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Attorney for Petitioner Samuel Villegas Lopez

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA)	CAPITAL CASE
)	EXECUTION SET MAY 16, 2012
Respondent,)	
)	No. 09-0247AP
v.)	
)	Maricopa County Superior Court
SAMUEL VILLEGAS LOPEZ)	No. CR-163419
)	
Petitioner.)	Petition for Review
_____)	

¶1 Samuel Lopez, by counsel, pursuant to Ariz. R. Crim. P. 32.9, petitions this court for review of the Maricopa County Superior Court’s April 3, 2012 ruling dismissing his post-conviction petition. This petition is grounded on the 6th, 8th, and 14th Amendments to the United States Constitution.

PROCEDURAL HISTORY

¶2 Petitioner filed a post-conviction petition with the Maricopa County Superior Court alleging that he received constitutionally ineffective assistance of sentencing counsel for his sentencing counsel’s failures to investigate and present

mitigating evidence at his capital sentencing trial. Petitioner supported his petition with numerous affidavits and exhibits. Petitioner acknowledged that he had not presented his claim in his previous Rule 32 petition, but alleged that he should be exempt from preclusion because the failure to present the claim before was due to the ineffective representation that he received from post-conviction counsel. The trial court dismissed Petitioner's claim as precluded holding that ineffective assistance of post-conviction counsel is not a defense to preclusion under Arizona law. Attachment 1.

ISSUES FOR REVIEW

¶3 Should Arizona recognize a constitutional right to counsel in state post-conviction? Should Arizona recognize ineffective assistance of counsel in post-conviction proceedings as an exception to preclusion?

ARGUMENT

¶4 Although the Supreme Court granted certiorari in *Martinez v. Ryan*, to answer the question left open in *Coleman v. Thompson*, viz., whether a criminal defendant has a constitutional right to counsel in post-conviction proceedings, the Court ultimately did not decide the answer to that question. Instead, the Court ruled that it need not settle the issue because it found that as a matter of equity, in certain situations a federal habeas petitioner could allege ineffective assistance of post-conviction counsel as cause to overcome procedural default to obtain federal habeas review.

¶5 This Court need not wait for the Supreme Court to decide the question, but should instead rule that the Constitution does indeed provide for effective assistance of counsel in post-conviction proceedings challenging the effectiveness of trial counsel. See *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) (holding that the constitution barred the execution of the mentally retarded prior to the United States Supreme Court holding the same); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. Banc 2003) (holding that the 8th Amendment barred the execution of children under 18 prior to the United States Supreme Court holding the same).

¶6 Reliability in sentencing is critical to the eighth amendment's protection against cruel and unusual punishment. *Woodson v. North Carolina*, 428 U.S. 280 (1976). A capital defendant is constitutionally guaranteed an individualized sentence. *Lockett v. Ohio*, 438 U.S. 586 (1978). Yet, that promise cannot be realized without competent counsel to investigate and present the evidence to the sentencer. *Wiggins v. Smith*, 539 U.S. 510 (2003). Protecting the right to counsel is paramount to protecting the right to a fair trial and to upholding the integrity of the judicial system. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."). The only way to correct the denial of constitutionally effective counsel that requires evidence

outside the record is by post-conviction. See, e.g., *Sears v. Upton*, 130 S.Ct. 3259 (2010)(evidence of ineffectiveness uncovered in post-conviction).

¶7 But an indigent, incarcerated capital defendant is no position to challenge the effectiveness of his trial counsel. He needs a lawyer for that. The State of Arizona recognizes this fact and appoints counsel in Rule 32 proceedings. But those proceedings are nothing more than a hollow promise without the appointment of competent counsel in post-conviction proceedings.

¶8 Public policy compels this Court to recognize a constitutional right to effective counsel in capital post-conviction proceedings challenging the death sentence of an indigent inmate. The guarantee of constitutionally effective counsel in post-conviction will serve to ensure a complete and fully developed record for the state court (and later federal court) to review. Such a guarantee is also necessary to avoid unwarranted preclusion rulings and to provide fair federal review.

¶9 Recognizing a constitutionally protected right to post-conviction counsel will speed finality, promote comity and will ultimately save taxpayer money. The current system puts the resources in challenging death sentences on the back end, in federal habeas. In most cases, particularly in Arizona, the evidence of ineffective sentencing counsel is not developed until federal attorneys are appointed under the Criminal Justice Act. Those lawyers then go about doing their

jobs and developing evidence that the state court never saw because the post-conviction lawyers did not do their job. Then, the lawyers spend time wrangling over which evidence will or will not be considered by the federal court. This Court should move that process back to the State Court and embrace its responsibility to provide effective counsel at post-conviction. By so doing, the record will be developed in the state court in the first instance and this Court will have the opportunity to correct any constitutional violations.

¶10. The lower court was bound by this Court's precedent. But this Court has the opportunity to boldly and courageously declare the constitutional right to counsel in state post-conviction proceedings challenging a capital sentence. It should do so.

CONCLUSION

WHEREFORE, for all the foregoing reasons and those raised in the lower court, the Petition for Review should be granted and further briefing and oral argument ordered.

Respectfully submitted this 16th day of April, 2012.

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Copy of the foregoing
emailed this 16th day of
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