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

REPLY TO RESPONSE TO
MOTION FOR STAY OF EXECUTION

(ORAL ARGUMENT GRANTED)

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Sam Lopez's Rule 60(b) motion involves a rare and extraordinary situation for equitable relief: *Martinez* overturned decades of settled Ninth Circuit precedent, dramatically altered the equities in this habeas proceeding, all the while demonstrating clear error in this Court's prior judgment. This Article III court has both the power and duty to do equity. It should do so here, especially where Appellee does not dispute the critical facts that: Lopez has never received a merits adjudication of the compelling ineffectiveness claim now before this Court; *Martinez* overturned settled Ninth Circuit precedent; Lopez sought relief under *Martinez* within three weeks; and this Court's prior ruling essentially proves post-conviction counsel's deficient performance under *Martinez*.

As Lopez shows in his opening and reply briefs, his 60(b) motion is not a second habeas petition, and the District Court clearly erred in weighing the equities. Even Appellee agrees that comity interests are *not* offended if an uncorrected, erroneous judgment would prevent any adjudication of a valid constitutional claim, like Lopez's. Not only is his claim to equity even stronger than that in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987), his entitlement to equitable relief aligns precisely with *Nedds v. Calderon*, 2012 U.S.App.Lexis 9148 (9th Cir. 2012), decided last week.

The outcome the Warden seeks here will "produce troublesome results" "create procedural abnormalities" and close the federal courthouse doors "class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Castro v. United States*, 540 U.S. 375, 381 (2003); *see also Panetti v. Quarterman,* 551 U.S. 930, 943 (2007). That cannot have been the intent of the Supreme Court in deciding *Martinez*.

The State has no interest in carrying out an unconstitutional sentence. Lopez has shown that this case presents important and serious questions – questions which should not be addressed under the haste and pressure of an execution warrant. Lopez had no control over the timing of the decision in *Martinez*. It was the State, through the Director, who created the exigency by pressing for an execution warrant when Lopez placed it on notice that he would bring such a motion.

It was likewise not Lopez's fault that his original unconstitutional sentence had to be overturned. It was not Lopez's fault that the State of Arizona appointed him one inexperienced, under-resourced, and ineffective lawyer after the next.

Martinez is about equity. *Gonzalez* is about equity. Where Lopez has shown that he presents substantial issues and the equities are in his favor, a stay should be granted.

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Respectfully submitted this 10th day of May 2012.

Kelley J.Henry
Denise I. Young

BY: /s/ Kelley J.Henry

CERTIFICATE OF SERVICE

I hereby certify that on the 10th 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:

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