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1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Filing Date: June 21, 2018**

3 **NO. S-1-SC-36408**

4 **STATE OF NEW MEXICO,**

5 Plaintiff-Respondent,

6 v.

7 **SAMMY J. PINON,**

8 Defendant-Petitioner.

9 **ORIGINAL PROCEEDING ON CERTIORARI**

10 **Mark Sanchez, District Judge**

11 L. Helen Bennett, P.C.

12 Linda Helen Bennett

13 Albuquerque, NM

14 for Petitioner

15 Hector H. Balderas, Attorney General

16 Anita Carlson, Assistant Attorney General

17 Santa Fe, NM

18 for Respondent

1 Fifth Judicial District Court raising, *inter alia*, claims of ineffective assistance of trial
2 and appellate counsel on the grounds that his trial counsel failed to properly impeach
3 a witness at a preliminary hearing and that his appellate counsel failed to raise a
4 plausible claim on appeal and failed to take any action in his appeal after filing the
5 docketing statement. After conducting a hearing on the merits, the district court
6 granted the petition for writ of habeas corpus in part. The district court denied Pinon's
7 due process claims but found that his appellate counsel

8 rendered per se ineffective assistance of counsel on . . . direct appeal by
9 failing to file *any* pleadings (memorandum in opposition to calendar
10 notice, motion for rehearing, or petition for certiorari) on his behalf . . .
11 and by failing to include all plausible claims raised in the [d]istrict
12 [c]ourt in the [d]ocketing [s]tatement (or by moving to amend the
13 [d]ocketing [s]tatement).

14 The district court reinstated Pinon's right to a direct appeal under Article VI, Section
15 2 of the New Mexico Constitution and ordered his habeas counsel to file a new notice
16 of appeal and new docketing statement with the Court of Appeals. The State did not
17 appeal the district court's grant of habeas corpus relief reinstating Pinon's right to a
18 direct appeal. *See* Rule 5-802(H)(1) NMRA (2009) (providing the State with an appeal
19 as of right to the granting of a writ of habeas corpus).

20 {4} Pursuant to the district court's reinstatement of his right to a direct appeal,
21 Pinon filed a second notice of appeal and docketing statement with the Court of

1 Appeals in 2014 appealing his 2007 conviction of retaliation against a witness. On
2 appeal, Pinon claims a violation of the confrontation clause under Article II, Section
3 14 of the New Mexico Constitution, insufficient evidence to support his conviction,
4 and ineffective assistance of trial and appellate counsel.

5 {5} The Court of Appeals issued a memorandum opinion in Pinon’s reinstated
6 appeal, summarily dismissing it on the basis that Pinon had previously perfected an
7 appeal of his conviction, which the Court of Appeals had decided against him. *State*
8 *v. Pinon*, No. 34,120, mem. op. ¶ 7 (N.M. Ct. App. Feb. 23, 2017) (non-precedential).
9 Stating that it was “unaware of any authority that allows the district court to
10 effectively order [the Court of Appeals] to reconsider an appeal where the appellant
11 previously perfected an appeal,” the Court of Appeals concluded that it lacked
12 jurisdiction over the appeal and dismissed it. *Id.* ¶¶ 7-8. We granted Pinon’s petition
13 for writ of certiorari, challenging the Court of Appeals’s dismissal of his reinstated
14 appeal.

15 {6} We conclude the Court of Appeals erred in dismissing Pinon’s reinstated
16 appeal. In the habeas proceedings, the district court granted Pinon’s petition on the
17 grounds of ineffective assistance of counsel and determined that the appropriate relief
18 was to reinstate his right of direct appeal under Article VI, Section 2. The State did not

1 appeal this decision. Pursuant to this unchallenged decision by the district court, Pinon
2 re-filed a direct appeal under Article VI, Section 2 with the Court of Appeals. *See*
3 Rule 12-102(B) NMRA. Although, as noted by the Court of Appeals, Pinon had
4 previously perfected a direct appeal, the district court concluded that his original
5 appellate counsel failed to pursue the appeal and provide him with effective assistance
6 in that initial appellate proceeding. Therefore, the district court concluded Pinon was
7 deprived of his right to a direct appeal and is now entitled to reinstate a direct appeal
8 in the Court of Appeals with the assistance of competent appellate counsel. Because
9 Pinon’s reinstated appeal was brought pursuant to the district court’s unchallenged
10 grant of habeas relief and determination that Pinon was entitled to a direct appeal with
11 the assistance of effective appellate counsel, we conclude that the Court of Appeals
12 erred in dismissing his appeal.

13 {7} In response to the petition for writ of certiorari the State challenges the outcome
14 of the original habeas proceedings. The State challenges both the district court’s
15 determination that Pinon received ineffective assistance of appellate counsel and the
16 propriety of the district court’s remedy reinstating Pinon’s right to a direct appeal. The
17 State requests that we remand this case “to the district court for full consideration of
18 [Pinon’s] claims in the state habeas proceeding.” We decline the State’s invitation to

1 address the lawfulness of the district court's findings or its remedy in the habeas
2 proceeding now because those matters are not before us to consider. While the State
3 had the opportunity to challenge the district court's findings in the habeas proceedings
4 it chose not to do so. For this reason, it is not appropriate for us to do so now.

5 **IT IS, THEREFORE, ADJUDGED THAT:**

6 {8} The Court of Appeals' dismissal of Pinon's reinstated appeal is reversed and
7 the matter is remanded to the Court of Appeals for further proceedings consistent with
8 this order.

9 {9} **IT IS SO ORDERED.**

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BARBARA J. VIGIL, Justice

12 **WE CONCUR:**

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JUDITH K. NAKAMURA, Chief Justice

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PETRA JIMENEZ MAES, Justice

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2 **CHARLES W. DANIELS, Justice**