

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAZARO MARTINEZ-HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63650

FILED

JUL 22 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal under NRAP 4(c) from a judgment of conviction, pursuant to a jury verdict, of assault with a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

First, appellant Lazaro Martinez-Hernandez argues that the police acted in bad faith in failing to collect the raw video of the incident, which he contends is exculpatory. We discern no plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unobjected-to error for plain error affecting substantial rights). Martinez-Hernandez did not demonstrate that had the raw footage been available to the defense, the result of the proceedings would have been different. *See Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (providing that defendant must show that evidence that police failed to gather was material). Martinez-Hernandez's contention that the raw footage would have supported a conclusion that he brandished the weapon without pointing it at the victim to stop an imminent assault by the victim was "merely a hoped-for conclusion." *Sheriff, Clark Cnty. v. Warner*, 112 Nev. 1234, 1240, 926 P.2d 775, 778 (1996) (quoting *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)). The record indicates that the video

introduced at trial was consistent with the raw footage of the event. The jury apparently observed nothing in the video that suggested the eyewitness' reports of the incident were inaccurate. Further, Martinez-Hernandez failed to demonstrate gross negligence or bad faith on the part of the police officers who collected the recording. *See Daniels*, 114 Nev. at 267, 956 P.2d at 115 (providing that where defendant demonstrates evidence was material, "the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or . . . bad faith" and imposing no sanction for mere negligence). Due to the lack of expertise of the business's staff, a copy of the incident could not be replicated that night. The police could not obtain the video until a knowledgeable staff member could copy it. The district court did not plainly err in not instructing the jury that the evidence would have been unfavorable to the State. *See id.*

Second, Martinez-Hernandez argues that the district court erred in admitting the video because technical glitches rendered it more prejudicial than probative. We discern no plain error. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Witnesses testified that the video accurately reflected the events of the evening and a police officer testified that the video was consistent with the raw footage of the events. Further, defense counsel was able to address the defects in front of the jury during the examination of witnesses. Any difference between the admitted copy and the raw footage went to the weight of the evidence and not its admissibility. *See Sorce v. State*, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972) ("[I]t is sufficient to establish only that it is reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence.").

Third, Martinez-Hernandez claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to disclose that the eyewitnesses to the assault were facing charges. Although the information surfaced prior to his sentencing, Martinez-Hernandez did not raise a *Brady* argument in the district court; therefore, we review the issue for plain error. See *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. The record indicates that the eyewitnesses to the incident were facing charges, but had not yet been formally charged in the district court. A witness can generally be impeached only with an appropriate felony conviction, not mere arrest. NRS 50.095; *Sheriff v. Hawkins*, 104 Nev. 70, 75 & n.5, 752 P.2d 769, 773 & n.5 (1988). The record does not indicate that the witnesses received favorable treatment in exchange for their testimony in this case. Therefore, Martinez-Hernandez failed to demonstrate plain error affecting his substantial rights.

Fourth, Martinez-Hernandez argues that the district court erred in excluding a defense witness. We discern no abuse of discretion. See *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008) (reviewing “district court’s decision whether to allow an unendorsed witness to testify for abuse of discretion”). Defense counsel attempted to endorse an eyewitness to the incident on the Friday before trial, which began the following Monday. See NRS 174.234(1) (requiring written notice of defense witnesses to be served upon the prosecuting attorney “not less than 5 judicial days before trial”). Although a strong presumption exists in favor of allowing late-disclosed witnesses to testify, see *Sampson v. State*, 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005), the right to present testimony is not absolute and must be balanced against “countervailing public interests,” *Taylor v. Illinois*, 484 U.S. 400, 414

(1988). As the witness's name does not appear in the record apart from the argument concerning admitting his testimony, there is no indication that the State could have anticipated the witness and therefore his testimony would have resulted in unfair surprise to the State. See *Sampson*, 121 Nev. at 828, 122 P.3d at 1260.

Fifth, Martinez-Hernandez argues that the district court abused its discretion in failing to give an instruction consistent with his theory of the case. Martinez-Hernandez did not request an instruction defining the offense of exhibiting a weapon in a threatening manner, and we discern no plain error in the district court not giving such an instruction. See *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Martinez-Hernandez pursued a theory of defense that any brandishing of the weapon was justified by the circumstances, which was in opposition to the instruction. See NRS 202.320(1) (prohibiting exhibiting of a deadly weapon "in a rude, angry or threatening manner not in necessary self-defense"). Therefore, the district court's failure to sua sponte issue the instruction was not an error that was "so unmistakable that it reveals itself by a casual inspection of the record." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation omitted); *Bonacci v. State*, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980).

Sixth, Martinez-Hernandez claims his conviction was not supported by sufficient evidence. We disagree. When viewed in the light most favorable to the State, the evidence presented at trial is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The victim and another witness testified that Martinez-Hernandez was upset, pushed the victim, then

retrieved a handgun from his vehicle, pointed it at the victim, and verbally threatened to kill the victim. *See* NRS 200.471. While he contends that other evidence contradicted this testimony, it was for the jury to determine the weight and credibility to give the conflicting testimony. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Seventh, Martinez-Hernandez argues that cumulative error warrants reversal of his conviction. Because we have found no error, there is nothing to cumulate. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Michael Villani, District Judge
Law Offices of Martin Hart, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk


CLERK OF THE COURT

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IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

LAZARO MARTINEZ-HERNANDEZ,
Petitioner,
v.
HOWARD SKOLNIK,
Director Nevada Department of Prisons,
Respondent.

CASE NO.: C-07-230237-1

DEPT. NO.: XVII

Date of Hearing: June 5, 2015.

Time of Hearing: 9:30 AM

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF

COMES NOW the Defendant/Petitioner LAZARO MARTINEZ-HERNANDEZ, by and through his undersigned attorney, TERRENCE M. JACKSON ESQ., and moves this court to enter an order granting his Petition and Supplemental Points and Authorities in support of Defendant's Petition for Writ of Habeas Corpus and Post Conviction Relief on the grounds his attorneys were ineffective in the following respects:

- (1) Defense counsel were ineffective under *Strickland* because they did not seek expert assistance to examine the video tape evidence.
- (2) Defense counsel rendered ineffective assistance of counsel during the jury selection process.
- (3) Defense counsel were ineffective because of failure to make an effective opening statement.

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1 (5) The Defense counsel were ineffective by failing to protect the appellate record by
2 insisting all bench conferences be recorded.

3 (6) The accumulation of errors in this case violated the Defendant's right to due process
4 of law under the Fifth, and Fourteenth Amendments and the right to counsel under the Sixth
5 Amendment.

6 But for the errors and ineffectiveness of counsel, there is a reasonable probability that Larzaro
7 Martinez-Hernandez (hereinafter "Martinez-Hernandez") would not have been convicted of the
8 crime charged, assault with a deadly weapon. This petition is brought pursuant to N.R.S. 34.360 as
9 defendant is constructively in custody. Wherefore, petition prays the Honorable Court grants the Writ
10 of Habeas Corpus and issue an order granting such further relief as justice requires.

11 12 INTRODUCTION

13 Procedural Statement

14 The defendant has been convicted of assault with a deadly weapon by jury trial in the
15 Eighth Judicial District Court. The Judgment was entered February 1, 2010 and the petitioner was
16 sentenced to 12 to 36 months in the Nevada Department of Corrections. The trial counsel Christine
17 Edoards and Marina Kalias did not inform petitioner of his right to appeal his conviction. The
18 Nevada Supreme Court granted a Writ of Habeas Corpus filed by Martin Hart, Esq., because the
19 Petitioner's counsel did not timely file a direct appeal and remanded the case to district court for
20 appointment of counsel to raise additional challenges to his conviction by a writ of habeas corpus.

21 This writ of habeas corpus raises additional issues of ineffectiveness not previously directly
22 decided by The Nevada Supreme Court which establishes that Petitioner's trial counsel were not
23 effective advocates under *Strickland v Washington*.

24 I. THE DEFENSE COUNSEL WERE INEFFECTIVE BECAUSE
25 THEY FAILED TO SEEK EXPERT ASSISTANCE TO
26 EXAMINE THE VIDEO TAPE EVIDENCE WHICH HAD
27 LIKELY BEEN ALTERED.

28 The defense case was predicated on the theory that the video tape of the crime was not

1 complete or was in some way altered or mishandled prior to trial. (TT 139, 140) In order to establish
2 or document this defense it could only have been accomplished effectively by hiring an expert to
3 review all the video tape evidence before trial and present testimony of such an expert. Merely
4 alleging the possibility of evidence tampering was not enough to persuade the judge, or a jury this
5 evidence was defective. There was however evidence to support the defendant's contention he was
6 acting in self defense and because there existed evidence of self defense, this should have alerted
7 counsel to investigate further with expert assistance. The possibility the tape have been altered
8 should have been easy to prove with expert assistance. Counsel's investigation pretrial
9 must therefore be considered inadequate.

10 *Strickland* noted that:

11 ...[j]udicial scrutiny of counsel performance must be highly deferential
12 however, counsel must at a minimum conduct a reasonable investigation enabling
13 him to make informed decisions about how best to represent his client.
14 *Strickland*, *Id.* 691, 104 S. Ct. at 2066. (Emphasis added)

15 That was not done here.

16 Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in
17 *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

18 To state a claim of ineffective assistance of counsel that is sufficient to
19 invalidate a judgement of conviction, Sanborn must demonstrate that trial counsel's
20 performance fell below an objective standard of reasonableness and that counsel's
21 deficiencies were so severe that they rendered the jury's verdict unreliable. See,
22 *Strickland v. Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984);
23 *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. Denied*, 471 U.S. 1004,
24 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on counsel's performance as a
25 whole, and with due regard for the strong presumption of effective assistance
26 accorded counsel by this court and *Strickland*, we hold that Sanborn's representation
27 indeed fell below an objective standard of reasonableness. Trial counsel did not
28 adequately perform pre-trial investigation, failed to pursue evidence supportive of a
claim of self-defense, and failed to explore allegations of the victim's propensity
towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the
defendant by the Sixth Amendment.
Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Counsel's failure to fully investigate by seeking expert testimony must be found ineffective
assistance.

Consider the case of *People v. Frierson*, 599 P.2d 587 (Cal. 1979), where the court reversed
for ineffective assistance of counsel by finding that failure to develop expert testimony to support

1 a diminished capacity was prejudicial error. The court stated:

2 "In the present case, despite his admitted awareness of the possibility of
3 developing a successful diminished capacity defense, trial counsel neglected either
4 to seek or obtain an expert appraisal of defendant's mental condition or the effect of
5 the drug PCP upon his physical or mental condition. Although, unlike *Saunders*,
6 counsel here did attempt to assert a diminished capacity defense, nevertheless it was
7 doomed to failure in the absence of evidence supporting it." *Id.* 598, 599 (Emphasis
8 added)

9 The court then continued...:

10 "...[W]e should not be understood as requiring that trial counsel must seek
11 psychiatric or expert advice in every case wherein drug intoxication is a possible
12 defense. Yet in a capital case, where it appears to be the sole potentially meritorious
13 defense, and counsel has elected in fact to present such a defense at trial, counsel
14 must be expected to take those reasonable measures to investigate the factual
15 framework underlying the defense preliminary to exercise of an informed choice
16 among the available tactical options, if any. In the present case, we need not speculate
17 as to the likely prejudicial effect of counsel's omissions; for counsel's failure to take
18 reasonable investigative measures actually resulted in the presentation to the jury
19 of an incomplete, undeveloped diminished capacity defense." *Id.* 599 (Emphasis added)

20 In this case, as in *Frierson*, counsel having chosen a particular defense (i.e., self defense)
21 were ineffective when they did not follow through with the necessary investigation including
22 retaining necessary expert witnesses to support the defense theory. Such expert testimony will
23 would have included any expert that could have established that defense.

