



**CLARK COUNTY COURTS
EIGHTH JUDICIAL DISTRICT COURT
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Tracie K. Lindeman

Steven D. Grierson
Clerk of the Court

January 25, 2011


Tracie Lindeman
Clerk of the Supreme Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. FREDYS A. MARTINEZ
S.C. CASE: 57197
D.C. CASE: 06C226586

Dear Ms. Lindeman:

Pursuant to your Order Re: Entry of Written Judgment or Order and Record on Appeal, filed December 8, 2010, attached is a certified copy of the Findings of Fact, Conclusions of Law and Order, filed January 21, 2011, in the above referenced case. If you have any questions regarding this matter, please contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT


Heather Lofquist, Deputy Clerk

1 **ORDR**

2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **THOMAS M. CARROLL**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #004232**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

8 **THE STATE OF NEVADA,**

9 **Plaintiff,**

10 **-vs-**

11 **FREDYS MARTINEZ, #1361243**

12 **Defendant.**

CASE NO: C226586

DEPT NO: XIV

14 **FINDINGS OF FACT, CONCLUSIONS OF**
15 **LAW AND ORDER**

16 **DATE OF HEARING: July 14, 2010**
17 **TIME OF HEARING: 9:00 A.M.**

18 **THIS CAUSE** having come on for hearing before the Honorable Donald Mosley,
19 **District Judge**, on the 14 day of July, 2010, the Petitioner not being present, proceeding in
20 **forma pauperis**, the Respondent being represented by **DAVID ROGER**, District Attorney, by
21 **and through Barbara Schifalacqua**, Deputy District Attorney, and the Court having
22 **considered the matter**, including briefs, transcripts, no arguments of counsel, and documents
23 **on file herein**, now therefore, the Court makes the following findings of fact and conclusions
24 **of law:**

25 **FINDINGS OF FACT**

26 **1. On September 29, 2006, Fredys Martinez (hereinafter "Defendant") was**
27 **charged by way of Grand Jury Indictment with: Count I – Burglary While in Possession of a**
28 **Deadly Weapon (Felony – NRS 205.060); Count II – Battery with use of a Deadly Weapon**

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1 (Felony – NRS 200.481); Count III – First Degree Kidnapping with use of a Deadly Weapon
2 (Felony – NRS 200.310, 200.320, 193.165); and Count IV – Sexual Assault with use of a
3 Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165).

4 2. Defendant's jury trial began on April 11, 2007. On April 12, 2007, the jury
5 found Defendant guilty of: Count I – Burglary while in Possession of a Weapon; Count II –
6 Battery with use of a Deadly Weapon; and Count III – First Degree Kidnapping with use of a
7 Deadly Weapon. The jury found Defendant not guilty of Count IV.

8 3. Defendant was present in court with counsel on May 24, 2007, and sentenced
9 as follows: as to Count I – SIXTY (60) to ONE HUNDRED EIGHTY (180) months; as to
10 Count II – FORTY-EIGHT (48) to ONE HUNDRED TWENTY (120) months, to run
11 concurrently with Count I; and as to Count III – SIXTY (60) months to LIFE, plus an equal
12 and consecutive term of SIXTY (60) months to LIFE for the use of a deadly weapon, the
13 entire sentence to run concurrently to Counts I and II. Defendant was given two hundred
14 eighty-one (281) days credit for time served.

15 4. Judgment of Conviction was filed on May 31, 2007. Defendant filed a Notice
16 of Appeal on June 5, 2007. The Nevada Supreme Court affirmed Defendant's conviction on
17 May 7, 2008. Remittitur issued on June 3, 2008.

18 5. On April 2, 2010, Defendant filed a motion for appointment of counsel. The
19 State's opposition was filed on April 9, 2010. Defendant's motion was denied on April 14,
20 2010, and the court's order was filed on April 24, 2010. Defendant filed a Notice of Appeal
21 on April 22, 2010.

22 6. Defendant filed a Motion to Vacate his Judgment of Conviction on April 21,
23 2010. The court denied Defendant's motion without requiring a response from the State on
24 May 5, 2010. The court noted that Defendant should have filed a Writ of Habeas Corpus but
25 such a petition would be time barred now anyway as Remittitur issued in his case in 2008.

26 7. Defendant subsequently filed a motion for an evidentiary hearing on May 13,
27 2010, the State filed its opposition to the motion on May 21, 2010, and the motion was
28 denied on May 26, 2010. On June 3, 2010, Defendant filed a notice of appeal.

