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In Propria Persona

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA)	No. CR 2008-145947-001 SE
)	
Plaintiff,)	REPLY TO STATE’S RESPONSE TO PETITION
)	FOR POST CONVICTION RELIEF
)	
vs.)	
)	
BRIAN ALLEN WILKINS,)	
)	
Defendant.)	

COMES NOW THE PETITIONER/DEFENDANT, proceeding *in propria persona*, hereby submits this reply to the State of Arizona’s response docketed on 7/28/2009. The State does not challenge, nor even respond, to any of the Petitioner’s colorable claims presented in the Rule 32 “Petition For Post-Conviction Relief,” filed on July 13, 2009, except for a circumventive response to Petitioner’s ineffective assistance of counsel claims. This can only be judged as an admission by the State of all Constitutional violations alleged in the Petition for PCR, since the State does not challenge them in its response. Thus the Petitioner respectfully requests the Court grant relief for all colorable claims presented in the Petition for PCR and dismiss with prejudice, said prosecution and all related charges, based on the following Memorandum of Points and Authorities.

Submitted August 2, 2009.

/s/ _____

MEMORANDUM OF POINTS AND AUTHORITIES

The State does not challenge the following claims presented in the Petition for PCR:

1. *Sixth and Fourteenth Amendment* violation by not providing counsel to Petitioner at arraignment,
2. *Sixth and Fourteenth Amendment* and *Constitution of Arizona, Art. 2 §§ 23 & 24* violations, in an unprecedented abuse of process by the State, the Court, and counsel by depriving the Petitioner of his right to trial by jury,
3. *Sixth Amendment Faretta* violation, depriving the Petitioner of his right to represent himself in court,
4. *Eighth and Fourteenth Amendment* and *Constitution of Arizona Art. 2 § 15* violations, holding the Petitioner in jail on an unconstitutionally excessive bond, depriving him of the opportunity to investigate said case,
5. *Fourteenth Amendment* due process violations, by prosecutor Lynn Krabbe wantonly and deliberately fabricating and using false evidence and testimony against the Petitioner,
6. The State's unconstitutional suppression of evidence, mainly in regards to its alleged "victim," Michael Arthur Wood, being on probation at the time of Petitioner's alleged "crimes," for criminal simulation (counterfeiting money). Wood also extorted the Petitioner on July 22, 2008, for \$1000.00,
7. State obstruction of Petitioner's right to appeal,
8. *Fourteenth Amendment* due process violations; Judge Emmet Ronan was given the Petitioner's case in Early January 2009, without a re-assignment order issued from the Criminal Presiding Judge (Judge David K. Udall had been assigned the case originally).

9. *Fourteenth Amendment* due process violation; Judge Ronan signing orders for prosecutor Lynn Krabbe when Ronan was not the judge assigned to Petitioner's case.

Since the State does not challenge said claims, this must be construed as an admission of all Constitutional violations, and thus reversal of conviction and sentence is required. The State's response centers around the "defense" not suffering "manifest injustice," pursuant to *Ariz. R. Crim. P. 17.5.*, and therefore his entire petition for post-conviction relief should be dismissed. The State adopts a hegemonic theory in believing they extended the Petitioner a good deed by wantonly depriving him of his right to a public trial by jury, and instead forcing him to sign a "favorable plea." The Defendant/Petitioner never was and never has been interested in a plea agreement. If the Petitioner was remotely interested in the plea agreement he ultimately was forced to sign, he would have signed said plea before it expired on October 22, 2008. As the State allows, the plea was signed on March 2, 2009, more than four months after the plea had expired. It is unprecedented for a State prosecution in Maricopa County or elsewhere, to confidently and wantonly alter a pleading with a ball-point pen, as they did with the plea agreement in this case, to accommodate an agenda. This is merely one example of "manifest injustice" which occurred throughout these proceedings, and justifies the prosecution and all charges being dismissed with prejudice.

"Manifest injustice" is appropriate nomenclature selection by the State, to describe the entirety of this case. The Petitioner's civil and Constitutional rights were, and continue to be, violated in repeated abuses of process throughout these criminal proceedings. The original Civil Rights Act of 1871, now codified via *42 U.S.C. § 1983* was "popularly known as the Ku Klux Act," *Collins v. Hardyman*, *341 U.S. 651, 657, 662 (1951)*, because the statute was enacted in part out of concern that many state courts were "in league with those who were bent upon abrogation of federally protected rights," *Mitchum v. Foster*, *407 U. S. 240 (1972)*. The State of Arizona's prosecution, Court, and public defender's office, each and all of them, blatantly, wantonly, and maliciously violated nearly every Constitutional right guaranteed to the Petitioner/Defendant by the U.S. and Arizona Constitutions, to actualize their desire to enter him into

a forced system of probation without due process. The State has admitted Constitutional error in their “Response” docketed 7/28/2009 by not challenging the colorable claims presented in the PCR. Thus, Petitioner will only respond to the single claim the State attempted to address: Ineffective Assistance of Counsel.