24 Defendant's case can easily be distinguished from a case like *People v. Williams*, 751
25 P.2d 395 (Cal. 1998), where the court affirmed the murder conviction, finding defense counsel
26 were not ineffective because counsel had actually considered the opinions of two experts on the
27 issue of defendant's sanity. Similarly, a case such as *People v. Apodaca*, 998 P.2d 25 (1999), in
28 which the court found that failure to get blood stains tested was not grounds for reversal as
ineffective assistance of counsel because prejudice could not be shown. The court in *Apodaca*
noted: "...even if tested such evidence would not likely have changed the outcome of the
proceeding." *Id.* 29. See also, *Evans v. State*, 117 Nev. 609 28 P.3d 498 (2001).

But consider, *Dees v. Caspiri*, 904 Fed 452 where the court noted... "counsel has a duty
to make a diligent investigation of the forensic evidence and its potential weaknesses."

Because that was not done in this case, and prejudice was likely a result, the conviction
must be reversed.

1 II. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF
2 COUNSEL DURING JURY SELECTION.

3 The Sixth Amendment right to a fair jury is fundamental. Key to that right is fair and
4 unbiased jurors. An attorney's diligence or skill during the voir dire jury selection process is
5 absolutely critical to a defendant receiving a fair trial. Criminal defendants have a Sixth Amendment
6 right to be tried by impartial and unbiased jurors. *Quintero v. Bell*, 256 F3d 409 (6th Cir. 2001) As
7 long ago as *Pointer v. United States*, 151 U.S. 396 (1809) the United States Supreme Court
8 recognized that "The right to challenge a given number of jurors without showing cause is one of
9 the most important rights secured to the accused." *Id.* 409 (Emphasis added).

10 Defendant's attorneys however did not effectively use voir dire or their peremptory
11 challenges during this case and the defendant was prejudiced thereby.

12 The judge began the voir dire process with routine questioning of the jurors. This questioning
13 however was not adequate to protect the defendant. A large number of potential jurors were directly
14 connected to law enforcement or had close family relatives connected to law enforcement (See
15 Response of Jurors #25, 150, 152, 153, 120, 125, 121, 143). Some jurors, such as Juror #121,
16 actually had multiple family members connected to law enforcement. The Court's voir dire of these
17 potential jurors seemed designed to convince jurors they would be fair despite their connections to
18 police. It was not designed to challenge them in a meaningful way. A typical question to all the
19 prospective jurors was like the rhetorical question asked to juror #143 ... "it shouldn't impact your
20 ability here." "Thanks." (T.T. Vol I, p. 20.) After that question, no follow up questions were asked
21 by the counsel for Martinez-Hernandez, not a one. Nothing was done to challenge such perfunctory
22 answers and juror #143 was never challenged for cause (T.T., Vol. I p. 48) Such perfunctory inquiry
23 of the court to these jurors was inadequate to discover any potential bias.

24 In *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981) the court noted:

25 The failure to make the inquiry requested by Darbin was not cured by the remainder
26 of the *voir dire*. Except for the inquiry into the family relationships, most of the
27 jurors were not asked any question which would help elicit bias in favor of law
28 enforcement officers or their testimony. The trial court did ask some additional
questions of the prospective jurors who stated that they were related to law
enforcement officers. However, the court simply invited some of those individuals
to make an express denial of bias resulting from their relationships. While a negative

1 response to the trial court's inquiry precluded counsel from challenging those jurors
2 for cause, the inquiry was not adequate to permit the informed exercise of peremptory
challenges. (Emphasis added).

3 The court continued in footnote:

4 A general inquiry concerning a juror's ability to try a case on the evidence presented
5 at trial and the law provided by the court should, at least theoretically, serve to
6 identify any bias that might preclude the juror from making an impartial decision.
7 However, as a practical matter, such general inquiries are inadequate to alert the
parties or the jurors themselves to potential sources of bias. A single, all-
encompassing and conclusory question would be sufficient. See, *Rosales-Lopez v.*
8 *United States*, 451 U.S. at 203 n.8 101 S. Ct. at 1641 n.8

(Stevens, J., dissenting):

9 [A]lthough trial judges have broad discretion to formulate *voir dire* questions, the
10 general question whether there was any reason "why you could not sit in this case as
a fair and impartial juror," . . . is not an inadequate substitute for a specific inquiry;
if it were, trial judges might be well advised simply to ask that question and nothing
else. *Id.* (Emphasis added).

11 The conclusory type questions of the trial court in this case were not sufficient to perform the
12 necessary screening function to find a fair and impartial jury. Counsel did not follow up. This was
13 ineffective assistance of counsel under *Strickland*. In this case, as in *Darbin*, defense counsel didn't
14 even try to question the potentially biased jurors to cure the court's inadequate questioning.

15 The failure to weed out possibly biased jurors may amount to reversible error. *United States*
16 *v. Pappas*, 639 F.2d 1(1st Cir. 1980); *United States v. Cenagros*, 853 Fed 1 (1st Cir. 1985) and See
17 *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979) which held failure to question prospective
18 jurors whether they believed law enforcement officers were more credible than other witnesses was
19 error.

20 The entire voir dire process, which was almost entirely conclusory questions such as: "Could
21 you be fair?" was inadequate under *Strickland*. This led to a structural error in the composition of
22 the jury that requires reversal. The defense attorneys' ineffectiveness of counsel during voir dire
23 required the use of valuable peremptory challenges on jurors who may have been excused for cause.
24 The entire voir dire/jury selection process was inadequate under *Strickland* and this led to a
25 structural error in the composition of the jury that requires reversal.

26 III. TRIAL COUNSEL FOR DEFENDANT RENDERED
27 INEFFECTIVE ASSISTANCE OF COUNSEL UNDER
28 *STRICKLAND* BY NOT MAKING AN EFFECTIVE OPENING

1 STATEMENT TO THE JURY.

2 Defense counsel for Petitioner made a very weak opening statement that was scarcely better
3 than waiving the opening statement. The Nevada Supreme Court has noted that failure to make an
4 'opening statement' is strong indicia of incompetency of counsel. In *Buffalo v. State*, 111 Nev.
5 1139, 901 P.2d 647 (1995), the Nevada Supreme Court reversed for incompetency of counsel.

6 Warner was based principally on counsel's failure to engage in an investigation of
7 the facts. Here there is much more than this. Defense counsel's failure to make an
8 opening statement, failure to consider legal defenses of self defense and defense of
9 others, failure to spend any time in legal research, and general failure to present a
10 cognizable defense rather clearly resulted in rendering the trial "unreliable." Id.
11 (Emphasis added).

12 Counsel here, rather than forego the opening, instead chose to make a weak opening
13 statement that was not clear, precise, or organized. The jury most likely developed a favorable
14 impression of the prosecution's case and an unfavorable view of the defense counsel. The opening
15 statement is of central importance because it comes first. As James R. Lucas noted in his article,
16 Opening Statement, 13 Hawaii L.R. 349:

17 Being first, it exploits the psychological principle of primacy. Being human, the first
18 thing the jurors do is form first impressions, and, as one author noted, 'in the
19 opening, the narrative, the outline of the flesh and bones of the case, the juror's first
20 impressions harden the cement. No amount of instruction from the court that minds
21 should not be made up until the conclusion of the case can prevent people from
22 forming first impressions.' And what happens after the jurors have formed their first
23 impression? 'Most jurors have made up their mind about the outcome and do not
24 change it through the balance of the trial.' First impressions count. *Id.* 351.
25 (Emphasis added).

26 A District of Columbia Court has stated:

27 The purpose of an opening statement for the defense is to explain the defense theory
28 of the case, to provide the jury an alternative interpretative matrix by which to
evaluate the evidence to focus the jury's attention on the weaknesses of the
government's case. *Oesky v. United States*, 398 F.2d 1 (D.C. 1977); See also, *United*
States v. Stansfield, 521 F.2d 1122, 1125 (9th Cir. 1975). (Emphasis added)

Competent counsel would have immediately developed the self defense theory to the jury
explaining it and carefully outlining with a specificity the testimony of each witness showing the
strengths of the Defendant's case and the weaknesses of the State's case. Compare the prosecution's
opening statement in which the prosecutor skillfully explained what he believed evidence would
show. The Defendant's prior statements were damaging and contradictory. The prosecutor then

1 concluded with a brief explanation of the law.

2 The defense counsel's inadequate opening was a product both of prior errors by the defense,
3 i.e., failure to properly research, analyze, prepare, or investigate alternative factual or legal theories,
4 and counsel's failure to effectively argue to the court the necessity of critical evidence with
5 competency. After receiving several negative rulings from the court at the trial's beginning, defense
6 counsel was unable to respond adequately to articulate with clarity the defense's theory of the case
7 to the jury that the video tape had been altered. The State of Nevada made two objections which were
8 sustained concerning the credibility of the tape. (Vol. I. p. 61, 63). This immediately left the jury
9 with a strong first impression that the defense was in some way not performing appropriately.
10 Counsel did not even state whether or not the Defendant, Martinez-Hernandez would in fact testify.

11 It is respectfully submitted that if it was unclear at the time of the opening statement that
12 Lazaro Hernandez-Martinez would testify than the better strategy would have been to waive the
13 opening statement rather than give a disjointed unpersuasive opening that was counterproductive.
14 The opening statement did not benefit the defendant's case. Counsel was clearly unprepared for the
15 opening and it had a lasting negative affect on the Defendant's case.

16 IV. THE DEFENSE COUNSEL FAILED TO ADEQUATELY
17 PROTECT THE RECORD ALLOWING NUMEROUS
18 UNRECORDED BENCH CONFERENCES AND OTHER
19 MATTERS DURING THE TRIAL WHICH DEPRIVED
20 DEFENDANT OF HIS FIFTH, SIXTH AND FOURTEENTH
21 AMENDMENT RIGHTS TO A COMPLETE RECORD
22 NECESSARY FOR HIS APPEAL.

23 In this case there were numerous unrecorded bench conferences during critical times of the
24 trial. (T.T. Vol. I, pg. 112), (T.T. Vol. I, pg. 140), (T.T. Vol. I, pg. 199), (T.T. Vol. I, Pg. 156), (T.T.
25 Vol. I, pg. 167). In *United States v. Gillis*, 773 F.2d 549 (4th Cir. 1985), the court stated:

26 A criminal defendant has a right to a meaningful appeal based on a complete
27 transcript. See, *Hardy v. United States*, 375 U.S. 277, 279, 84 S. Ct. 424, 11 L.Ed.2d
28 331 (1964). When a transcript is less than complete, the court must determine
whether the alleged omissions or deficiencies justify a new trial. In *United States v. Gillis*, it was held that whether an omission from a transcript warrants a new trial

1 depends on whether the appellant has demonstrated that the omission "specifically
2 prejudices his appeal. ..." 773 .2d 549, 554 (4th Cir.1985). (Emphasis added)

3 In *Bransford v. Brown*, 806 F.2d 83 (6th Cir. 1986), the court appellate counsel was deficient
4 for not acquiring necessary transcripts for appeal:

5 We agree with petitioner that Mr. Townsend's performance as his appellate counsel
6 was deficient. Although Mr. Townsend testified that he twice read the trial transcript
7 of over nine hundred pages, he somehow failed to notice that the jury instructions and
8 subsequent proceedings were missing, and so he never attempted to obtain them. As
9 the Supreme Court has noted, appellate counsel's duty cannot be discharged unless
10 he has a transcript of the court's charge to the jury. *Hardy v. United States*, 375 U.S.
11 277, 282, 84 S. Ct. 424, 428, 11 L.Ed.2d 331 (1964).

