

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-163419

03/30/2012

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA

SUSANNE B. BLOMO

v.

SAMUEL V LOPEZ (A)

SAMUEL V LOPEZ
#43833/ASPC/EYMAN COMPLEX
PO BOX 3400
FLORENCE AZ 85232
DENISE I YOUNG

COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

PCR DISMISSED

The Court has reviewed the defendant's Notice of Post-Conviction Relief, Petition for Post-Conviction Relief, Motion to Exceed Page Limits for Petition for Post-Conviction Relief, the State's response, and the defendant's reply and Supplemental to Petition for Post-Conviction Relief, as well as the court's file. This is a successive Rule 32 petition in which the defendant claims he is entitled to relief based upon a significant change in the law and newly discovered evidence. Ariz.R.Crim.P. 32.1(e) and (g).

The defendant was convicted of first degree murder, kidnapping, sexual assault and burglary by a jury and sentenced to death for the murder by a judge. On direct appeal, the Arizona Supreme Court affirmed the convictions but vacated and remanded for a new sentencing proceeding. *State v. Lopez (Lopez I)*, 163 Ariz. 108, 786 P.2d 959 (1990). The defendant was again sentenced to death by a judge, and this sentence was affirmed by Arizona Supreme Court. *State v. Lopez (Lopez II)*, 175 Ariz. 407, 857 P.2d 1261 (1993).

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The defendant then sought Rule 32 relief. In his petition, he raised claims of ineffective assistance of counsel, specifically that his attorney failed to move for a change of judge, failed to object to flawed presentence reports, and failed to provide key documents to his medical expert for consideration before testifying at sentencing. The trial judge dismissed the petition, finding that trial counsel's performance did not fall below prevailing professional norms and there was no reasonable probability of a different trial or sentencing outcome based on alleged ineffective assistance of counsel. The Arizona Supreme Court denied review.

In this successive petition, the defendant raises two claims for relief. He first claims that his first Rule 32 counsel was ineffective for failing to raise a claim of ineffective assistance of counsel at sentencing. The Arizona Supreme Court has repeatedly held that a claim that Rule 32 counsel provided ineffective assistance in a prior Rule 32 proceeding is not a valid substantive claim under Rule 32. *State v. Mata*, 185 Ariz. 319, 333 n.9, 336-37, 916 P.2d 1035, 1049 (1996); *State v. Krum*, 183 Ariz. 288, 291-92, 903 P.2d 596, 599-600 (1995).

The defendant recognizes this precedent but asserts that the United States Supreme Court's recent decisions in *Maples v. Thomas*, ___ U.S. ___, 132 S. Ct. 912 (2012), and *Martinez v. Ryan*, ___ U.S. ___, 2012 WL ___ (March 20, 2012), are significant changes in the law that apply to his case. The Court finds that these decisions are not applicable to the defendant. The underlying issue in *Maples* was whether "cause" existed under federal law to overcome a state procedural default. *See* 132 S. Ct. at 922 (explaining the general rule). The Court held that *Maples* had shown ample cause "to excuse the procedural default into which he was trapped when counsel of record *abandoned* him without a word of warning." *Id.* at 927 (emphasis added). The record here shows that the defendant's PCR counsel did not "abandon" him, but rather pursued the PCR on his behalf.

In *Martinez*, the defendant had failed to raise a claim of ineffective assistance of counsel in his first PCR and thus was found precluded from raising this ground in subsequent PCR proceedings and federal habeas. The Court held that under these circumstances, federal courts may as a matter of equity excuse a defendant's procedural default of failing to comply with a state collateral review rule if that lack of compliance is attributable to an attorney's failure to deliver constitutionally effective assistance. The Court equated the PCR attorney's failure to be the same as having no attorney to assist the defendant, thereby allowing the lower court to consider exercising its equitable powers to waive the procedural default if the defendant is able to demonstrate that his ineffective assistance of counsel claim is substantial and that he suffered prejudice. Again, the record here shows that unlike *Martinez*, the defendant raised ineffective assistance of counsel claims in his first PCR.

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Neither *Maples* nor *Martinez* held that there is a constitutional right to effective assistance of counsel in the first Rule 32 proceeding. Thus, the Arizona Supreme Court's holdings in *Mata* and *Krum* remain controlling law and this Court is bound to follow them.

The Court finds that *Maples* and *Martinez* do not apply to the defendant and his claim that his first PCR counsel was ineffective is not cognizable in a Rule 32 proceeding under Arizona law. Because this claim is not cognizable under controlling precedent, the Court also rejects the defendant's assertion that first PCR counsel's ineffectiveness is "newly-discovered evidence."

In his second claim for relief, the defendant claims that his trial counsel provided ineffective assistance at sentencing. The Court finds this claim precluded because, as previously noted, the defendant raised claims of ineffective assistance of counsel in his first PCR.

Pursuant to Rule 32.2, a claim is precluded if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceedings. *State v. Shrum*, 200 Ariz. 115, ¶12, 203 P.3d 1175 (2009); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996); *State v. Conner*, 163 Ariz. 97, 99–100, 786 P.2d 948, 950–51 (1990).

In *Stewart*, the Arizona Supreme Court instructed:

With some petitions, the trial court need not examine the facts. For example, if a petitioner asserts ineffective assistance of counsel at sentencing, and, in a later petition, asserts ineffective assistance of counsel at trial, preclusion is required without examining facts. The ground of ineffective assistance of counsel cannot be raised repeatedly. There is a strong policy against piecemeal litigation. *See State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002).

202 Ariz. 446, 450, 46 P.3d 1067 (2002).

The defendant's second claim fits squarely within the parameters addressed in *Stewart*. He raised ineffective assistance of counsel claims related to the trial and sentencing proceedings. Thus, like the example set out in *Stewart*, because he asserted ineffective assistance of counsel claims in his first PCR, the defendant is precluded from asserting in this successive PCR another claim that his counsel provided ineffective assistance at sentencing. As *Stewart* instructs, "preclusion is required without examining the facts." *Stewart*, 202 Ariz. at 450.

THE COURT FINDS that the defendant is procedurally precluded from relief regarding his two claims.

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IT IS THEREFORE ORDERED dismissing the defendant's Petition for Post-Conviction Relief.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.