The State alleges Maricopa County public defender “Mr. Brown...filed a written motion to have the case set for a Witness Preliminary Hearing” allegedly on July 29th or 30th, 2008 (this is not clear from the State’s response). The State does not attach an exhibit of said motion, nor does the Court record reflect that this “written motion” was ever filed by David Allen Brown at any point in these proceedings. A preliminary hearing was set by the Court, *sua sponte*, for August 1, 2008, on the same day of Petitioner’s initial/bond hearing (7/22/2008)(see attached Exhibit A). The State falsely declaring Brown filed any “written motion[s]” at all in this case, coupled with its failure to include exhibits proving the existence of this alleged “motion,” alone, warrants dismissal of this prosecution with prejudice. Further, the record also does not reflect a required “in writing” motion to continue the Petitioner’s trial - which was supposed to take place on January 20, 2009, *Ariz. R. Crim. P. 8.5 (Continuance of Trial)* - being filed either by the State or by Maricopa County public defenders (see Exhibit 11, “Wilkins Docket List” attached to PCR). The “manifest injustice” only continued there; and ends in the Maricopa County Superior Court with these Rule 32 proceedings. Again, since the State does not challenge a vast majority of the Petition for Post Conviction Relief filed on 7/13/2009, Petitioner will only address the “ineffective counsel” claim the State vaguely addressed and challenged.¹

LAW AND ARGUMENT

A Rule 32 petition for post-conviction relief is not a direct appeal from a judgment under Rule 31. Rather, it is a collateral attack on a judgment and is post-conviction relief other than an appeal, *Moreno v.*

¹ As Defendants In Arizona courts procedurally preclude any and all claims for appellate review which they do not bring in their first Post Conviction Relief Petition, *Ariz. R. Crim. P. 32.2(a)(3)*, prosecutors are also lawfully limited to one single response pleading to a PCR petition, *Ariz. R. Crim. P. Rule 32.6(a)*. The State, in this case, has filed its one and only response to said PCR Petition.

Gonzalez, 192 Ariz. 131, 962 P.2d 201 (1998). Arizona's Constitution guarantees criminal defendants "the right to appeal in all cases," *Ariz. Const. Art. 2, § 24*. Arizona Rule of Criminal Procedure 32 was originally adopted in 1973, by the Arizona Supreme Court, as a "unified procedure." *Ariz. R.Crim. P. 32.1 general comment*. It included all forms of post-conviction review under Arizona law other than direct appeal, and it replaced the "different mechanics, requirements and time limits" that had previously existed. See *State v. Whipple*, 177 Ariz. 272, 866 P.2d 1358, 1360 (Ct. App. 1993). In 1992, Arizona Rule of Criminal Procedure 17.1(e) was amended to read: "By pleading guilty or no contest in a noncapital case, a defendant waives the right to have the appellate courts review the proceedings by way of direct appeal, and may seek review only by filing a petition for post-conviction relief pursuant to Rule 32 and, if denied, a petition for review." *Ariz. R. Crim. P. 17.1(e)*; *Summers v. Schriro*, (9th Cir.), 481 F.3d 710 (2007). To bring an of-right proceeding under Rule 32, a plea-convicted defendant must provide to the Arizona Superior Court, within 90 days of conviction and sentencing in that court, notice of his or her intent to file a Petition for Post-Conviction Review. *Ariz. R.Crim. P. 32.4(a)*. When the petition is filed, the Superior Court must provide an opportunity for a response and reply. *Id.* 32.6. If there are colorable claims for which additional evidence is required, the Superior Court must hold an evidentiary hearing. *Id.* 32.6(c), 32.8; *Summers*. In this case, each and every Arizona appellate court decision the State cites in support of their claims to dismiss said PCR petition, pursuant to Arizona Rule of Criminal Procedure 17.5, was decided prior to 1992, thus are not legally binding to Petitioner's case.