12 Indeed, the most basic and fundamental tool of [an appellate advocate's] profession
13 is the complete trial transcript, through which his trained fingers may leaf and his
14 trained eyes may roam in search of an error, a lead to an error, or even a basis upon
15 which to urge a change in an established and hitherto accepted principle of law.¹⁹
16 Anything short of a complete transcript is incompatible with effective appellate
17 advocacy. (Emphasis added). *Id.* at 288, 84 S. Ct. at 431 (Goldberg, J.
18 concurring)(Emphasis added and footnote omitted). Justice Goldberg noted that this
19 is true even when trial counsel is the same as appellate counsel. *Id.* Thus, Mr.
20 Townsend's failure even to discover that the transcripts for the final proceedings
21 were absent fell below professional norms for appellate representation. (Emphasis
22 added).

23 Counsel for the Defendant in this case unfortunately did not demand that all bench
24 conferences be recorded. Counsel allowed the judge to determine that many bench conferences went
25 unrecorded. It is now impossible for appellate counsel to do anything but speculate whether or not
26 evidence or rulings in those unrecorded bench conferences establish ineffective assistance of counsel
27 under *Strickland*. In such a highly contested case, this was inexcusable professional neglect by trial
28 counsel.

Appellate counsel submits it is likely the unrecorded bench conferences may have shown
important appellate issues that cannot now be raised. For example, the argument for a critical motion
to dismiss at the close of evidence was not recorded. (T.T. V1, pg. 149).

Defense counsel stated:

24 DEFENSE COUNSEL: "Can we make a motion to dismiss? There is a lack of
25 evidence at this time."

26 THE COURT: "Okay Counsel -
27 _____
28

1 MR. WESTMEYER: "And for the record Judge, I'll oppose that."

2 THE COURT: "Everybody come up here to my ... come up here right now."

3 [BENCH CONFERENCE - NOT TRANSCRIBED]

4 The court's reasoning on the arguments of counsel is left unknown because the transcript was never
5 recorded, so no appellate remedy is available to defendant.

6 Similarly, an important sidebar conference occurred during the questioning of an important
7 defense witness, Maceo. He was called to impeach the alleged victim Richard Pena. (T.T. Vol. I, pg.
8 155). This failure to record this bench conference is another example during critical time of trial
9 when counsel failed to adequately respond to the prosecutor's objections during testimony and then
10 did nothing to protect the record during the side bar conference. Maceo's testimony ended abruptly
11 after the sidebar conference and he was never able to testify fully. (T.T. Vol. I, pg. 156). It is not
12 known how, if at all, Maceo could have assisted defendant's self defense claim.

13 In the case of *United States v. Nolan*, 910 F.2d 1553, 1560 (7th Cir. 1990), the court noted
14 that "prejudice is found when a trial transcript is so deficient that it is "impossible for the appellate
15 court to determine if the district court has committed reversible error." The record here is so very
16 deficient and that the appellate court must guess at what the court may have stated in the numerous
17 unrecorded bench conferences. There was no strategic reason for not asking to record bench
18 conferences. Counsel cannot justify these actions on the grounds the bench conferences were not
19 significant. It can reasonably be inferred that the manner in which counsel handled other issues
20 during trial demonstrates counsels ineffectiveness during bench conferences, but without an actual
21 record it is impossible to know for certain.

22 V. THE ACCUMULATION OF ERRORS IN THIS CASE VIOLATED THE
23 DEFENDANT/PETITIONER'S RIGHTS TO DUE PROCESS OF LAW
24 UNDER THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH
25 AMENDMENTS AND REQUIRES REVERSAL.

26 The numerous errors and deficiencies of counsel in this case require reversal of the
27 conviction. It can be argued that even considered separately, the errors or omissions of counsel
28 were of such a magnitude that they each require reversal. But it is clear, when viewed cumulatively,

1 the case for reversal is overwhelming. *State v. Daniel*, 119 Nev. 498, *see also*, *Sipsas v. State*, 102
2 Nev. at 123, 216 P.2d at 235, stating: "The accumulation of error is more serious than either isolated
3 breach, and resulted in the denial of a fair trial."

4 Prejudice may result from the cumulative impact of multiple deficiencies. *Cooper v.*
5 *Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (*En Banc*), cert. Denied, 440 U.S. 970; *Harris by*
6 *and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir. 1995).

7 The multiple errors of counsel in this case when cumulated together require reversal. A
8 quantitative analysis makes that clear. *See*, Van Cleave, Rachel, ***When is Error Not an Error?*** Habeas
9 Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

10 Relevant factors to consider in evaluating a claim of cumulative error are [1] whether the
11 issue of guilt is close, [2] the quantity and character of the error, and [3] the gravity of the crime
12 charged. *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State*, 114
13 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See also*, *Big Pond v. State*, 101 Nev. 1, 692 P.2d 1228
14 (1985); *Daniel v. State*, 119 Nev. 498, 78 P.3d 890 (2003).

15 Defense counsel in this case failed by not seeking expert assistance pre trial. During trial
16 counsel were not effective during jury selection, opening statement, and by not protecting the record
17 and demanding all bench conferences be recorded during trial. The defendant was deprived of due
18 process rights and was prejudiced thereby.

19 20 21 22 CONCLUSION

23 "If counsel entirely fails to subject the prosecution to meaningful adversarial testing, then
24 there has been a denial of Sixth Amendment rights that make the adversary process itself
25 presumptively unreliable." *United States v. Cronin*, 466 U.S. 648, 656-59, 104 S. Ct. 2039, 2045-47,
26 80 L.Ed.2d 657 (1984).

27 It is respectfully submitted the Defendant/Petitioner in this case did not receive his Sixth
28 Amendment right of effective assistance of counsel under *Strickland v. Washington* at both pretrial

1 and trial. The failures of Mr. Martinez- Hernandez's defense counsel prejudiced him so that his
2 conviction must be reversed.

3 DATED this 24th day of February, 2015.

4
5 Respectfully submitted,

6
7 /s/ Terrence M. Jackson
8 TERRENCE M. JACKSON, ESQ.
9 Nevada Bar No. 00854
10 Law Office of Terrence M. Jackson
11 624 South Ninth Street
12 Las Vegas, NV 89101
13 T: 702-386-0001 / F: 702-386-0085
14 Terry.jackson.esq@gmail.com
15 Counsel for LAZARO MARTINEZ-HERNANDEZ
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1 **NOTICE OF MOTION**

2 TO: CLARK COUNTY DISTRICT ATTORNEY

3 YOU WILL PLEASE TAKE NOTICE that a motion for: Supplemental Points and
4 Authorities in Support of Petition For Writ of Habeas Corpus For Post Conviction Relief in the
5 above-captioned case will be heard on the 06 day of June, 2015, at the hour of 9: 30 AM
6 / PM in the Clark County Courthouse.

7
8
9 Clark County District Attorney

10
11 **CERTIFICATE OF SERVICE**

12 I hereby certify as an Assistant to Terrence M. Jackson, a person competent to serve papers
13 and not a party to the above-entitled action and that on the 24th day of February, 2015, I served a
14 true, correct copy of the same and e-filed stamped copy of the foregoing Supplemental Points and
15 Authorities in Support of Petition For Writ of Habeas Corpus For Post Conviction Relief to the
16 District Attorney's Office via the email service address noted below.

17
18 STEVEN B. WOLFSON
19 CLARK COUNTY DISTRICT ATTORNEY

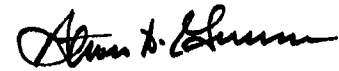
20 PDMotions@ccdanv.com

21 ADAM LAXALT
22 NEVADA ATTORNEY GENERAL

23 Grant Sawyer Building
24 555 E. Washington Ave., Ste. 3900
25 Las Vegas, NV 89101

26 By: /s/ Beverly Jackson

27 An Assistant to Terrence M. Jackson
28


CLERK OF THE COURT

1 **OPPS**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **RYAN MACDONALD**
6 **Deputy District Attorney**
7 **Nevada Bar #012615**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: 07C230237

12 LAZARO MARTINEZ-HERNANDEZ,
13 #1493472

DEPT NO: XVII

14 Defendant.

15 STATE'S MOTION TO DISMISS DEFENDANT'S SUPPLEMENTAL POINTS AND
16 AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS FOR
17 POST CONVICTION RELIEF

18 DATE OF HEARING: SEPTEMBER 4, 2015
19 TIME OF HEARING: 9:30 AM

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through RYAN MACDONALD, Deputy District Attorney, and hereby
22 submits the attached Points and Authorities in Opposition to Defendant's Supplemental Points
23 and Authorities in Support of Petition for Writ of Habeas Corpus for Post Conviction Relief.

24 This motion to dismiss is made and based upon all the papers and pleadings on file
25 herein, the attached points and authorities in support hereof, and oral argument at the time of
26 hearing, if deemed necessary by this Honorable Court.

27 ///

28 ///

///

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On February 16, 2007, the State charged Lazaro Martinez-Hernandez (hereinafter
4 "Defendant") by way of Information with one count of Assault With a Deadly Weapon (Felony
5 – NRS 200.471). On February 5, 2008, a jury found Defendant guilty. On April 10, 2008,
6 Defendant was sentenced to the Nevada Department of Corrections for twelve (12) to thirty
7 six (36) months. The sentence was suspended, and Defendant was placed on probation for an
8 indeterminate period not to exceed three (3) years, subject to certain conditions of release. The
9 Judgment of Conviction was filed on April 25, 2008. Defendant did not file a direct appeal.

10 On January 1, 2010, Defendant's stipulated to having violated the conditions of his
11 probation, and his probation was revoked. The original twelve (12) to thirty six (36) months
12 sentence was then imposed, and Defendant received ninety six (96) days credit for time served.
13 An Amended Judgment of Conviction was filed on February 1, 2010.

14 On February 1, 2011, Defendant filed a Petition for Writ of Habeas Corpus through
15 counsel, wherein he raised an appeal-deprivation claim. On May 18, 2012, Defendant filed a
16 Supplement to his Petition. The State filed its Response and Motion to Dismiss on July 2,
17 2012. On October 5, 2012, this Court held an evidentiary hearing on Defendant's appeal-
18 deprivation claim, and found that Defendant had been deprived of his right to a direct appeal
19 and was therefore entitled to file an untimely Lozada appeal.

20 On July 22, 2013, Defendant filed a Notice of Appeal. The Nevada Supreme Court
21 affirmed Defendant's conviction on July 22, 2014, and Remittitur issued on August 26, 2014.

22 On February 24, 2015, Defendant filed the instant "Supplemental" Points and
23 Authorities in Support of Petition for Writ of Habeas Corpus for Post Conviction Relief. The
24 State hereby responds as follows.

25 ///

26 ///

27 ///

28 ///

ARGUMENT

I. BECAUSE DEFENDANT IS NOT IN CUSTODY, THIS COURT LACKS JURISDICTION TO GRANT DEFENDANT'S PETITION

Defendant began serving a sentence of twelve (12) to thirty six (36) months in the Nevada Department of Corrections on January 1, 2010, with ninety six (96) days credit for time served. Thus, at the very latest, Defendant would have been released from custody in 2013.¹ The Supreme Court of Nevada has found that "[a] district court may not issue a writ of habeas corpus if the post-conviction petitioner filed the petition challenging the validity of a conviction after having completed the sentence for the challenged conviction." Jackson v. State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999); see also Nev. Const. art. 6, § 6(1); see also NRS 34.360 ("Every person unlawfully committed, detained, confined or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint."); NRS 34.724(1) ("Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained ... in violation of the Constitution of the United States or the constitution or laws of this state ... may ... file a post-conviction petition for a writ of habeas corpus to obtain relief from the conviction....").

As the instant petition was filed after Defendant finished serving his sentence, he is not entitled to relief through a Post-Conviction Petition for Writ of Habeas Corpus.

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¹ Defendant has provided no detail whatsoever regarding his custody status, and as such, it is unknown to the State.

1 CONCLUSION


2 Based on the foregoing, the State respectfully requests that this Court DISMISS
3 Defendant's post-conviction petition.

