ARIZONA SUPREME COURT

STATE OF ARIZONA, Plaintiff, v. SAMUEL VILLEGAS LOPEZ, Defendant.	CR–12–0187 PC Maricopa County Superior Court No. CR163419

THE STATE OF ARIZONA'S OPPOSITION TO PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW.

Whether the trial court abused its discretion in finding that Lopez's successive petition for post-conviction relief was precluded under Rule 32.2?

II. FACTS MATERIAL TO THE ISSUE PRESENTED.

In 1994, Lopez filed a post-conviction relief (PCR) petition alleging a number of claims including two claims of ineffective assistance of counsel (IAC) at resentencing. Lopez subsequently filed a supplemental PCR petition alleging an additional IAC claim and elaborating upon one he previously raised. Lopez filed a PCR reply on August 8, 1995.

The trial court rejected Lopez's claims and denied Lopez's later request for rehearing. Lopez sought review of the dismissal of his PCR petition in this Court. This Court denied review or reconsideration of the trial court's ruling.

On February 16, 2012, Lopez filed a successive PCR petition, and on March 21, 2012 he submitted a supplement to his successive PCR petition. The trial court dismissed Lopez's successive PCR petition on March 30, 2012, finding that Lopez is procedurally precluded from relief.

III. REASONS THIS COURT SHOULD DENY REVIEW.

A. *Law*.

Claims that were raised or could have been raised on direct appeal or in a prior PCR proceeding are precluded. Rule 32.2, Ariz. R. Crim. P. If a petitioner has asserted IAC claims in a previous petition and asserts IAC claims in a later

petition, the claims must be precluded without examining the facts. *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 12, 46 P.3d 1067, 1071 (2002).

Rule 32.2(b) provides an exception to preclusion when:

> There has been a *significant change* in the law that if determined to *apply* to defendant's case *would probably overturn the defendant's conviction or sentence*[.]

Ariz. R. Crim. P. 32.1(g) (emphasis added).

Arizona law also provides an exception to preclusion when:

> Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence.

Ariz. R. Crim. P. 32.1(e). Newly discovered material facts do not exist if the defendant did not exercise due diligence in securing the newly discovered material facts. Ariz. R. Crim. P. 32.1(e)(2).

A. *Argument.*

1. Because there has been no substantial change in the law affecting Lopez's case, Lopez's successive PCR petition does not fall within Rule 32.2(b)'s exception to preclusion.

Lopez filed a successive PCR petition raising IAC claims after his 1994 PCR petition, which also raised IAC claims, had been considered and dismissed by the trial court. The trial court properly dismissed Lopez's successive petition finding Lopez is "procedurally precluded from relief." *See* Ariz. R. Crim. P. 32.2; *Smith*, 202 Ariz. at 450, ¶ 12, 46 P.3d at 1071.

In his successive PCR petition, Lopez contended that *Maples v. Thomas*, 132

S.Ct. 912 (2012), is a significant change in the law that is an exception to the rule of preclusion. In his supplement to his successive PCR petition, Lopez suggested that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), creates an exception to the rules of preclusion. Neither *Maples* nor *Martinez* is a significant change in the law that is an exception to the rule of preclusion.

Maples concerns whether it is appropriate to apply the "cause" prong of the federal "cause and prejudice" exception to procedural default on federal habeas review. The Court held that when a state PCR attorney abandons his client and no longer represents the client without the client's knowledge, then such actions constitute "cause" to overcome procedural default in federal habeas proceedings. *See Maples*, 132 S.Ct. at 927.

Lopez's *Maples* claim is unavailing because *Maples* does not create a free-standing right to counsel or to the effective assistance of counsel in state post-conviction proceedings. Instead, it only establishes that abandonment of PCR counsel can be used as cause to overcome a procedural default *in a federal habeas proceeding*. Moreover, even if *Maples* applies to state proceedings, Lopez's PCR attorney did not abandon him. He petitioned this Court for review of the dismissal of Lopez's PCR petition, thus preserving issues for review in Lopez's federal habeas proceeding. *See Lopez v. Ryan*, (*Lopez III*), 630 F.3d 1198, 1208 (9th Cir. 2011). An attorney's omission of a claim—even a colorable constitutional claim—

does not constitute abandonment. *See Towery v. Ryan*, 673 F.3d 933, 9 (9th Cir. 2012). Thus *Maples* is not a significant change in the law that is applicable to Lopez's case.

