areas (denoted f, g, and h) related directly to the claim that trial counsel had failed to conduct a thorough mitigation investigation:

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

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

uninvestigated impulsivity defense. More investigation remains to document these facts.

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

70. It is also my understanding that the family members interviewed by the Project were not "unwilling to commit to signing affidavits," as asserted by Mr. Doyle in the motion for continuance that he filed. *See* ¶ 55, *supra*. On the contrary, the Project had simply determined that it was premature to memorialize their information in affidavit form because the factual investigation had not been completed. In the three months that they had been investigating the case, they had made considerable progress, but, as indicated in ¶¶ 25-26, *supra*, mitigation investigation is a slow process because of the need to build rapport and trust with reticent witnesses in order to overcome the barriers to disclosure of sensitive information. For example, the rape of Mr. Lopez's mother by an unknown perpetrator is clearly a traumatic event that would require an unusual degree of rapport before she would be comfortable discussing it with people outside the family.

71. The pro bono lawyers from the Arizona Capital Representation Project had begun to respond to the very red flags that would have prompted any reasonable postconviction lawyer in 1995 to conduct further investigation. No reasonable lawyer at that time could engage in the wishful thinking of the appellate lawyer who had told the court that there was "no real hope of an execution" in this case. *See* ¶ 48, *supra*. Since the time of trial and resentencing, Arizona had executed three prisoners: Donald Harding, on April 6, 1992; John Brewer, on March 3, 1993; and

James Clark, on April 14, 1993. Although the courts had begun to erect new procedural barriers to postconviction relief (*see*, for example, *McCleskey v. Zant*, 499 U.S. 467 (1991) (curtailing successive habeas corpus petitions in federal court)), this was also a time frame in which relief was widely available even in highly aggravated cases when meritorious claims (including those involving ineffective counsel) were thoroughly investigated. *See* James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases* (June 2000), *reprinted in part in* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1852 (2000) (finding that 68 percent of death sentences in that period were overturned by higher courts, and 82 percent of the remanded cases resulted in different outcomes).

71. I have written about one such case in which I was personally involved in this time frame where the failure to conduct thorough mitigation investigation was the basis of relief after a meticulous, multigenerational investigation of the client's background demonstrated the well-corroborated mitigation that could have been presented at trial. Russell Stetler, *The Unknown Story of a Motherless Child*, 77 U.M.K.C. L. REV. 947 (2009), discussing *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995). Significantly, in *all* of the cases in which the United States Supreme Court found trial counsel ineffective for failure to conduct thorough investigation (*see* ¶ 18, *supra*), trial counsel did *more* mitigation investigation than Mr. Brown or Mr. Sterling (or, for that matter, Mr. Doyle) undertook on behalf of Mr. Lopez. In *Williams v. Taylor*, 529 U.S. 362, 368 (2000), the defense offered the testimony of his mother, two neighbors, and a taped excerpt from a psychiatrist. In *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), trial counsel consulted a psychologist and obtained presentence investigation report and Department of Social

Services records detailing physical and sexual abuse, an alcoholic mother, and placement in foster care. In *Rompilla v. Beard*, 545 U.S. 374, 381-382 (2005), trial counsel interviewed five members of the client's family and consulted three mental health experts. In *Porter v. McCollum*, 130 S. Ct. 447, 449 (2009), there was penalty phase testimony from Mr. Porter's ex-wife and an excerpt from a deposition. In *Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010), seven mitigation witnesses testified at the penalty phase. In Mr. Lopez's case, the sentencer never heard from anyone who actually knew Mr. Lopez personally and cared whether he lived or died – because trial counsel (and state postconviction counsel) had formed no relationship with anyone who knew him outside the jail.

72. After careful consideration of all the material I have reviewed, it is my considered professional opinion that the performance of trial counsel in 1987 and 1990 and state postconviction counsel in 1995 fell far below then prevailing norms in the area of mitigation preparation in a capital case. Common sense would have told any reasonable attorney that the red flags warranted further investigation, but none of the lawyers appointed by the state courts to represent Mr. Lopez responded at all. They failed to gather records; they failed to talk with family members, teachers, neighbors, friends, or anyone else who knew Mr. Lopez; and they collectively failed to provide their one mental health expert with the richly documented social history that is the cornerstone of a reliable assessment. In these extraordinary circumstances, the sentencer never had the opportunity to consider the evidence that is essential to a fair and morally just verdict.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746, and under the laws of the States of Arizona and California, that the foregoing is true and correct and that this affidavit was executed this 10th day of February 2012 in Oakland, California.