4 DATED this 22nd day of July, 2015.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #

9 BY


10 RYAN MACDONALD
11 Deputy District Attorney
12 Nevada Bar #012615

13 CERTIFICATE OF FACSIMILE TRANSMISSION

14 I hereby certify that service of State's Motion To Dismiss Defendant's Supplemental
15 Points And Authorities In Support Of Petition For Writ Of Habeas Corpus For Post Conviction
16 Relief, was made this 22nd day of July, 2015, by facsimile transmission to:

17 TERRENCE JACKSON, ESQ.
18 702-386-0085

19
20
21 BY:


22 C. Cintola
23 Employee of the District Attorney's Office
24
25
26
27
28

RM/MR/cc/L3


CLERK OF THE COURT

1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

8 THE STATE OF NEVADA,)
9 Plaintiff,) CASE NO. 07C230237
10 vs.) DEPT. XVII
11 LAZARO MARTINEZ-HERNANDEZ,)
12 Defendant.)
13)

14 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

15 FRIDAY, SEPTEMBER 4, 2015

16 **TRANSCRIPT OF PROCEEDINGS RE:**

17 **DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)**
18

19 **APPEARANCES:**

20 For the State: ERIKA L. WIBORG, ESQ.,
21 Deputy District Attorney

22 For the Defendant: TERRENCE M. JACKSON, ESQ.,
23

24
25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

0085

1 LAS VEGAS, NEVADA; FRIDAY, SEPTEMBER 4, 2015

2 [Proceeding commenced at 9:29 a.m.]

3
4 THE COURT: All right. Ready, Mr. Jackson?

5 MR. JACKSON: Yes.

6 THE COURT: All right. This is on State v. Martinez-
7 Hernandez. Defendant's here. And we also have the Court
8 Interpreter. Its defense petition's for writ of habeas corpus. Go
9 ahead, Mr. Jackson.

10 MR. JACKSON: Should I approach the podium or can you hear me
11 from here?

12 THE COURT: I can hear you perfect from there. Wherever you
13 feel comfortable.

14 MR. JACKSON: All right. I feel more comfortable here.

15 THE COURT: All right.

16 MR. JACKSON: Your Honor, first issue I guess I got to deal
17 with -- with is the State's response which is more or less
18 procedural response. They claim that this case doesn't qualify for
19 a habeas corpus petition based on the fact that the Defendant
20 standing next to me is out of custody.

21 They cite the statute. They cite a case. I respectfully
22 disagree with that position. They cite the Jackson case. I don't
23 think it's named after me. But the Jackson case talks about -- in
24 the footnote it talks about habeas petitions that are filed many
25 years after of conviction presented unreasonable burden on the

1 Courts and that's one argument, of course, for, you know, not
2 allowing people to come back and re-raise habeas petitions.

3 In this case, the Defendant acted diligently. The fact
4 that he got a short sentence; he got 12 to 36 months. He filed his
5 appeal immediately. It was denied. He got out of after 12 months.
6 In fact, I think he was just getting out of custody when I got
7 appointed to do the writ, but he got out. He's out.

8 Now, does that mean that he can't follow through on writ
9 of habeas corpus to challenge an illegal, an unconstitutional
10 conviction under Strickland? I think not because otherwise he'd
11 have no remedy.

12 What it means is he's -- be -- would be left with a
13 felony conviction with no remedy at all. Too late to file a sur
14 petition. He will end up with a conviction for a felony with all
15 the collateral consequences; he can't vote, he can't get a job, he
16 can't have a gun, can't, you know, do many things that someone with
17 a felony conviction can do. And also he'd just have that stain on
18 his record if, in fact, he's innocent or if, in fact, he deserves a
19 new trial, if, in fact, he was wrongly convicted.

20 I don't think the legislature meant to restrict the class
21 of people that have relatively short sentences so that by the time
22 the case comes around, they can't raise a writ of habeas corpus to
23 challenge the conviction. You cannot raise ineffective assistance
24 of counsel on direct appeal. 'Cause you can't raise it on direct
25 appeal, you're only option is to wait until it comes around on

1 post-conviction.

2 You get a sentence of -- of actual incarceration of only
3 a year as the State's saying, no. You can't do federal -- or
4 excuse me -- State habeas corpus. Maybe his remedy is now to go
5 into Federal Court. But I -- we're going -- that's going to delay
6 the process 'cause he'll have to go up to the Nevada Supreme Court
7 to argue this issue if the Court rules it back.

8 I'd rather argue this case on the merit, but the case
9 didn't challenge this matter on the merits. I'd still like for the
10 record to argue the merits of his writ because I think there were
11 meritorious claims that he could make in this writ.

12 THE COURT: I think at this point we need to stick to, you
13 know, procedural argument. Anything else to add, Mr. Jackson?

14 MR. JACKSON: No. Not in the procedural argument. I think
15 that -- I think that it's -- it doesn't make any sense as logically
16 -- you know, it violates equal protection too. To give someone who
17 has, you know, a serious charge like -- like murder or armed
18 robbery the right to file a writ, but not give someone a lesser
19 charger a right to file a writ makes no sense at all. It violates
20 equal protection. Why shouldn't someone who has a somewhat lesser
21 charge and get a somewhat lesser sentence not to be allowed to
22 challenge his ineffective assistance of counsel at trial; that
23 makes no sense at all. I think it violates equal protection. I
24 didn't raise that argument in my response, but it still seems
25 totally unfair for the violation of 14th amendment.

1 THE COURT: All right. Thank you. Ms. Wiborg.

2 MS. WIBORG: And, Your Honor, the Court is well aware of this
3 issue as it's at issue on another case we had today, Mr. Daniel
4 Owens. So I'm confident that the Court is familiar with this issue
5 that the remedy that you're seeking with the petition is release
6 from unlawful custody. So when you're no longer in custody, he's
7 not only not in physical custody, but he's not on parole or
8 anything, so that remedy is no longer needed.

9 If he wants to continue to try and get this jury verdict
10 overturned at this point, he's left with a pardon. And to claim
11 that equal protection is an issue is just unfounded as people who
12 commit different kinds of crimes aren't part of separate
13 constitutionally protected group. So Your Honor's familiar with
14 the law here. The remedy is not at issue in a case where the
15 Defendant is no longer in custody, so the State would ask that you
16 deny it.

17 THE COURT: Well, we did some independent research on this
18 case and I hope I'm not opening up the flood gates, okay. And I
19 know Mr. Lay's here in the other case coming up with a similar
20 issue.

21 State v. Baliotis, if I'm pronouncing that correctly,
22 it's 643 P 2nd 1223, and the language in particular is at 1224, it's
23 1982. It appears to be still good law. And the holding -- this
24 maybe dicta, I don't know. You can argue that. We have -- I'm
25 reading from the opinion it says, you know, the phrase under

1 sentence, it says we have interpreted the term under sentence as
2 requiring at a minimum some form of constructive restraint or
3 supervision, okay. We all think we all -- meaning, probation,
4 parole or obviously incarceration. It goes on, the provision under
5 sentence means that the petitioner must at the time he files his
6 writ for habeas relief be subject to Nevada authority. I think in
7 our -- I don't know if it applies here. I'm just saying in this
8 case, he filed timely. But by the passage of time, he's out. He's
9 not on parole. And the argument to the State is he's not under
10 restraint. Therefore, he doesn't -- is not -- a writ is not
11 available under 34.724.

12 But I'm reading this here and it says, it means that the
13 petitioner must at the time he files his writ be subject to that
14 restraint. So, I don't know if this argument's ever been brought
15 up by either Judge or by other counsel or this case, but I would
16 like to get this issue resolved. So, let's pass this like two or
17 three weeks. If you want a supplemental briefing on this case, the
18 interpretation of this language -- like I said this -- Ms. Wiborg,
19 you're absolutely correct. This comes up all the time. But I've
20 never seen this where it says to file timely and just -- by the
21 time it gets to Court, you're done, no -- you're no longer under
22 restraint.

23 MS. WIBORG: Would it -- I'm sorry, 643 P 2nd --

24 THE COURT: 1223 and I think this particular language at 1224.
25 And it's also at 98 Nevada 176.

1 And then -- is that enough time for each side, two or
2 three weeks?

3 MR. JACKSON: That's fine, Your Honor.

4 MS. WIBORG: Sure.

5 THE COURT: Okay. I'm just -- both sides just supplement your
6 briefs. We're not going back --

7 MR. JACKSON: Okay.

8 THE COURT: -- and forth again. And then -- and, Carol, like
9 a couple weeks thereafter. We'll put it on the criminal calendar
10 for decision.

11 [Colloquy between the Court and the Clerk]

12 THE CLERK: So two weeks is September 18th. And then after
13 that, decision on October 9th.

14 MR. JACKSON: Thank you, Your Honor.

15 THE COURT: Thank you.

16 MS. WIBORG: So the --

17 THE COURT: Like I said, I hope I'm not opening up any flood
18 gates, but I just -- there's some case law out there and I just
19 want to make sure we're all making the right decision. Thank you.

20 [Proceeding concluded at 9:38 a.m.]

21
22 ATTEST: I hereby certify that I have truly and correctly
23 transcribed the audio/video proceedings in the above-entitled case
to the best of my ability.

24 *Michelle Ramsey*
25 Michelle Ramsey
Court Recorder/Transcriber


CLERK OF THE COURT

RPLY
TERRENCE M. JACKSON, ESQ.
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Terry.jackson.esq@gmail.com

Counsel for LAZARO MARTINEZ-HERNANDEZ

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

LAZARO MARTINEZ-HERNANDEZ,
149347,

Defendant.

CASE NO.: C-07-230237-1

DEPT. NO.: XVII

Date of Hearing: September 14, 2015

Time of Hearing: 9:30 AM

**REPLY TO STATE'S MOTION TO DISMISS DEFENDANT'S SUPPLEMENTAL
POINTS AND AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF**

The State of Nevada argues that because to Defendant is not in physical custody, he cannot assert the Writ of Habeas Corpus for post conviction relief for a wrongful conviction.

Defendant/Petitioner LAZARO MARTINEZ-HERNANDEZ, has suffered a felony conviction and thereby is still in constructive custody of the State of Nevada.

Unless the State wishes to grant Defendant a full pardon, and restore him all of his civil rights, so that he will not have the collateral consequences associated with a felony conviction which entails substantial loss of liberty, Defendant submits his right to Habeas Corpus cannot be denied.

Defendant has no other remedy at law to correct the ineffective assistance of counsel which led to his wrongful conviction.

...

Wherefore, Defendant/Petitioner LAZARO MARTINEZ-HERNANDEZ submits that there being no opposition on the merits to his petition, he prays this Honorable Court should grant the Writ of Habeas Corpus and issue an order granting such further relief as justice requires.

DATED this 24th day of July, 2015.

Respectfully submitted,

/s/ Terrence M. Jackson
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
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624 South Ninth Street
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T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com
Counsel for LAZARO MARTINEZ-HERNANDEZ

CERTIFICATE OF SERVICE

I hereby certify I am an Assistant to Terrence M. Jackson, am a person competent to serve papers, not a party to the above-entitled action and that on the 24th day of July, 2015, I served a true and correct copy of the same by e-filing via Wiznet a copy of the foregoing Reply to State's Motion to Dismiss Defendant's Supplemental Points and Authorities in Support of Petition For Writ of Habeas Corpus For Post Conviction Relief to the District Attorney's Office via the email service address noted below:

STEVEN B. WOLFSON
Clark County District Attorney
PDMotions@ccdavnv.com
RYAN MACDONALD
Deputy District Attorney
ryan.macdonald@clarkcountynyda.com

and by U.S. postal service with first class postage affixed to:

ADAM LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

By: /s/ Ila C. Wills

An Assistant to Terrence M. Jackson


CLERK OF THE COURT

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Counsel for LAZARO MARTINEZ-HERNANDEZ

**IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

LAZARO MARTINEZ-HERNANDEZ,)	CASE NO.: C-07-230237-1
Petitioner,)	DEPT. NO.: XVII
v.)	
HOWARD SKOLNIK,)	Date of Hearing: 10/09/15
Director Nevada Department of Prisons,)	Time of Hearing: 9:30 AM
Respondent.)	

