

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

No. 12-99001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL VILLEGAS LOPEZ

Appellant-Petitioner

v.

CHARLES RYAN, ET. AL

Appellee-Respondent

MOTION FOR STAY OF EXECUTION

(ORAL ARGUMENT GRANTED)

Denise I. Young
Attorney at Law
2930 North Santa Rosa
Tucson, AZ
(520) 322-5344
Dyoung3@mindspring.com

Kelley J. Henry
Supervisory AFPD-Capital Habeas
Federal Public Defender's Office
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37203
(615) 337-0469
Kelley_henry@fd.org

Counsel for Samuel Lopez

Founded exclusively upon equitable principles, the intervening decision in *Martinez v. Ryan*, 566 U.S. ____ , 132 S.Ct. 1309 (2012) sets forth an equitable rule of law that dramatically alters the equities in this case and entitles Sam Lopez to equitable relief. *No court* has ever reviewed the merits of his claim that counsel was ineffective at sentencing for failing to present a plethora of available mitigating evidence. And without a stay, he will be executed without having received *any* process in *any* court for review of a claim that *Martinez* recognizes as the very bedrock of our justice system: “The right to the effective assistance of counsel at trial is a bedrock principle in our justice system.” *Id.* at 1315. This Court should grant a stay, and afterwards grant him the equitable relief he seeks, so that he can finally be heard on his bedrock ineffective assistance claim.

Indeed, *Martinez* marks a sea change in this case. Initially, this Court barred Lopez’s ineffective-assistance-of-trial-counsel claim by laying the grave failures of post-conviction counsel at Lopez’s feet. *Lopez v. Ryan*, 630 F.3d 1198, 1206 (9th Cir. 2011). As a matter of equity, *Martinez* does not countenance such a result, thus repudiating this Court’s prior denial of relief. Despite *Martinez*’s profound effect upon the fundamental justice and equity of the federal courts’ judgment in this capital case, the District Court not only failed to grasp *Martinez*’s full import, but made clear errors in

purporting to weigh all the equities. In effect, the District Court order has undone *Martinez*.

As Lopez demonstrates in his accompanying brief, this appeal involves serious, unanswered questions about the meaning of *Martinez*, as well as thorny questions about the District Court's misapprehension about *Martinez*'s effect upon the equities of this case. Because this Court requires sufficient time to sort through these complex issues in this (perhaps the first case in which the Ninth Circuit will openly address the meaning of *Martinez*), this Court should issue a stay to permit the careful, deliberative assessment of *Martinez*'s impact upon the equity of this Court's prior, erroneous denial of habeas corpus relief. Such serious and academic issues should not be decided in haste.

This Court should grant a stay for at least two reasons. First, because the District Court has granted a certificate of appealability, this Court is authorized to grant a stay of execution to allow proper consideration of this appeal. As the Supreme Court held in *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), a habeas petitioner is entitled to a stay of execution when he presents "substantial grounds upon which relief might be granted" in a *second* habeas petition. *A fortiori*, where Lopez's appeal is in an even more favorable posture – that involving the reopening of his *first* habeas petition – this

Court should grant a stay given the substantial grounds presented in this appeal. *See e.g., Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004)(en banc)(granting stay of execution to allow proper consideration of second habeas petition where petitioner made *prima facie* showing of entitlement to relief on the merits); *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002)(granting stay of execution in proceedings under Fed.R.Civ.P. 60(b)).

Second, Lopez also meets the four-pronged standard for granting preliminary injunctive relief, which requires a movant to show: (1) a likelihood of success on merits; (2) that he is likely to suffer irreparable harm absent relief; (3) the balance of equities tips in his favor; and (4) injunctive relief is in the public interest. *Rhoades v. Reinke*, 671 F.3d 856, 858 (9th Cir. 2011)(per curiam).

