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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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|---------------------------------------|---|--|
| RICHARD A. LEAVITT, |) | |
| |) | CASE NO. CV-93-0024-S-BLW |
| Petitioner, |) | |
| |) | MOTION FOR RELIEF FROM |
| vs. |) | JUDGMENT PURSUANT TO |
| |) | FED.R.CIV.P. 60(b), APPLICATION |
| A.J. ARAVE, Warden of the Idaho State |) | FOR FURTHER STAY OF |
| Maximum Security Prison, |) | EXECUTION, AND SUPPORTING |
| |) | MEMORANDUM |
| Respondent. |) | |
| _____ |) | |

I. Motion for Relief from Judgment Pursuant to Fed.R.Civ.P. 60(b).

Pursuant to F.R.Civ.P. 60(b), Petitioner Richard A. Leavitt moves the Court for its Order granting him relief from its Judgment, dated October 22, 1996, Dkt. No. 62, at pp. 16-17, denying him relief on certain claims contained in the Petition and requests a

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EXECUTION, AND SUPPORTING MEMORANDUM

further stay of execution for the duration of proceedings in this Court. In particular, the Court ordered that Claim No. 9, alleging ineffective assistance of trial counsel, was defaulted on the ground that it had not been raised in the state courts, relying on the law as it existed at that time. On March 20, 2012, however, less than 2 months ago, the United States Supreme Court decided *Martinez v. Ryan*, 132 S.Ct. 1309 (March 20, 2012), in which it ruled that ineffective assistance of post-conviction counsel may serve to establish cause for failing to raise a claim of ineffective assistance of counsel. Accordingly, the Court's dismissal of Claim 9 because of procedural default was incorrectly decided.

This motion is supported by the record herein, and by the memorandum of counsel, immediately following.

II. Procedure for Seeking Relief in the District Court

At the present time, this Court lacks authority to grant relief under Federal Rules of Civil Procedure Rule 60(b) because the case is still pending before the Ninth Circuit, and the mandate has been stayed pending the decision on the petition for certiorari filed in the Supreme Court. A decision from the Supreme Court is expected on May 14, 2012.

However, this Court has authority to consider the motion under F.R.Civ P. Rule 62.1(a), which states in relevant part: "If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the

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court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.”

Thus, this Court should review the motion and, as set forth below, after consideration of the motion, order the movant to inform the Ninth Circuit pursuant to F.R.Civ. P. Rule 62.1(b) that either it would grant the motion or that the motion raises a substantial issue. If the Circuit then remands, this Court will have authority to rule on the merits of the motion.

The Committee Notes to the rule set forth the reasons for the request for remand:

. . . a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. . . .The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

In this complex capital case, where the Court has previously procedurally defaulted claims under rules which no longer apply, this motion raises a substantial issue and this Court should follow the procedures set forth in Rule 62.1 in order to insure that the petitioner’s claims are fully and properly addressed on the merits, where the basis for the prior default no longer exists.

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III. Rule 60(b) is the Proper Method for Applying *Martinez v. Ryan* in this Case.

Less than two months ago, the United States Supreme Court issued its opinion in *Martinez v. Ryan*, 132 S.Ct. 1309 (March 20, 2012), after Mr. Leavitt's Petition for Certiorari was filed in the Supreme Court and before a decision on his petition was rendered. In *Martinez*, the Court qualified its holding in *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that an attorney's errors in a post-conviction proceeding typically do not qualify as cause to excuse a default, by recognizing an exception which had not been squarely addressed in *Coleman*: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's default of a claim of ineffective assistance at trial." *Id.* 1315. The Supreme Court's decision in *Martinez* dramatically impacts the resolution of Mr. Leavitt's petition for writ of habeas corpus filed in this Court in 1993, as well as the proper consideration of certain ineffective assistance of trial counsel claims, which in view of *Martinez*, this court improvidently dismissed as procedurally defaulted in 1996.

This Court in its procedural decision held that all claims of ineffective assistance were defaulted and that no cause or prejudice could be shown through attorney errors during the post-conviction proceedings.