**SUPPLEMENTAL POINTS AND AUTHORITIES ON WHETHER COURT HAS
JURISDICTION TO CONSIDER PETITIONER'S POST CONVICTION WRIT**

COMES NOW the Defendant/Petitioner LAZARO MARTINEZ-HERNANDEZ, by and through counsel, TERRENCE M. JACKSON, ESQ., and at this court's request files these Supplemental Points and Authorities on the question: whether the court has jurisdiction to consider Petitioner's Writ of Habeas Corpus in this case even though the Defendant/Petitioner is no longer in physical custody of the State of Nevada.

POINTS AND AUTHORITIES

The District Court Retains Jurisdiction in This Case to Resolve the Defendant's Timely Filed
Writ of Habeas Corpus for Post Conviction Relief.

0094

1 Nevada law is clear that a defendant usually cannot challenge ineffective assistance of
2 counsel on direct appeal except in extremely limited circumstances. *Daniel v. State*, 100 Nev. 579,
3 688 P.2d 315 (1984). A claim of ineffective trial counsel must generally be supported by factual
4 allegations from an evidentiary hearing. Consequently, a claim of ineffective assistance is properly
5 raised in proceedings for post conviction relief. *See, Lewis v. State*, 100 Nev. 456, 686 P.2d 219
6 (1984); *Bolden v. State*, 99 Nev. 181, 659 P.2d 886 (1983); *Gibbons v. State*, 97 Nev. 520, 634 P.2d
7 1214 (1981). The only remedy which was available to defendant to challenge the ineffective
8 assistance which occurred in this case was by a post conviction habeas corpus petition alleging
9 ineffective assistance because an evidentiary hearing was needed. This could not be done in this case
10 until after the direct appeal process had been completed.

11 In all cases in which a defendant receives a relatively short sentence of incarceration, such
12 as occurred in this case, even when the defendant proceeds as rapidly as possible, without any delays
13 in the process, he cannot, because of time delays inherent in the appellate process, file a post
14 conviction relief petition before he has been released from prison. A defendant should not need to
15 request a lengthy sentence just to be able to appeal an unjust or improper conviction. Such a result
16 would be unfair and is absurd.

17 NEV. CONST. ART. VI, § 6 provides district courts original jurisdiction "in all cases
18 excluded by law from the original jurisdiction of justices' courts" as well as "power to issue writs
19 of Habeas Corpus ..." Although a court may have general jurisdiction over a criminal case until an
20 indictment or information is filed. NEV. CONST. ART. I, § 8; NRS § 173.015. "It is the rule in this
21 state, however, that felonies may be prosecuted by either indictment or information. The statutory
22 provisions are amply sufficient to protect an accused from unfounded accusations." *Cairns v. Sheriff*,
23 *Clark Cnty.*, 89 Nev. 113, 116, 508 P.2d 1015, 1017 (1973) (citations omitted).

24 Once a court has jurisdiction over a case it will lose jurisdiction in very limited
25 circumstances. *See, e.g., Ravera v. City of Reno*, 100 Nev. 68, 71, 675 P.2d 407, 409 (1984) (case
26 was dismissed); *Gemma v. Gemma*, 105 Nev. 458, 462, 778 P.2d 429, 432 (1989) (division of
27 community property is final unless the court specifically retains jurisdiction); *Taylor v. Taylor*, 105
28 Nev. 384, 386, 775 P.2d 703, 704 (1989) (new law restricts the court's jurisdiction); *Friedman v.*

1 *Eighth Judicial Dist. Court of State, ex rel. Cnty. of Clark*, 127 Nev. Adv. Op. 75, 264 P.3d 1161,
2 1163-64 (2011) (child custody when parties move to another jurisdiction); *Vaile v. Porsboll*, 128
3 Nev. Adv. Op. 3, 268 P.3d 1272, 1273 (2012) (modify child support when parties no longer live in
4 Nevada). The current matter has not been determined to be a limited circumstance in which
5 jurisdiction should be automatically be lost, thus the trial court retains jurisdiction to decide
6 defendant's habeas corpus petition on the merits. If this Court were to adopt the State's position
7 herein that a court could lose jurisdiction over a meritorious case simply by passage of time, then the
8 State would erroneously benefit from every delay in every such matter. There would be nothing to
9 prevent the State from always delaying proceedings if a person's meritorious habeas corpus petition
10 could automatically be dismissed upon their release from prison.

11 Courts generally refuse to hear cases where the issue(s) have become moot.

12 This court has frequently refused to determine questions presented in purely
13 moot cases. Cases presenting real controversies at the time of their institution may
14 become moot by the happening of subsequent events. A moot case is one which seeks
15 to determine an abstract question which does not rest upon existing facts or rights.
Nat'l Collegiate Athletic Ass'n. v. Univ. of Nevada, Reno, 97 Nev. 56, 58, 624 P.2d
10, 11 (1981) (citations omitted) (Emphasis added).

16 However, federal courts have long held that the reviewing court does not automatically lose
17 statutory jurisdiction to hear a habeas corpus petition when the prisoner is released from custody.
18 Depending on the relief being sought and whether such relief is rendered moot by release, the court
19 may still maintain constitutional jurisdiction.

20 A prisoner's release from custody pending appeal does not affect the
21 reviewing court's statutory jurisdiction to hear his habeas petition. See *Carafas v.*
22 *LaVallee*, 391 U.S. 234, 238, 88 S.Ct. 1556, 1559, 20 L.Ed.2d 554 (1968). Mootness,
23 however, goes to our constitutional jurisdiction, not our statutory jurisdiction. Under
24 Article III, we may not entertain an appeal if there is no longer a live case or
25 controversy before us.

26 It is clear that the direct consequences of the state action challenged here can
27 no longer be remedied in habeas. Petitioners cannot be released from a term of
28 incarceration that they have already served. Were petitioners seeking to vacate their
original convictions, then the collateral consequences would be sufficient to
overcome mootness. See *Sibron v. New York*, 392 U.S. 40, 54-55, 88 S.Ct. 1889,
1898-99, 20 L.Ed.2d 917 (1968). But petitioners do not challenge their convictions.
They do not even challenge the finding ... They object solely to the penalty-the
additional incarceration-imposed on them for these acts.

Cox v. McCarthy, 829 F.2d 800, 802-03 (9th Cir. 1987) (Emphasis added).

1 Defendant submits his case is distinguishable from *Nevada Dept. of Prisons v. Arndt*, 98 Nev.
2 84, 640 P.2d 1318 (1982), wherein *Arndt* was found to have already received the precise relief he
3 sought by way of habeas corpus petition (transfer to medium security prison), thus properly rendering
4 his petition moot. *Ibid.*, 98 Nev. 84, 640 P.2d 1318 (1982). In the instant case, Martinez-Hernandez
5 challenges his conviction and the collateral consequences before the trial court. Having argued the
6 collateral consequences of his conviction as part of his habeas corpus proceedings, and having
7 challenged his conviction directly rather than just his sentence to the trial court, it is respectfully
8 submitted the issue of ineffectiveness at trial is not moot even though petitioner has completed his
9 prison sentence. There is still viable relief that can be addressed and given by reversing the
10 conviction.

11 The case of *Jackson v. State*, 115 Nev. 21, 973 P.2d 241(1999) is also easily distinguishable
12 because of the lengthy delay of fourteen years from the time of defendant's release from prison until
13 the post conviction petition was filed. The court there noted in footnote 2:

14 "[M]oreover, this court has previously recognized that "habeas petitions that
15 are filed many years after conviction are an unreasonable burden on the criminal
justice system." (Id. 23) (Emphasis added).

16 NRS § 34.724 makes clear that habeas relief is constitutionally based as it specifically
17 pertains to a person's liberty interest.

18 Any person convicted of a crime and under sentence of death or
19 imprisonment who claims that the conviction was obtained, or that the sentence was
imposed, in violation of the Constitution of the United States or the Constitution or
20 laws of the State, or who claims that the time that the person has served pursuant to
21 the judgment of conviction has been improperly computed, may, without paying a
22 filing fee, file a post conviction petition for a writ of habeas corpus to obtain relief
from the conviction or sentence or to challenge the computation of time that the
person has served. NRS § 34.724. (Emphasis added).

23 The federal court in defining custody surely had this underlying constitutional issue in mind
24 in interpreting that "in custody" pertains directly to the liberty interest of a defendant. Therefore,
25 assuming the United States Supreme Court and the Ninth Circuit Court of Appeals are both correctly
26 defining "in custody" as including collateral consequences, then the State of Nevada would be remiss
27 not to adopt the same interpretation.

28 Historically when this Court has been unclear regarding habeas corpus proceedings, it has

1 looked to the United States Supreme Court for guidance and has adopted its interpretation. *See,*
2 *e.g., Hill v. Warden, Nevada State Prison*, 96 Nev. 38, 39-40, 604 P.2d 807 (1980); *see also Foster*
3 *v. Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d 453, 456 (2010) (“[S]erve[s] as persuasive authority for
4 this court’s examination of this issue ...”) Therefore, this Court should look to the federal court’s
5 case law interpreting the constitutionally based concept of “in custody” and determine that the trial
6 court does retain jurisdiction to hear the habeas corpus presented to the court in this case.

7 **CONCLUSION**

8 Defendant submits that holding this court has no jurisdiction to consider his Writ of Habeas
9 Corpus would be enforcing a procedural bar that would result in a fundamental miscarriage of justice
10 contrary to Nevada Supreme Court law.

11 In *Mitchell v. State*, 122 Nev. 1269, 149 P.3d 33 (2006), the Nevada Supreme Court found
12 that if a procedural bar existed to challenging the conviction of a defendant who was actually
13 innocent, it would amount to a fundamental miscarriage of justice and therefore the procedural bar
14 should be lifted. Defendant submits in this case there is substantial likelihood the ineffectiveness of
15 his counsel prevented him from establishing his innocence and that therefore it would be a
16 fundamental miscarriage of justice to deny him the opportunity to establish this by Writ of Habeas
17 Corpus.

18 Although “ ... There must exist a time when a criminal conviction is final.” *Groesbeck v.*
19 *Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1989) that time has not come yet in this case.
20 There was no delay by the defendant in filing his appeal and then proceeding with the post
21 conviction writ which involved constitutional issues including the defendant’s right to effective
22 assistance of counsel. The writ must be heard on the merits to protect defendant’s fundamental Sixth
23 Amendment rights.

24 **DATED** this 11th day of September, 2015.

25 Respectfully submitted,

26 /s/ Terrence M. Jackson
27 TERRENCE M. JACKSON, ESQ.
28 Nevada Bar No. 00854
Terry.jackson.esq@gmail.com
Counsel for LAZARO MARTINEZ-HERNANDEZ

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CERTIFICATE OF SERVICE

I hereby certify I am an Assistant to Terrence M. Jackson, and that on the 11th day of September, 2015, I served a copy of the Defendant, Lazaro Martinez-Hernandez's, Supplemental Points and Authorities on Whether Court has Jurisdiction to Consider Petitioner's Post Conviction Writ via CM/ECF, electronic filing, to the District Attorney's Office via the email service address noted below:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

JACOB VILLANI
Deputy District Attorney - Criminal
jacob.villani@clarkcountyda.com

[x] And by U.S. postal service to the parties listed below:

ADAM LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

By: /s/ Ila C. Wills
Ila C. Wills, Assistant

099


CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
RYAN MACDONALD
Deputy District Attorney
Nevada Bar #12615
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LAZARO MARTINEZ - HERNANDEZ,
aka, Lazaro Martinezhernandez, #1493472

Defendant.