Lopez's *Martinez* claim is similarly unavailing. *Martinez* also does not create a free-standing right to counsel or to the effective assistance of counsel in state post-conviction proceedings. 132 S.Ct. at 1315. *Martinez* holds that in *federal habeas proceedings*, a federal habeas court may consider a prisoner's otherwise procedurally defaulted IAC-trial claim if the prisoner establishes: (1) his state PCR counsel was constitutionally ineffective in failing to raise the claim in state court, and; (2) the underlying IAC-trial claim is "a substantial one." *Id.* at 1318.

The Court specifically held in *Martinez* that, "state collateral cases on direct review from state courts are unaffected by the ruling in this case." *Id.* at 1320. Thus, *Martinez* is inapplicable to state PCR proceedings and does not create an exception to state PCR rules of preclusion.

2. **<u>Because there are no newly discovered material facts, Lopez's successive PCR petition does not fall within Rule 32.2(b)'s exception to preclusion.</u>**

In his successive PCR petition, Lopez asserted that the declarations from his family members were newly discovered material facts. None of this material constitutes newly discovered material facts under the rule because Lopez did not

exercise diligence in gathering the material. *See* Ariz. R. Crim. P. 32.1(e) (newly discovered material facts exist if they could not have been discovered with due diligence before trial); *State v. Jeffers*, 135 Ariz. 404, 427, 661 P.2d 1105, 1128 (1983) (evidence is not newly discovered where defendant knew of existence and identity of witnesses but made no effort to obtain witnesses' statements).

Certainly, Lopez was aware of the conditions of his own childhood and could have provided this information to sentencing, resentencing, and PCR counsel. The record does not reflect that Lopez lacked access to information from his family members. Lopez was not diligent in gathering material regarding his childhood, and the material does not constitute newly discovered material facts. *See* Ariz. R. Crim. P. 32.1(e)(2); *Jeffers*, 135 Ariz. at 427, 661 P.2d at 1128; *see also Lopez III*, 630 F.3d at 1206 (Lopez does not contend that he lacked access to the information from his family members regarding family history; he could presumably obtain it without court order and with minimal expense).

Moreover, the material Lopez presented to the PCR court did not constitute newly discovered *material* facts entitling him to relief because it would not have "probably" changed the sentence. *See* Ariz. R. Crim. P. 32.1(e)(3). The aggravation was extremely weighty. The sentencing judge was aware that Lopez was brought up in poverty and with an absent father. The additional information

about his childhood that Lopez provided with his successive PCR petition would not have changed the sentence.

3. **Lopez's request that this Court find a constitutional right to the effective assistance of counsel in PCR proceedings is improper and unsupported by the law.**

Lopez asked this Court to review the PCR court's dismissal of his successive PCR petition. Below, Lopez did not ask the PCR court to recognize a right to effective assistance of counsel in PCR proceedings. Instead, Lopez "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." (Petition for Review, at 2.) Thus, the question of whether this Court should declare a right to effective assistance of counsel in PCR proceedings is not before this Court.

Furthermore, the United States Supreme Court has found that there is no right to effective assistance of counsel in state PCR proceedings. *See Martinez*, 132 S.Ct. at 1315; *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555–59 (1987). This Court has similarly not recognized a right to effective assistance of counsel in PCR proceedings. *State v. Mata*, 185 Ariz. 319, 333, n. 9, 916 P.2d 1035, 1049 (1996); *State v. Krum*, 183 Ariz. 288, 291–92, 903 P.2d 596, 599–600 (1995); *See also State v. Diaz*, 228 Ariz. 541, 543–44, ¶¶ 7–8, 269 P.3d 717, 719–20 (App. 2012) (Rule 32.2(b) does not create

an exception for IAC claims not previously raised due to the ineffective assistance of PCR counsel). Lopez's public policy arguments do not establish a reasoned basis for abandoning precedent and declaring a constitutional right to effective assistance of PCR counsel.

IV. CONCLUSION.

A PCR petition is addressed to the sound discretion of the trial court. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). The PCR court did not abuse its discretion in finding that Lopez's PCR claim[s] were precluded and dismissing his successive petition. This Court should therefore deny review.

RESPECTFULLY SUBMITTED this 24th day of April, 2012.

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