'Ineffective assistance of counsel may constitute cause, if the representation amounts to an independent Sixth Amendment violation.' *Moran v. McDaniel*, 80 F.3d 1261, 1271 (9th Cir. 1996). However, because a state

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prisoner has no Sixth Amendment right to effective assistance of counsel during a state collateral proceeding, counsel's alleged conflicts, failures or omissions in a post-conviction action can never establish cause. *Id.*; *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996, *cert. denied*, 116 S.Ct. 980 (1996)). Thus, there is no cause to excuse a default even where, as here, the collateral proceeding is the first place an ineffective assistance of counsel claim could have been presented. *Moran*, 80 F.3dat 1271; *Bonin v. Calderon*, 77 F.3d at 1159; *Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir.) (en banc) (plurality), *cert. denied*, 116 S.Ct. 36 (1995). Moreover, the rule is the same even though counsel responsible for representing the petitioner in the collateral proceeding is, at the same time, representing the petitioner on direct review. *See, Bonin v. Vasquez*, 999 F.2d 425, 431 (9th Cir. 1993). It also applies even though the state procedure requires the petitioner to assert any ineffective assistance of counsel claim in a collateral proceeding prior to the completion of direct review. *Id.*

Memorandum Decision and Order, Dkt. No. 62, pp. 16-17.

Mr. Leavitt appealed the denial of his claims based upon procedural default and argued there was cause for the default. The Ninth Circuit upheld the district court on the default of issues of ineffective assistance of trial and appellate counsel and did not address the issue of cause and prejudice although raised by Mr. Leavitt. The Ninth Circuit did remand to permit consideration of ineffective assistance at re-sentencing based on *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001).¹ This motion does not ask this Court to reconsider its prior ruling or the appellate court decision on the claim of error during re-sentencing.

¹The Ninth Circuit also held that the district erred in dismissing two instances of trial counsel error on procedural default grounds, but upheld the decision on the merits despite the fact that Mr. Leavitt had no opportunity to develop the claim in the federal district court.

Under established Supreme Court jurisprudence “[f]ederal habeas courts reviewing the constitutionality of a state prisoner’s conviction and sentence are guided by rules, [including] . . .the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule.” *Id.* at 1316. In *Martinez*, the Supreme Court acknowledged that prisoners who fail to present their ineffective assistance of trial counsel claims during their initial review collateral proceedings in state court would be barred from doing so in a subsequent state collateral proceeding, and that absent a showing of cause and prejudice, such ineffective assistance of trial counsel claims would be barred from federal habeas review under the procedural default doctrine. *Id.*

Previous to *Martinez*, district and appellate federal courts universally understood the Supreme Court’s decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), to hold that the negligence of a prisoner’s post-conviction lawyer would not qualify as cause to excuse such a procedural default. *Smith v. Baldwin*, 510 F.3d 1127, 1146-1147 (9th Cir. 2007) (under *Coleman*, attorney ineffectiveness in the postconviction process is not considered cause for the purposes of excusing the procedural default at that stage); *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996). Nevertheless, as the Supreme Court clarified in *Martinez*, its decision in *Coleman*, did not [actually] present the

occasion to . . . determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default,” *Id.* at 1316, and accordingly, as a matter of first impression, the Court held that ineffective assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance of counsel at trial. *Id.* at 1315. The Court went on to hold that to demonstrate cause for a default, a petitioner would be required to establish (1) that his initial review post-conviction lawyer was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) that “the underlying ineffective-assistance of trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Id.* at 1318-1319. With respect to this latter requirement to establish that the underlying ineffective assistance claim is substantial, the Court cited to the minimal showing needed for a certificate of appealability to issue. *Id.*

Because the Court gave Martinez himself retroactive benefit of its decision, *Id.* at 1321 (remanding to the court of appeals to determine the application of the decision to the petitioner Martinez), the decision must be given retroactive effect in all other courts where the application for habeas relief is still pending. See *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 90, 96 (1993) (“[W]e hold that this Court’s application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to

that decision.”) Moreover, the Court clearly evidenced its intention that its decision be made applicable to pending cases.

Six days after *Martinez* was decided, the Supreme Court granted certiorari, vacated opinions, and remanded five federal habeas cases to the United States Courts of Appeals for the Fifth, Sixth and Ninth Circuits for reconsideration in light of *Martinez*. *Smith v. Colson*, No. 10-8629, 2012 WL 986816 (U.S. Mar. 26, 2012); *Cantu v. Thaler*, No. 10-11031, 2012 WL 986818 (U.S. Mar. 26, 2012); *Middlebrooks v. Colson*, No. 11-5067, 2012 WL 986820 (U.S. Mar. 26, 2012); *Newbury v. Thaler*, No. 11-6969, 2012 WL 986822 (U.S. Mar. 26, 2012); *Woods v. Holbrook*, No. 11-7978, 2012 WL 986823 (U.S. Mar. 26, 2012). In addition, since *Martinez* did not announce a new rule of constitutional law, no bar exists to limit its application to pending habeas cases. *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1188 (9th Cir. 2011). It follows for all these reasons that the Supreme Court’s ruling in *Martinez* applies to Leavitt’s pending habeas corpus proceeding. *Martinez* provides a road map for Leavitt to show cause that will excuse his post-conviction attorney’s failure to bring or develop the factual basis of claims concerning the ineffectiveness of his trial counsel.