CASE NO: 07C230237

DEPT NO: XVII

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL POINTS AND
AUTHORITIES ON WHETHER COURT HAS JURISDICTION TO CONSIDER
PETITIONER'S POST CONVICTION WRIT

DATE OF HEARING: October 9, 2015
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through RYAN MACDONALD, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Points and Authorities on Whether Court Has Jurisdiction to Consider Petitioner's Post-Conviction Writ.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

///

///

POINTS AND AUTHORITIES
STATEMENT OF THE CASE

On February 16, 2007, the State charged Lazaro Martinez-Hernandez (hereinafter "Defendant") by way of Information with one count of Assault With a Deadly Weapon (Felony – NRS 200.471). On February 5, 2008, a jury found Defendant guilty. On April 10, 2008, Defendant was sentenced to the Nevada Department of Corrections for 12 to 36 months. The sentence was suspended, and Defendant was placed on probation for an indeterminate period not to exceed three year, subject to certain conditions of release. The Judgment of Conviction was filed on April 25, 2008. Defendant did not file a direct appeal.

On January 1, 2010, Defendant's stipulated to having violated the conditions of his probation and his probation was revoked. The original 12 to 36 month sentence was imposed, and Defendant received 96 days credit for time served. An Amended Judgment of Conviction was filed on February 1, 2010.

On February 1, 2011, Defendant filed a Petition for Writ of Habeas Corpus through counsel, wherein he raised an appeal-deprivation claim. On May 18, 2012, Defendant filed a Supplement to his Petition. The State filed its Response and Motion to Dismiss on July 2, 2012. On October 5, 2012, this Court held an evidentiary hearing on Defendant's appeal-deprivation claim, and found that Defendant had been deprived of his right to a direct appeal and was therefore entitled to file an untimely Lozada appeal.

On July 22, 2013, Defendant filed a Notice of Appeal. The Nevada Supreme Court affirmed Defendant's conviction on July 22, 2014, and Remittitur issued on August 26, 2014.

On February 24, 2015, Defendant filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Petition"). The State filed its response on July 22, 2015. On September 4, 2015, a hearing was held where the district court deferred its decision and ordered supplemental briefing.

ARGUMENT

In his Supplemental Points and Authorities, Defendant claims that the district court retains jurisdiction to resolve his Petition even though he is no longer in custody or on probation or parole. First, Defendant argues that once a court has jurisdiction it will lose

1 jurisdiction in very limited circumstances. To support his argument, Defendant cites to several
2 Nevada cases for the proposition that those cases represent the only limited circumstances in
3 which a court will lose jurisdiction over a case. However, Defendant's argument attempts to
4 ignore Nevada Supreme Court's finding that "[a] district court may not issue a writ of habeas
5 corpus if the post-conviction petitioner filed the petition challenging the validity of a
6 conviction after having completed the sentence for the challenged conviction." Jackson v.
7 State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999); see also, Dir., Nev. Dep't of Prisons v. Arndt,
8 98 Nev. 84, 84, 640 P.2d 1318, 1319 (1982) (use of the extraordinary Writ of Habeas Corpus
9 is warranted only to challenge present custody or restraint and the legality of that
10 confinement); State v. Baliotis, 98 Nev. 176, 178, 643 P.2d 1223, 1224 (1982) (citing Dixon
11 v. Warden, 85 Nev. 703, 704-5, 462 P.2d 753, 754 (1969)) (explaining that custody is required
12 for persons seeking post-conviction relief under former NRS 177.315).

13 Next, Defendant attempts to distinguish his case from both Jackson and Arndt.
14 Defendant claims that in Arndt the Court denied defendants petition because he was found to
15 have already received the precise relief he sought, thereby rendering his petition moot.
16 However, the Court in Arndt specially found that because the defendant was no longer under
17 the custody or restraint that he claimed was unlawful, there was no longer a basis for a habeas
18 corpus remedy. 98 Nev. at 85-86, 640 P.2d 1319. Similarly, in Jackson, the Court held that
19 writs of habeas corpus may not be issued if the post-conviction petitioner filed the petition
20 challenging the validity of a conviction after having completed the sentence for the challenged
21 conviction. 115 Nev. at 22, 973 P.2d 241. The Court's commentary on the fact that the
22 defendant in Jackson filed his petition 14 years after his conviction went to the fact that habeas
23 relief might not have been available in that case even if the defendant was in custody at that
24 time. Id. at 23, 973 P.2d at 242; see also Groesbeck v. Warden, Nev. State Prison, 100 Nev.
25 259, 259, 679 P.2d 1268, 1268 (1984) (even in cases where a defendant was still in custody
26 habeas corpus petitions filed many years after conviction were an unreasonable burden
27 on the criminal justice system).

1 Third, Defendant claims that federal courts have interpreted "in custody" to
2 pertain directly to the liberty interest of a defendant. Defendant argues that the State of
3 Nevada should adopt the same interpretation. However, Defendant fails to cite to any
4 case law or authority to support this interpretation of the meaning of "in custody."
5 Moreover, the Nevada Supreme Court has previously declined to follow federal court's
6 approach in habeas corpus cases. Dir., Nev. Dep't of Arndt, 98 Nev. at 86 n.2, 640 P.2d
7 at 1320 ("The United States Supreme Court has acknowledged the appropriateness of
8 the federal habeas corpus remedy to challenge future confinement. The Supreme Court
9 of Nevada found no compelling reason to apply the federal approach.").

10 Lastly, Defendant cites to Mitchell v. State to support his argument that if a
11 procedural bar exists to challenging the conviction of a defendant who was actually
12 innocent, it would amount to a fundamental miscarriage of justice and, therefore, the
13 procedural bar should be lifted. In Mitchell, the Court analyzed the procedural bars to
14 an untimely or successive petition where a constitutional violation probably resulted in
15 a conviction of someone who is factually [actually] innocent. 122 Nev. 1269, 1274,
16 149 P.3d 33, 36 (2006). However, habeas corpus remedy exists to test the legality of
17 the State's restraint on liberty, therefore, if a defendant is no longer in custody the habeas
18 relief is moot. Jackson, 115 Nev. at 23, 943 P.2d at 242. In this case, Defendant is no
19 longer in custody, he has finished serving his sentence and is not on parole or probation.
20 Therefore, habeas relief is moot and the district court lacks jurisdiction.

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1 **CONCLUSION**

2 Based on the foregoing, the State respectfully requests that this Court DISMISS
3 Defendant's post-conviction petition.

4 DATED this 10th day of October, 2015.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar # 001565

9 BY

Robert B. MacDonald
10 RYAN MACDONALD
11 Deputy District Attorney
12 Nevada Bar #12615

13 **CERTIFICATE OF ELECTRONIC FILING**

14 I hereby certify that service of STATE'S RESPONSE TO DEFENDANT'S
15 SUPPLEMENTAL POINTS AND AUTHORITIES ON WHETHER COURT HAS
16 JURISDICTION TO CONSIDER PETITIONER'S POST CONVICTION WRIT, was made
17 this 10th day of October, 2015, by Electronic Filing to:

18 TERRENCE M. JACKSON, ESQ.
19 terry.jackson.esq@gmail.com

20
21
22 C. Jimenez
23 Secretary for the District Attorney's Office
24
25
26
27

28 RM/cmj/L3


CLERK OF THE COURT

1 RTRAN

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,

)

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Plaintiff,

)

CASE NO. 07C230237

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vs.

)

DEPT. XVII

11

LAZARO MARTINEZ-HERNANDEZ,

)

12

Defendant.

)

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BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

15

FRIDAY, OCTOBER 9, 2015

16

TRANSCRIPT OF PROCEEDINGS RE:

17

DECISION: DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

18

(POST CONVICTION)

19

20

APPEARANCES:

21

For the State:

JACOB VILLANI, ESQ.,

22

Deputy District Attorney

23

For the Defendant:

TERRENCE M. JACKSON, ESQ.,

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25

RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; FRIDAY, OCTOBER 9, 2015

2 [Proceeding commenced at 9:40 a.m.]

3
4 THE COURT: All right. This is the Martinez matter.
5 Defendant's present at liberty with Court Interpreter, Mr. Jackson.
6 Mr. Jackson it's your petition.

7 MR. JACKSON: Well, as the Court has already considered this
8 issue in the previous case, I'm aware that --

9 THE COURT: But we have to put it on the record here because
10 it won't, you know, carry over to the next level if -- if you go
11 there.

12 MR. JACKSON: Yeah. My -- my issue with the statute is that
13 the Defendant I think proceeded in a timely manner to raise the
14 issue of ineffective assistance of counsel. That case law is you
15 can't challenge ineffective assistance on direct appeal. And by
16 the time we got around ineffective assistance, he had served his
17 relatively short prison sentence of 12 months.

18 Because of that, he basically left with no remedy to
19 challenge ineffective assistance of counsel and also to raise the -
20 - the corrugative [sic] issue of actual innocence which could have
21 developed if he had effective assistance of counsel. So he's
22 prejudiced. He's also prejudiced because of the things that go
23 with a criminal conviction; the collateral consequences which are
24 not minor. You can't vote. You can't hold a gun. You can't get
25 certain jobs. And if he was actually innocent and if he could have

1 been acquitted if he had good counsel, that's something
2 significant.

3 Now, one of the reasons for having post-conviction, the
4 most important reason is -- and the Courts talk about this in
5 saying the important of having post-conviction is that you could
6 have an evidentiary hearing and you can develop the facts on
7 whether or not counsel was ineffective. You don't get that on a
8 direct appeal.

9 On a direct appeal you just get what happened with the
10 trial, but you can't really raise ineffectiveness on direct appeal.
11 On post-conviction hearings you bring in the attorney to find out
12 what if any they -- reason they had a strategy or why they did it
13 or didn't do something. And if they were ineffective and there
14 were issues in this case of what they should or should not have
15 done, the Court can make a recent determination on whether or not
16 they acted appropriately.

17 And, of course, the appellate court can review. And if
18 the Nevada Supreme Court decides that, you know, they shouldn't
19 decide this because he wasn't in custody, he has the right, of
20 course, to go into Federal Court. But there still won't even be a
21 record. We don't even have the hearing here when I go to Federal
22 Court or -- or his next attorney possibly goes to Federal Court to
23 -- do a Federal habeas corpus petition. There really won't be even
24 an adequate record to raise that issue in Federal Court out of
25 Federal writ of habeas corpus.

1 The only thing I'd probably be able to challenge is
2 Nevada's law that says you can't raise a post-conviction if you're
3 not in custody. And that's probably what he'll be stuck with if
4 Nevada Supreme Court rules [indecipherable] -- if Your Honor rules
5 against -- I know Your Honor probably feels compelled to rule that
6 way because the Nevada case law at least is vague, but mainly does
7 not support holding that you should have a Federal or rather a
8 State post-conviction petition if you're not in custody.

9 To me it doesn't make any sense because it would almost
10 seem that you would have to argue for more time than a minimum
11 sentence so you have enough time to go through the full process.
12 Instead of arguing for 12 to 36 months, you might say, well, I'd
13 rather have 24 to 60 months because I'm innocent and the only way
14 I'll be able to exercise all my appellate rights including direct
15 appeal and post-conviction is to get a little longer sentence, Your
16 Honor. So the next time I think I'd rather have a little longer
17 time. And that doesn't make any sense at all.

18 And for that reason, it's -- you're still facing a loss
19 in liberty because of the conviction and I think the Federal case,
20 does it say that, make more sense.