To force a lawyer on a defendant can only lead him to believe that the law contrives against him," *Faretta v. California*, 422 U.S. 834 (1975). The "two-prong" test the State alleges must be proven by the Petitioner for ineffective counsel claims, pursuant to *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985), and *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984), was consolidated by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). As the State may likely argue there is "hearsay precluded" testimony present in the Petitioner's pleadings, it should be noted:

Statements...having equivalent circumstantial guarantees of trustworthiness [are not precluded by the hearsay rule], if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. *Ariz. R. Evid. Art. 8; Rule 804.*

Every ineffective counsel claim brought by the Petitioner is proven by a preponderance of the evidence via exhibits in the form of Court dockets, including a schedule of the Maricopa County Superior Court's docket record for this case. Even without additional discovery Petitioner moved the Court to produce (which the Court has not ruled upon), this remains the case. The State falsely declares in their "Response" that "Judge Ronan...entered a plea of guilt" in this case, (*Pg. 2, ¶ 2*). It was Judge Theresa Sanders who entered a plea of guilty on March 2, 2009.

The State then asked the Court to "understand" that "the plea bargain...was an exceptional offer," *Id., last ¶; Pg. 3*. The State merely and arrogantly assumes the Petitioner wanted to sign some sort of "plea" throughout this prosecution instead of proving his innocence at trial (even though the burden is actually on the State to prove the Petitioner's guilt). The State goes on to say, "[public defender] Mr. Ziemba's actions were not only reasonable, but also exemplary." (*Id, pg. 5*). The State's positive review and personal admiration for their public defenders' is not lawfully relevant to these proceedings. Again, if the Petitioner had any premonitions of signing a plea, he would have done so before said plea expired on October 22, 2008. The State knew the Petitioner would sign a plea if unconstitutionally cornered, specifically by the State, Court, and public defenders unlawfully revoking Petitioner's right to a public trial - *Constitution of Ariz., Art. 2 §§ 23 & 24; Sixth Amendment of U.S. Constitution; 13 A.R.S. § 114(1)* - by wantonly and blatantly violating *Ariz. R. Crim. P. 8.5*. The State boldly asserts, as legally binding, *Ariz. R. Crim. P. 17.5*, in § I, *pg. 3* of State's response, declaring the Petitioner must, "show a manifest injustice will result" if the Court does not permit him to withdraw from an accepted plea agreement." The State alleges this rule must be strictly adhered to by the Petitioner and Court; however the State believes it may circumvent *Ariz. R. Crim. P. 8.5* to wantonly deprive the Petitioner of a public trial by jury. The

State's claims, pursuant to Rule 17.5, lack colorable merit because Rule 32 supersedes said claims, and Rule 17.5 is not a proper conveyance of post-conviction relief.

The State goes on, falsely proclaiming the Petitioner said he signed "a bad bargain." The aforementioned - along with the State alleging that the *Joe U. Smith, 140 Ariz. 355, 681 P.2d 1374 [1984]*) decision does not apply to their public defenders in Maricopa County - present two false, non-colorable claims. Therefore, the Petitioner will not respond to these.

CONCLUSION

The State does not challenge, nor even remotely address any of the claims the Petitioner brought in the Petition for PCR. This can only be judged as an admission of prejudicial, Constitutional error by the State, thus reversal will be required in Petitioner's case. The State's "Response" to Petitioner's claims of ineffective counsel simply lack colorable substance, and is seemingly relying on the Court, *sua sponte*, to dismiss Petitioner's PCR proceedings because of assumed prosecutorial entitlement. Petitioner respectfully requests the Court grant relief, and dismiss the prosecution (and all charges) as outlined in the PCR. In the alternative, Petitioner respectfully requests the Court set a hearing (informal or evidentiary) within thirty days on [Petitioner's] claims that present a material issue of fact or law, *Ariz. R. Crim. P. 32.6 (c)*. The State will have the burden of proving, beyond a reasonable doubt, that the proven Constitutional defects in these proceedings were "harmless error." *Ariz. R. Crim. P. 32.8 (c)*. The State seems to believe this current action is a "Rule 17" petition or motion for Post-Conviction Relief; which does not exist in Arizona jurisprudence. Even if "Rule 17 PCR" did exist, based on its presumed colorable elements, Petitioner would still prove his claim by a preponderance of the evidence.

As the State declares in ¶3, pg. 2 of their Response, "plea agreements are an effective and approved tool for effectuating public policy; they serve both the interests of justice and judicial economy. *State v. Watton, 164 Ariz. 323, 793 Ariz. 80 (1990)*." The matter at hand (PCR proceedings), in the "interest of justice and judicial economy," can and should be quickly and efficiently dispositioned based

on all pleadings filed in collateral attack dockets, responses, and recorded facts, via an informal conference, in the event the Court decides such.

Respectfully submitted this 2nd day of August, 2009.

/s/ _____

/s/Brian A. Wilkins

Pro-Per Defendant/Petitioner for Post Conviction Relief

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/s/ _____

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Pro-Per Petitioner