RUSSELL STETLER

Sworn to before me this

10 day of Feb 2012

JAS1 KALI J. SNOWDEN COMM. # 1921577 NOTARY PUBLIC • CALIFORNIA ALAMEDA COUNTY My Comm Expires Jan. 13, 2015 JAS1

Notary Public

My commission expires 01/13/2015.

AFFIDAVIT OF SAMUEL VILLEGAS LOPEZ

1. My Name is Samuel Villegas Lopez. My ADOC inmate number is 43833. My family calls me Sammy. My date of birth is June 30, 1962.

2. I am on death row in Arizona for the murder of Estefana Holmes.

3. Since I was arrested for Mrs. Holmes's murder in 1986, I have been represented by many different lawyers. My first trial attorney was Joel Brown. My second trial lawyer was George Sterling. My third lawyer was James Rummage. Mr. Rummage represented me on my second direct appeal. My fourth lawyer was Robert Doyle. Mr. Doyle represented me in state post-conviction. My current lawyers are Kelley Henry and Denise Young. They have represented me in federal court on habeas.

4. During post-conviction, the Arizona Capital Representation Project (ACRP) volunteered to help Mr. Doyle investigate my case. I met regularly with ACRP attorney Statia Peakhart. Ms. Peakhart was the first attorney who explained to me why my family and my background mattered for my case. I was really happy to understand this, and I accepted ACRP's help investigating my background. Since Mr. Doyle was representing me at the time, I told him that I wanted him to work with ACRP and follow their advice. I even wrote Mr. Doyle and told him that I wanted him to ask for more time so that the ACRP could finish their investigation on my case. I never wanted my post-conviction attorney to waive any of my claims. I told him that.

5. I'm not educated. I don't even have a high school education. I don't understand what lawyers know about the law. It's just too complicated for me. From the moment I was arrested for Mrs. Holmes's murder, I knew that the best thing I could do was follow my attorneys' advice. I never put any restrictions on what my lawyers could or could not do to investigate my case. I have always counted on my lawyers to represent me because I do not know how to represent myself.

6. My mom is Concha Villegas, and my dad was Arcadio Lopez, Sr. They were both born in this country. My mom and dad had 8 boys and 1 daughter who died when she was a baby. I am their sixth son. My brothers and I were all born in Phoenix, Arizona. My dad was a violent drunk. He used to beat my mother in front of all of us. He didn't just hit her once and stop. He hit her over and over until she was bloody. We tried to protect her, but then he beat us too. We were afraid of our dad the way some kids are afraid of monsters. I often sat at the window and kept a lookout for my dad. I felt like this was my job when I was a little boy. When I saw him, I told my mom to run and hide, and I ran and hid too. My mom worked and fed us and tried to protect us from my dad. She was the only one on our side and the only person that kept us alive. Every day I was afraid that my dad was going to kill her, and without my mom around, I would die too. I grew up without hope. I know people will probably read that and think I'm trying to make up excuses for Mrs. Holmes' horrible murder. I'm not. I'll say more about that crime in a minute. I'll never make excuses for it. I just know that my lawyers say my background matters and that my childhood was more hopeless than most people could ever understand.

7. I've always wondered how things would have been different for my brothers and me if my dad loved us and took care of us. It's so hard for me to believe that most people actually grow up with that kind of love. If anyone ever looks at my life and tries to learn something, I hope they learn to appreciate having two loving parents. What a blessing that must be.

8. My little sister, Gloria, was the last of my parent's children. My mom and my brothers and I were all so happy to have a little girl in our family. It didn't matter to us that she was deformed. We felt like she was an angel sent from God. She was the one bright spot in our lives. Gloria had a surgery that was supposed to fix her deformed arm, and she died in the hospital afterwards. When Gloria died, it was like someone turned out the only bright spot we ever had.

9. After Gloria died, my dad took off for good. We never heard from him again. I hated what my dad did to our family, but it still hurt that he abandoned us. I wanted him to be a normal dad. When he finally left, it was just another slap in the face. A few years ago, my lawyer, Kelley Henry, told me that he died homeless and alone under a bridge in California. It made me sad to learn what happened to him. I don't understand how I could feel this way about a man who was such a monster.

10. My mom was the only one who put food on our table. She had to work like a dog at two and sometimes even three jobs just to put food on the table. We moved around a lot because we got evicted and couldn't afford rent many, many times. My mother did the best she could, but she didn't have skills for a good job. Even though she was born in the United States, she has never spoken good English. She was only able to get cleaning and other physical jobs that paid very little. She did everything possible to keep my brothers and me alive. I loved her, and I wished I could take good care of her. I hope that whoever reads this understands how hard my mom had to work to protect us from my dad and take care of eight boys.