21 THE COURT: Thank you, Mr. Jackson. Mr. Villani.

22 MR. VILLANI: And just briefly, Your Honor, and I know you're
23 well aware of this. I just want to put us in context for the
24 purpose of this hearing. It's not like he's been divested of every
25 appellate resource he has. He filed a direct appeal. The Supreme

1 Court's reviewed the case he went through and everything and found
2 that no, nothing wrong happened there.

3 Now, a writ is an extraordinary remedy and that's what --
4 that's why it is the way it is. That's why, you know, you can
5 raise a couple of issues. You can raise ineffective assistance of
6 counsel. But the fact that he was released, our Nevada
7 Constitution doesn't allow him to file that writ now, but it's not
8 as if he's stuck as if somehow he was unfairly convicted and didn't
9 have any recourse or any appellate rights like that, so I'll submit
10 it on that, Your Honor, and our briefing.

11 THE COURT: Anything further, Mr. Jackson?

12 MR. JACKSON: No.

13 THE COURT: All right. Thank you.

14 I am going to adopt the procedural history of the State's
15 briefs. I do find the Defendant had filed his petition while he
16 was under restraint or custody in this matter. However, under 34 -
17 - NRS 34.724 only a person who is under restraint may file a writ
18 which happened here, so it's timely. However, under Nevada
19 Constitution, I only have power to issue writs on behalf of persons
20 in actual custody. The Defendant is not in custody.

21 Now, I would note also in the case of Department of
22 Prisons versus Arndt; that's A-R-N-D-T which has been cited. Our
23 Nevada Supreme Court stated quote, nevertheless, we have
24 consistently held the use of extraordinary writ is warranted only
25 to challenge present custody or restraint and the legality of that

1 confinement. So since he has completed his confinement, there's
2 nothing to challenge as far as the legality of the confinement as
3 I'm reading here in Department of Prison's case. But numerous
4 cases cited by both parties said he must be under restraint either
5 parole or prison. And I don't find that in this case.

6 And I welcome this going up because it's an interesting
7 issue and good luck, Mr. Jackson.

8 MR. VILLANI: Thank you, Your Honor.

9 MR. JACKSON: All right. And I'll be looking forward to the
10 written order because --

11 THE COURT: Now do you need a separate order for appointment?
12 Do you go through Drew? I mean --

13 MR. JACKSON: I think, you know, just I'll find out from Drew.
14 But Drew has routinely appointed me on -- on these and I -- if I --
15 if I ask the Court for an order, I'll have one prepared. I just --
16 as soon as the -- the order's prepared denying it, I'll ask Drew,
17 then I'll file a notice of appeal. Assume that I'm -- I'll be
18 appointed.

19 THE COURT: Whatever you need, Mr. Jackson --

20 MR. JACKSON: All right. Thank you.

21 THE COURT: -- if you want to take up further.

22 Mr. Villani, I did mention before in the other case, the
23 Owens and this case, will you prepare the appropriate order? We're
24 going to set a -- like three weeks; is that enough time for you to
25 get the order completed?

1 MR. VILLANI: Has that been okay with Appellate in the past?
2 Has that --
3 THE COURT: We usually do it two weeks -- two to three weeks.
4 MR. VILLANI: That's fine.
5 THE COURT: These are relatively short.
6 MR. VILLANI: What they do is they wait for the minutes. As
7 soon as the minutes post we can get working on that. So I think
8 three weeks would be sufficient.
9 THE COURT: How much time do you need, Carol?
10 MR. VILLANI: So it's up to you.
11 THE CLERK: We'll do November 5th.
12 MR. VILLANI: Okay.
13 MR. JACKSON: Okay. That's fine with me. The longer I push -
14 -
15 THE COURT: So we're going to put it on calendar to make sure
16 that the order's been prepared, signed -- if an order, it'd be
17 signed and that way, Mr. Jackson, your -- your clock will start
18 ticking as soon as you get it.
19 MR. JACKSON: Yeah. And then I'll file a notice within 30
20 days of appeal. I'll take short of my statuses of continuing
21 counsel.
22 THE COURT: All right.
23 MR. VILLANI: And that's on your 8:30 calendar, Your Honor?
24 THE COURT: Yes.
25 MR. VILLANI: Okay. Thank you.

1 THE COURT: Thank you, gentlemen.
2 MR. JACKSON: We can waive the Defendant's presence?
3 THE COURT: Yes, absolutely.
4 MR. JACKSON: Okay.
5 MR. VILLANI: Thank you, Your Honor.
6 MR. JACKSON: I'll keep him informed of further action on
7 appeal.

8 [Proceeding concluded at 9:50 a.m.]
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20 ATTEST: I hereby certify that I have truly and correctly
21 transcribed the audio/video proceedings in the above-entitled case
22 to the best of my ability.

23 
24 Michelle Ramsey
25 Court Recorder/Transcriber


CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
RYAN MACDONALD
Deputy District Attorney
Nevada Bar #12615
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

CASE NO: C230237

LAZARO MARTINEZ-HERNANDEZ,
aka, Lazaro Martinezhernandez, #1493472

DEPT NO: XVII

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: October 9, 2015
TIME OF HEARING: 9:30 AM

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 9TH day of October, 2015, the Petitioner being present, REPRESENTED BY TERRENCE M. JACKSON ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JACOB VILLANI, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On February 16, 2007, the State charged Lazaro Martinez-Hernandez (hereinafter "Defendant") by way of Information with one count of Assault With a Deadly Weapon (Felony - NRS 200.471). On February 5, 2008, a jury found Defendant guilty. On April 10, 2008,

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1 Defendant was sentenced to the Nevada Department of Corrections for 12 to 36 months. The
2 sentence was suspended, and Defendant was placed on probation for an indeterminate period
3 not to exceed three year, subject to certain conditions of release. The Judgment of Conviction
4 was filed on April 25, 2008. Defendant did not file a direct appeal.

5 On January 1, 2010, Defendant's stipulated to having violated the conditions of his
6 probation and his probation was revoked. The original 12 to 36 month sentence was imposed,
7 and Defendant received 96 days credit for time served. An Amended Judgment of Conviction
8 was filed on February 1, 2010.

9 On February 1, 2011, Defendant filed a Petition for Writ of Habeas Corpus through
10 counsel, wherein he raised an appeal-deprivation claim. On May 18, 2012, Defendant filed a
11 Supplement to his Petition. The State filed its Response and Motion to Dismiss on July 2,
12 2012. On October 5, 2012, this Court held an evidentiary hearing on Defendant's appeal-
13 deprivation claim, and found that Defendant had been deprived of his right to a direct appeal
14 and was therefore entitled to file an untimely Lozada appeal.

15 On July 22, 2013, Defendant filed a Notice of Appeal. The Nevada Supreme Court
16 affirmed Defendant's conviction on July 22, 2014, and Remittitur issued on August 26, 2014.

17 On February 24, 2015, Defendant filed a Supplemental Points and Authorities in
18 Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief ("Petition"). The
19 State filed its response on July 22, 2015. On September 4, 2015, a hearing was held where the
20 district court deferred its decision and ordered supplemental briefing. On September 11, 2015,
21 Defendant filed a Supplemental Point and Authorities on Whether Court Has Jurisdiction to
22 Consider Petitioner's Post-Conviction Writ. The State filed its Response on October 6, 2015.

23 This Court finds that Defendant is not entitled to relief through a post-conviction
24 Petition for Writ of Habeas Corpus since Defendant is no longer in custody or on probation or
25 parole. The Nevada Supreme Court has found that "[a] district court may not issue a writ of
26 habeas corpus if the post-conviction petitioner filed the petition challenging the validity of a
27 conviction after having completed the sentence for the challenged conviction." Jackson v.
28 State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). The Nevada Supreme Court has consistently

1 held that the use of the extraordinary Writ of Habeas Corpus is warranted only to challenge
2 present custody or restraint and the legality of that confinement. Dir., Nev. Dep't of Prisons
3 v. Arndt, 98 Nev. 84, 84, 640 P.2d 1318, 1319 (1982); see also State v. Baliotis, 98 Nev. 176,
4 178, 643 P.2d 1223, 1224 (1982) (citing Dixon v. Warden, 85 Nev. 703, 704-5, 462 P.2d 753,
5 754 (1969)) (explaining that custody is required for persons seeking post-conviction relief
6 under former NRS 177.315). This Court finds that pursuant to Arndt there is nothing left for
7 Defendant to challenge as far as the legality of his confinement since Defendant has completed
8 his sentence and he is not on probation or parole.

9 **ORDER**

10 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
11 shall be, and it is, hereby denied.

12 DATED this 4 day of October, 2015.

13 *Nov* *[Signature]*
14 DISTRICT JUDGE *JS*

15
16 STEVEN B. WOLFSON
17 Clark County District Attorney
18 Nevada Bar #001565

19 BY *[Signature]*

20 RYAN MACDONALD
21 Deputy District Attorney
22 Nevada Bar #12615
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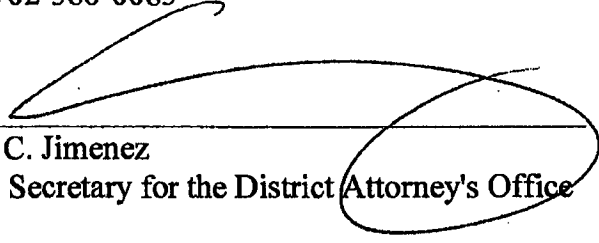
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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER, was made this 5th day of ~~October~~ November, 2015, by facsimile transmission
to:

TERRENCE MICHAEL JACKSON, ESQ.
1702-386-0085

BY 
C. Jimenez
Secretary for the District Attorney's Office

RM/cmj/L3


CLERK OF THE COURT

1 **NOAS**
2 **TERRENCE M. JACKSON, ESQ.**
3 Nevada Bar No. 00854
4 Law Office of Terrence M. Jackson
5 624 South Ninth Street
6 Las Vegas, NV 89101
7 T: 702-386-0001
8 F: 702-386-0085
9 Terry.jackson.esq@gmail.com

10 *Counsel for Lazaro Martinez-Hernandez*

11
12 **IN THE EIGHTH JUDICIAL DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**
14

15 The State of Nevada,)	District Case No.: 07-C-230237
16 Plaintiff,)	Dept. XVII
17 v.)	
18 Lazaro Martinez-Hernandez,)	NOTICE OF APPEAL
19 Defendant.)	

20 NOTICE is hereby given that the Defendant, LAZARO MARTINEZ-
21 HERNANDEZ, by and through his attorney, TERRENCE M. JACKSON, ESQ.,
22 hereby appeals to the Nevada Supreme Court, from the Order denying his post
23 conviction Writ of Habeas Corpus, file stamped and dated November 5, 2015.

24 Defendant, LAZARO MARTINEZ-HERNANDEZ further states he is indigent
25 and requests that the filing fees be waived.

26 Respectfully submitted this 9th day of November, 2015.

27 /s/ Terrence M. Jackson
28 Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702.386.0001 / F: 702.386.0085
Terry.jackson.esq@gmail.com
Counsel for Lazaro Martinez-Hernandez

1 CERTIFICATE OF SERVICE

2 I hereby certify I am an assistant to Terrence M. Jackson, Esq., not a party to
3 this action, and on the 9th day of November, 2015, I served a true, correct and e-filed
4 stamped copy of the foregoing: Defendant, LAZARO MARTINEZ-HERNANDEZ'S,
5 NOTICE OF APPEAL as follows:
6

7 [X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court;

8 [X] Via the Supreme Court Drop Box on the 17th floor of the Regional Justice
9 Center;

10 [X] and by United States first class mail to the Nevada Attorney General and the
11 Defendant as follows:
12
13

14 STEVEN B. WOLFSON
15 Clark County District Attorney
16 steven.wolfson@clarkcountyda.com
17

STEVEN S. OWENS
Chief Deputy D.A. - Criminal
APPELLATE DIVISION
steven.owens@clarkcountyda.com

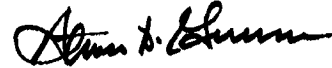
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19 L. MARTINEZ-HERNANDEZ
20 1716 Weeping Willow
21 Las Vegas, NV 89104
22

ADAM LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

23 By: /s/ Ila C. Wills
24 Assistant to T. M. Jackson, Esq.
25
26
27
28

COPY

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11/13/2015 08:57:51 AM



CLERK OF THE COURT

NEO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAZARO MARTINEZ-HERNANDEZ,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 07C230237

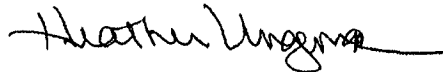
Dept No: XVII

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

PLEASE TAKE NOTICE that on November 5, 2015, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on November 13, 2015.