1 8. Defendant filed the instant Petition for Writ of Habeas Corpus on April 30,
2 2010. The State filed its Response on July 9, 2010.

3 9. On July 14 2010, the court held a hearing regarding Defendant's petition.
4 Defendant was not present and the court did not entertain arguments from either party.

5 10. Defendant's Judgment of Conviction was filed on May 31, 2007. He filed a
6 direct appeal on June 5, 2007. The Nevada Supreme Court ultimately dismissed Defendant's
7 appeal and Remittitur issued on Tuesday, June 3, 2008.

8 11. Consequently, Defendant had until Wednesday, June 3, 2009, to file his post-
9 conviction habeas petition.

10 12. Defendant filed the instant petition on April 30, 2010, almost one (1) year after
11 deadline with which to file a post-conviction petition had passed.

12 13. Defendant's petition is extremely untimely and is time barred as outside the
13 one-year time limitation.

14 14. A petition subject to procedural bars may be considered on its merits if good
15 cause is shown.

16 15. Defendant pled no facts to explain the delay in filing his petition. Thus,
17 Defendant has not demonstrated good cause to overcome the procedural bar.

18 CONCLUSIONS OF LAW

19 1. The mandatory provisions of NRS 34.726 state:

20 Unless there is good cause shown for delay, a petition that
21 challenges the validity of a judgment or sentence must be filed
22 within 1 year after entry of the judgment of conviction or, if an
23 appeal has been taken from the judgment, **within 1 year after**
24 **the Supreme Court issues it's Remittitur.** For the purposes of
25 this subsection, good cause for delay exists if the petitioner
demonstrates to the satisfaction of the court:

- 26 (a) That the delay is not the fault of the petitioner; and
27 (b) That dismissal of the petition as untimely will unduly
28 prejudice the petitioner. (Emphasis added).

26 2. The one year time bar is strictly construed. In Gonzales v. State, 118 Nev. 61,
27 590 P.3d 901 (2002), the Nevada Supreme Court rejected a habeas petition that was filed
28 two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS

1 34.726(1). Gonzales reiterated the importance of filing the petition with the district court
2 within the one year mandate, absent a showing of "good cause" for the delay in filing.
3 Gonzales, 53 P.3d at 902.

4 3. In State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070 (2005),
5 the Nevada Supreme Court held as follows:

6 Given the untimely and successive nature of [defendant's]
7 petition, the district court *had a duty imposed by law* to consider
8 whether any or all of [defendant's] claims were barred under
9 NRS 34.726, NRS 34.810, NRS 34.800, or by the law of the case
... [and] the court's failure to make this determination here
constituted an arbitrary and unreasonable exercise of discretion.

10 [Emphasis added.] 121 Nev. at 234. (See also State v. Haberstroh, 119 Nev. 173,
11 180-81, 69 P.3d 676, 681-82 (2003) wherein the Nevada Supreme Court held that parties
12 cannot stipulate to waive, ignore or disregard the mandatory procedural default rules nor can
13 they empower a court to disregard them.) Thus, a Defendant's petition will not be considered
14 on the merits if it is subject to the procedural bars and no good cause is shown. Id.

15 4. "In order to demonstrate good cause, a petitioner must show that an
16 impediment external to the defense prevented him or her from complying with the state
17 procedural default rules." Hathaway v. State, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing
18 Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110
19 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 769 P.2d 72
20 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v.
21 Director, 104 Nev. 656, 764 P.2d 1303 (1988).

22 5. Such an external impediment could be "that the factual or legal basis for a
23 claim was not reasonably available to counsel, or that 'some interference by officials' made
24 compliance impracticable." Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S.
25 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;
26 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998). Clearly, any
27 delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

28 6. In addition, to find good cause there must be a "substantial reason; one that

1 affords a legal excuse." Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235,
2 236, 773 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.
3 1981). The lack of the assistance of counsel when preparing a petition, and even the failure
4 of trial counsel to forward a copy of the file to a petitioner, have been found to be non-
5 substantial, not constituting good cause. See Phelps v. Director Nevada Department of
6 Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v. State, 111 Nev. 335, 890 P.2d
7 797 (1995).

8 ORDER


9 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas
10 Corpus (Post-Conviction) shall be, and it is, hereby denied.

11 DATED this 13th day of September, 2010.

12 
13 DISTRICT JUDGE 8

14
15 DAVID ROGER
16 DISTRICT ATTORNEY
17 Nevada Bar #002781

18 BY


19 THOMAS M. CARROLL
20 Chief Deputy District Attorney
21 Nevada Bar #004232
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