11. Because my mom had to work and my dad was almost always drunk, my seven brothers and I never had adults watching us, teaching us, taking care of us, of showing us they loved us. We didn't have adults in our lives to teach us things like discipline and schoolwork and all the other things that help people live productive lives. We didn't even know what a productive life was. We thought it was just as made-up as what we used to watch on Gilligan's Island.

12. Growing up, I started to hang out with other kids in the neighborhood who were poor like me and who also had problems at home. I spent a lot of time with Pete Servin and his older brother, Manuel. Manuel was friends with my older brother Steve. Manuel and Steve were my heroes. I wanted to be around them, and I tried to be like them. Manuel and Steve taught us how to break into houses so that we could get money for food. We didn't want to hurt anyone. It's just that burglaries were the only way we knew how to get a little money. Our neighborhood and our messed up families convinced us we had no other options.

13. Manuel and Steve used to sniff paint. I very young when they showed me how to do it. That's when I starting sniffing paint a lot. I did it because it was the only way I knew to escape my hopeless life. I didn't see any other way out.

14. I used to sleepwalk, and I had really bad nightmares as a kid. The day after I sleepwalked, my brothers or my mother always told me that I ran out of the house screaming or that they found me in the kitchen all curled up. They said I was sweating and shivering and really scared, but I had to take their word for it. I never remembered sleepwalking.

15. After my father left, my mother got a boyfriend named Pedro Santibenez and let him move into our house. We called him Pete. Pete had wife in Mexico and he had children from that marriage. Some of those children were in the United States illegally.

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

17. It just broke me apart to see that my mom chose Pete and his illegal children over us. I couldn't believe it. We felt let down and betrayed like no one loved us. We were her flesh and blood, and she put us out on the street. My mom was the only one who had protected me and kept me alive, and then suddenly, she turned her back on me too. I felt like I had absolutely nothing. I knew things would never get better for me. I had no reason to stay alive. I did nothing with myself but try to stay high on paint or any other drugs or alcohol I could find.

18. At the time Mrs. Holmes was murdered, I was at the lowest point in my life. I had been in prison for resisting arrest when police found me sniffing paint in the park. While I was in prison, my two younger brothers, Joe and George, were arrested for murder and my brother George was sent to death row. I felt like I failed them. I should have been there to protect them and keep them out of trouble, but I was locked up. I wanted to die. I didn't have a father, my mother had kicked me out, and I wasn't there when my little brothers needed me most. I was living in a friend's car, and I was spending all my time sniffing paint because it was the only answer to my problems that I had ever learned.

19. I'm no lawyer, so I've always followed my lawyers' advice. But when they assigned my case to the same judge who sentenced my younger brother George to death, I asked my lawyer to get me a different judge. I did not think that the judge who sentenced George to death could be fair to me. My lawyer did not try to get the case moved to a new judge like I asked him to.

20. Until now, none of my lawyers have ever let me tell this to anyone besides them: I've never remembered the night that Estefana Holmes was killed. I was losing hours and days all the time during that period. There were afternoons, evenings, and whole days that just disappeared from my memory. People commented on the things that happened or the things I did while I was high on paint and other drugs, and I just couldn't remember any of it.

21. I don't remember going into Mrs. Holmes's house. I don't remember being there or doing any of the things the police said I did. I cannot believe I could ever do those horrible things. My mom was raped. I know what an awful thing rape is. I've never been able to believe that I could

actually do the same thing to someone else. What happened to Ms. Holmes was so horrible and so wrong. I've always been sorry for what she went through that night and for what her family has gone through ever since. But I don't know if I actually committed that crime. That awful night is just one of many days and nights that I couldn't remember.

22. I'm not saying I'm not responsible for the crime. I'm just saying I don't know if I actually am. I've always wondered, because it never added up for me. If you asked anyone who knew me, they'd tell you that I was not the kind of person to rape and stab an elderly woman to death. I've never wanted to do anything like that. The only person I ever wanted to hurt was myself.

23. I can't blame Mrs. Holmes's family for hating me. I would hate anyone convicted of killing one of my family members. I just wish I could remember that night.

Further affiant sayeth not.

Dated this 9TH day of February, 2012 in Florence, Pinal County, Arizona.

Samuel Villegas Lopez

State of Arizona)
)
County of Pinal)

Subscribed and sworn to before me this 9 day of February, 2012.

Notary Public

OFFICIAL SEAL
A. FRANCES OWENS
NOTARY PUBLIC - State of Arizona
PINAL COUNTY
My Comm. Expires April 1, 2013