He certainly will suffer irreparable harm, and he "can show a significant possibility of success on the merits." *Moormann v. Schriro*, 672 F.3d 644, 647 (9th Cir. 2012), *citing Hill v. McDonough*, 547 U.S. 573, 584 (2006). Indeed, as shown in his accompanying brief, Lopez has established that he very well may win his appeal, because: (1) The district court erroneously held that believed that Lopez's 60(b) motion was a second habeas petition; (2) *Martinez* works a sea change in the equities which formerly provided the basis for this Court's denial of relief by clearly

establishing that Lopez's ineffectiveness claim was improperly barred in federal court because of post-conviction counsel's errors; and (3) the district court clearly erred in weighing the equities, including by failing to recognize the profound significance of *Martinez* to this case and by giving great weight to a purported state interest in finality which the Supreme Court has rejected as a valid equitable interest in 60(b) cases, where 60(b) provides an exception to finality. *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

On the question of the balance of equities, Lopez has shown that *Martinez* itself profoundly changes the habeas equities in this case – relieving Lopez from bearing the fault of the ineffectiveness of the post-conviction attorney appointed by the state. As such, Lopez's case presents the uncommon case in which an intervening legal event, when considered with all the equities, provides grounds for reopening a federal habeas judgment. *See e.g., Abdur'Rahman v. Bell*, 392 F.3d 174 (6th Cir. 2004)(en banc), *vacated* 545 U.S. 1151 (2005), *Rule 60(b) relief reinstated on remand*, 2008 U.S. Dist. Lexis 37863 (M.D. Tenn. 2008).

Further, as a matter of equity which also favors a stay, Lopez comes to this Court with clean hands: He sought equitable relief within weeks of the Supreme Court's decision in *Martinez*, he could not have brought his claim earlier, and he put the Arizona Supreme Court and the State on notice

of his intent to rely on *Martinez* the day it was decided. With Lopez having done everything he could to bring this case to the Court as quickly as possible, the equities favor a stay.

Significantly, the very bedrock claim of ineffective-assistance-of-trial-counsel which no court has ever heard, and the related showing of ineffective assistance of post-conviction counsel paint a compelling picture of an individual who would not now be on death row had he not been the victim of dismal lawyering at trial followed by clearly ineffective lawyering in post-conviction proceedings. *See Lopez*, 630 F.3d at 1206.

Under *Martinez*, it quite clearly appears that Lopez can prove his entitlement to relief. Mitigation Expert, Russell Stetler, has reviewed the performance of post-conviction counsel and found that post-conviction counsel's performance was well below prevailing professional norms at the time of the post-conviction. Stetler's affidavit is well-corroborated by the affidavit of Statia Peakheart, a lawyer with the Arizona Capital Representation project at the time of Lopez's post-conviction, whose assistance was ultimately spurned by post-conviction counsel. A seasoned capital habeas lawyer, Ms. Peakheart has sworn, "Mr. Doyle's representation stands out as one of the worst cases of ineffective lawyering I have ever seen

– particularly since we had already done so much of the issue-spotting, mitigation/life history investigation and record-gathering for him.” ER#.

Here, a series of untrained and inexperienced lawyers failed to conduct a minimally competent investigation into Lopez's social history and background so that their expert witness could reach a reliable and certain conclusion. Had they done so, they would have been able to present the testimony, such as that provided in Dr. Woods declaration, that Lopez's upbringing, characterized by terror, brutality, and abject poverty, resulted in cognitive and mental impairments. Those impairments manifested themselves in dissociative episodes, night terrors, and substance abuse. The lawyers would have been able to corroborate those medical and psychiatric opinions thus mitigating and explaining the single aggravating circumstance in this case. The chaos of the crime is consistent with Lopez experiencing a post-traumatic dissociative episode brought on by the constellation of substance abuse and mental impairments. But no court has considered these facts because the evidence supporting them was not pursued by state court counsel. State court counsel have sworn under oath that the evidence presented to the district court was not withheld by them for any strategic reason. Rather, they did not know about it because they did not investigate.

At bottom, therefore, Lopez has made a significant showing that both trial and post-conviction counsel were ineffective, such that he has shown the very likelihood of success on the merits supporting a stay.

CONCLUSION

To ensure this Court has sufficient time to review, consider and address Lopez's appeal from the District Court's order denying Lopez relief, and "to protect [Lopez]" who has "a potentially legitimate claim of ineffective assistance of trial counsel," Lopez respectfully requests this Court stay his execution scheduled for May 16, 2012 pending review of his pending appeal and further order of this Court. *Martinez, supra*, at 1315.

Respectfully submitted this 4th day of May 2012.

Kelley J. Henry
Denise I. Young

BY: /s/ Kelley J. Henry

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

Kent Cattani
Susanne Blomo
Assistant Attorney Generals
1275 W. Washington
Phoenix, AZ 85007-2997

/s Kelley J. Henry
Attorney for Samuel Lopez