In Idaho capital cases, the post-conviction petition is “the first occasion [at which] to raise a claim of ineffective assistance at trial.” *Martinez*, 132 S.Ct at 1315. *See*, I.C.

§19-2719. In fact, the post-conviction petition must be filed within forty-two days of the entry of the judgment of death; in contrast, non-capital defendants have one year after the determination of the appeal to file a post-conviction petition. *See*, I.C. § 19-4902. The judgment of death was first entered against Mr. Leavitt on January 8, 1986, and he filed his post-conviction petition on February 19, 1986 within the forty-two day time period. Based on the short statutory time period which was strictly enforced by the state courts at the time of Mr. Leavitt's conviction, Idaho falls squarely within the definition of an "initial review" state set forth in *Martinez*. Therefore, this Court must determine whether the failures of post-conviction counsel establish cause for any procedural default and consider this issue anew in light of *Martinez*.

Moreover, the motion for this Court to reconsider its prior ruling on procedural default under *Martinez* is properly brought under Federal Rule of Civil Procedure, Rule 60(b). *See, Gonzalez v. Crosby*, 545 U.S. 524 (2005). In *Gonzalez*, the habeas petitioner had his first petition denied as untimely under 28 U.S.C. § 2244(d). However, a subsequent Supreme Court decision held that a petition was properly filed, even if dismissed on procedural default grounds. *See, Artuz v. Bennett*, 531 U.S. 4 (2000). Nine months after *Artuz*, Gonzalez filed a pro se motion to alter or amend the judgment and invoking Rule 60(b). The Supreme Court held that challenging a "defect in the integrity of the federal habeas proceedings" is properly brought under Rule 60(b).

Nevertheless, the Supreme Court denied the 60(b) relief sought in *Gonzalez* because he had long before abandoned that claim. In contrast, Mr. Leavitt's petition is not final at this time, and he has actively pursued his remedies to date. He raised the issue of cause and prejudice throughout his appeal. Therefore, since his case is still pending on direct review from the denial of his habeas petition, his case is controlled by *Martinez*, and this Court should consider the question of cause and prejudice on the claims previously defaulted.

IV. The Specific Claims Improperly Defaulted in Light of *Martinez*

Leavitt was barred from developing in the federal court proceedings any of his claims that trial and appellate counsel provided ineffective assistance of counsel because of the application of the then existing rules of procedural default. As a result of the district court ruling in 1996, he was unable to develop the full evidentiary basis for these claims or seek an evidentiary hearing in federal court under the pre-AEPDA standard, as set forth in *Towsend v. Sain*, 372 U.S. 293 (1963).

Now that the Supreme Court has established that ineffective assistance of post-conviction counsel, while not amounting to a separate Sixth Amendment claim, can nevertheless establish cause for the default, this Court should reconsider its prior ruling and permit Leavitt to present evidence to support his claim that there was cause for default.

Leavitt should be permitted to engage in further discovery on the issue of post-conviction counsel's representation during the state consolidated collateral review and appeal proceedings. For example, a review of the state proceedings on post-conviction demonstrates that counsel appears to have engaged no investigators or experts. Nor did he raise all of the issues addressed in Leavitt's federal petition.

This Court held, as did the Ninth Circuit, that the claim of ineffective assistance during the combined post-conviction and appeal proceedings were properly defaulted under the state default rule established in *Paz v. State*, 852 P.2d 1355, 1357 (1993). However, the Supreme Court in *Martinez* has shown that this rule, requiring as it does that the petitioner himself be able to recognize potential errors in the post-conviction process, must be reconsidered as a valid rule of procedural default.

Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert*, 545 U. S., at 619, 125 S. Ct. 2582, 162 L. Ed. 2d 552. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. Cf., e.g.,

id., at 620-621, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (describing the educational background of the prison population). While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

Martinez, 132 S.Ct. at 1317.

In this case, because of the failures of appellate/post-conviction counsel, claims relating to trial counsels' acts and omissions were not fully developed in the state court proceedings. These claims include issues regarding the presentation of evidence at both the guilt and penalty phases. For example, trial counsel employed no mental health experts prior to trial and did not present potentially significant expert evidence regarding the blood located at the scene. In addition, neither trial counsel nor post-conviction counsel challenged the erroneous instructions on the presumption of innocence, reasonable doubt and alibi. While this Court held that the instructions were erroneous and granted relief, the Ninth Circuit did not reach the merits of the claim under *Teague v. Lane*, 489 U.S. 288 (1989).²

In addition, under the rules in effect at the time of Mr. Leavitt's post-conviction petition, he was not able to raise any issues of ineffective assistance of counsel on appeal

² One judge on the panel found, in a concurring opinion, that the alibi instruction was error invited by trial counsel. *Leavitt v. Arave*, 383 F.3d 809, 847-848, Fernandez, J. concurring. Certainly, the issue of why a counsel would *seek* an instruction which improperly shifted the burden is one to be examined under the ineffective assistance of counsel rubric. *See, Lankford v. Arave*, 468 F.3d 578, 584 (9th Cir. 2006) [conviction reversed for trial counsel request of erroneous accomplice instruction placing greater burden on defendant's case].

because his post-conviction petition was decided by the state district court, one year before the briefing on appeal was even begun.

This Court having found reversible error once before on the merits of the instructional claims but denying relief on the ineffective assistance of counsel claims on procedural grounds, it is appropriate for the Court to now permit reconsideration of the claims in this capital case based upon *Martinez*. At least one panel of the Ninth Circuit has vacated the judgment of the district court and remanded for consideration of previously defaulted claims in light of *Martinez*, and directed the district court to afford the petitioner an evidentiary hearing “if the district court determines that one is warranted.” *See, Lopez v. Ryan*, No. 09-99028, Order Dated April 26, 2012, a copy of which is attached hereto.

Mr. Leavitt seeks similar relief in this case, to permit this Court to reconsider its prior denial of the petition on procedural default grounds.

V. This Court Should Grant a Stay of Execution

Petitioner also seeks a stay of the State’s attempts to set a date for execution. Currently, this appeal is pending before the United States Supreme Court on his Petition for Writ of Certiorari. This Court has previously enjoined the State from seeking to carry out a sentence of death. However, should the cert petition be denied and the stay of the mandate lifted, the State has indicated that it will immediately seek to set an execution

date of June 12, 2012. This rapid date, after almost twenty years of litigation, is not warranted given the significant change in the law which occurred barely fifty days ago. As pursuit of this motion may involve the necessity of further argument, hearings and a potential evidentiary hearing, this Court should enter a stay in this matter under Local Rule 9.2(c).

VI. Conclusion

For these reasons, it is respectfully requested that this Court grant the relief requested and enter a stay of execution for the duration of these proceedings.

DATED this 11th day of May, 2012.

/s/
David Z. Nevin
Andrew Parnes

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/
David Z. Nevin

FILED

UNITED STATES COURT OF APPEALS

APR 26 2012

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GEORGE M. LOPEZ,

Petitioner - Appellant,

v.

CHARLES L. RYAN,

Respondent - Appellee.

No. 09-99028

D.C. No. 4:97-cv-00224-CKJ

District of Arizona,

Tucson

ORDER

Before: WARDLAW, PAEZ, and RAWLINSON, Circuit Judges.

Petitioner’s motion to remand is GRANTED. The judgment is vacated and this case is remanded for to the district court to reconsider its denial of Lopez’s habeas petition in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2011), an intervening Supreme Court decision which appears to affect Lopez’s guilt- and penalty-phase ineffective assistance of counsel claims. Specifically, the district court should address: (1) the ineffective assistance of counsel claims previously found procedurally defaulted; and (2) how *Martinez* applies to claims of ineffective assistance of counsel who failed to develop a factual record during the initial post-conviction relief proceedings; and should afford Lopez an evidentiary hearing if the district court determines that one is warranted. The district court shall enter a new judgment.

The oral argument scheduled for May 10, 2012 in Pasadena, California is VACATED. The panel assigned to this appeal will retain jurisdiction over any further appeal. A certified copy of this order shall serve as the mandate of this court.

VACATED AND REMANDED.