STEVEN D. GRIERSON, CLERK OF THE COURT



Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 13 day of November 2015, I placed a copy of this Notice of Entry in:

- ☒ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-
- ☒ The United States mail addressed as follows:
Lazaro Martinez-Hernandez Terrence M. Jackson, Esq.
1716 Weeping Willow Ln. 624 S. Ninth St.
Las Vegas, NV 89104 Las Vegas, NV 89101
(last known address)



Heather Ungermann, Deputy Clerk

01/19

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MASTER INDEX

Case No: 69169

Document	Volume	Page No.
State's Motion to Dismiss Supp. Points & Authorities (July 22, 2015) (Date of Hearing: September 4, 2015)	I	081 - 084
State's Response & Motion to Dismiss (July 2, 2012) (Supplemental Petition for WHC)	I	054 - 059
State's Response on Whether Court Has Jurisdiction (October 6, 2015) (Date of Hearing: October 9, 2015)	I	100 - 104
Supplemental Brief (May 18, 2012)	I	017 - 053
Supplemental Points & Authorities (February 24, 2015) (Petition for Post-Conviction Relief)	I	068 - 080
Supplemental Points & Authorities: Whether Court Has ... Jurisdiction to Consider Petitioner's Post-Conviction WHC (September 11, 2015) (Date of Hearing: October 9, 2015)	I	094 - 099
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Verdict (February 5, 2008) (filed in open court)	I	001

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☒ Via Electronic Service (E-flex) to the Nevada Supreme Court and to the Eighth Judicial District Court;

☒ and by United States first class mail to the Nevada Attorney General and Appellant as follows:

STEVEN S. OWENS
Chief Deputy D.A. - Criminal Appeals
steven.owens@clarkcountyda.com

ADAM LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

...

1 VER

ORIGINAL

FILED IN OPEN COURT
FEB 05 2008 20 35 PM

CHARLES J. SHORT
CLERK OF THE COURT

BY


SANDRA JETER, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 LAZRO MARTINEZ-HERNANDEZ,

11 Defendant.

CASE NO: C230237

DEPT NO: V

12 VERDICT

13 We, the jury in the above entitled case, find the Defendant LAZRO MARTINEZ-
14 HERNANDEZ, as follows:

15 COUNT 1 - ASSAULT WITH A DEADLY WEAPON

16 (please check the appropriate box, select only one)

17 ☒ Guilty of ASSAULT WITH A DEADLY WEAPON

18 ☐ Not Guilty

19 DATED this 5 day of February, 2008

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22 FOREPERSON
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ORIGINAL

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JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED

APR 25 9 57 AM '08

Chris [Signature]
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LAZARO MARTINEZ-HERNANDEZ
aka Lazaro Martinezhernandez, #1493472

Defendant.

Case No: C230237

Dept No: V

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime(s) of ASSAULT WITH A DEADLY WEAPON (Felony), in violation of NRS 200.471; thereafter, on the 10th day of April, 2008, the Defendant was present in court for sentencing with his counsel, WILLIAM CROCK, ESQ, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the \$25.00 Administrative Assessment Fee and \$150.00 DNA Analysis fee including submission to testing to determine genetic markers and/or secretor status, the Defendant is sentenced as follows: to a MINIMUM term of TWELVE (12) MONTHS and a MAXIMUM term of THIRTY-SIX (36) MONTHS in the NEVADA DEPARTMENT OF CORRECTIONS; sentence SUSPENDED, PROBATION for an indeterminate period not to exceed THREE (3) YEARS. CONDITIONS:

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CLERK OF THE COURT

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CLERK OF THE COURT

- 1 1. Deft. shall submit his/her person, property, place of residence, vehicle or areas under
- 2 his/her control to search at any time, with or without a search warrant or warrant of arrest,
- 3 for evidence of a crime or violation of probation by the Division of Parole and Probation or
- 4 its agent.
- 5 2. Comply with any curfew imposed by P&P.
- 6 3. Complete impulse control and anger management counseling as deemed necessary by an
- 7 evaluation.
- 8 4. Have no contact whatsoever with the victim or the victim's family.
- 9 5. Obtain and maintain full-time employment.
- 10 6. Do not possess any weapons.

11 DATED this 24 day of April, 2008.

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13 _____
14 DISTRICT JUDGE
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ckb

1 AJOC

FILED
FEB 01 2010

Sharon L. Johnson
CLERK OF COURT

2 ORIGINAL

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4 DISTRICT COURT
5 CLARK COUNTY, NEVADA
6

7 THE STATE OF NEVADA,
8

9 Plaintiff,

CASE NO. C230237

10 -vs-

DEPT. NO. XVII

11 LAZRO MARTINEZ-HERNANDEZ
12 aka Lazaro Martinezhernandez
13 #1493472

14 Defendant.

15 AMENDED JUDGMENT OF CONVICTION
16 (JURY TRIAL)
17

18 The Defendant previously entered a plea of not guilty to the crime of ASSAULT
19 WITH A DEADLY WEAPON (Category B Felony), in violation of NRS 200.471; and the
20 matter having been tried before a jury and the Defendant having been found guilty of
21 the crime of ASSAULT WITH A DEADLY WEAPON (Category B Felony), in violation of
22 NRS 200.471; thereafter, on the 10TH day of April, 2008, the Defendant was present in
23 court for sentencing with counsel wherein the Court did adjudge the Defendant guilty of
24 said crime as set forth in the jury's verdict, suspended the execution of the sentence
25 imposed and granted probation to the Defendant.
26

27
28 THEREAFTER, a parole and probation officer provided the Court with a written
statement setting forth that the Defendant has, in the judgment of the parole and

004

1 probation officer, violated the conditions of probation; and on the 21st day of January,
2 2010, the Defendant was present in court with his counsel, CARL ARNOLD, ESQ., and
3 pursuant to a probation violation hearing/proceeding, and good cause appearing to
4 amend the Judgment of Conviction; now therefore,
5

6 IT IS HEREBY ORDERED that the probation previously granted to the Defendant
7 is revoked; and IT IS FURTHER ORDERED that the original sentence of a MAXIMUM
8 of THIRTY-SIX (36) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12)
9 MONTHS in the Nevada Department of Corrections (NDC) is imposed; with NINETY-
10 SIX (96) DAYS Credit for Time Served.
11

12
13 DATED this 15th day of February, 2010

14
15 
16 MICHAEL VILLANI
17 DISTRICT JUDGE
18
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PCR
MARTIN HART, ESQ.
Nevada Bar No. 5984
The Law Offices of Martin Hart Law, LLC
229 South Las Vegas Blvd Ste 200
Las Vegas, Nevada 89101
(702) 380-4278
Attorney for Defendant

FILED
FEB 01 2011
John S. Johnson
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

LAZARO MARTINEZ-HERNANDEZ,

Petitioner,

vs.

HOWARD SKOLNIK, DIRECTOR
NEVADA DEPARTMENT OF
CORRECTIONS.

Respondent.

CASE NO.: C230237
DEPT. NO.:
DOCKET NO.:

PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

TO: THE HONORABLE JUDGE OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK:

COMES NOW, the above-named Petitioner, LAZARO MARTINEZ-HERNANDEZ, by and
through his undersigned attorney, Martin Hart, Esq., and hereby submits his Petition for Writ of Habeas
Corpus.

1. Name of institution and county in which Petitioner is presently imprisoned: As Defendant
is serving a sentence of probation, he is constructively imprisoned in the Nevada Department of
Corrections.

2. Name and location of court which entered the judgment of conviction under attack: Eighth
Judicial District Court - Clark County, Nevada.

3. Date of judgment of conviction: February 1, 2010.

4. Case number: C230237

5. (a) Sentence: 12 months to 36 months Nevada Department of Corrections.

- 1 (b) If sentence is death, state any date upon which execution is scheduled: N/A.
- 2 6. Is Petitioner presently serving a sentence for a conviction other than the conviction under
- 3 attack in this Petition? No.
- 4 7. Nature of offense involved and conviction being challenged: Assault with a Deadly Weapon.
- 5 8. What was Petitioner's plea? Not guilty.
- 6 9. If Petitioner entered a plea of guilty or guilty but mentally ill to one count of an indictment
- 7 or information, and a plea of not guilty to another count of an indictment or information, or if a plea of
- 8 guilty or guilty but mentally ill was negotiated, give details: N/A
- 9 10. If Petitioner was found guilty after a plea of not guilty, was the finding made by: Jury.
- 10 11. Did Petitioner testify at the trial? Yes.
- 11 12. Did Petitioner appeal from the judgment of conviction? No.
- 12 13. If Petitioner did appeal, answer the following:
- 13 (a) Name of court: N/A.
- 14 (b) Case number:
- 15 © Result:
- 16 (d) Date of result:
- 17 14. If Petitioner did not appeal, explain briefly why Petitioner did not: Was not informed of his
- 18 right to appeal.
- 19 15. Other than a direct appeal from the judgment of conviction and sentence, has Petitioner
- 20 previously filed any petitions, applications or motions with respect to this judgment in any court, state
- 21 or federal? No.
- 22 16. If the answer to number 15 was yes, give the following information: N/A
- 23 17. Has any ground raised in this petition been previously presented to this or any other court
- 24 by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? No.
- 25 (a) Which of the grounds is the same: N/A
- 26 (b) The proceedings in which these grounds were raised: N/A
- 27
- 28

1 © Briefly explain why Petitioner is again raising these grounds: N/A

2 18. If any of the grounds listed in numbers 23(a), (b), © and (d), or listed on any additional
3 pages attached, were not previously presented in any other court, state or federal, list briefly what
4 grounds were not so presented, and give reasons for not presenting them: None of the grounds listed
5 have been previously presented; this is Petitioner's initial Petition for Post-Conviction Relief, and this
6 is the first opportunity to address issues of ineffective assistance of counsel.

7 19. Is Petitioner filing this Petition more than one year following the filing of the Judgment of
8 Conviction or the filing of a decision on direct appeal? No.

9 20. Does Petitioner have any petition or appeal now pending in any court, either state or federal,
10 as to the judgment under attack? No.

11 21. Give the name of each attorney who represented Petitioner in the proceeding resulting in
12 Petitioner's conviction and on direct appeal:

13 Christina A. Di Edoardo and Marina Kolias - trial counsel

14 22. Does Petitioner have any future sentences to serve after Petitioner completes the sentence
15 imposed by the judgment under attack? No.

16 23. State concisely every ground on which you claim that you are being held unlawfully.
17 Summarize briefly the facts supporting each ground.

18 a) Ground one: Trial counsel was ineffective in that sufficient pre-trial investigation was not
19 performed resulting in Due Process violations and in violation of the Sixth, Eighth and Fourteenth
20 Amendments of the U.S. Constitution and the Nevada State Constitution.

21 Supporting facts: Defense counsel did not adequately contact all witnesses in trial preparation
22 and did not call essential witnesses.

23 b) Ground Two: Trial counsel did not appeal nor inform defendant of his right to appeal his
24 conviction resulting in Due Process violations and in violation of the Sixth, Eighth and Fourteenth
25 Amendments of the U.S. Constitution and the Nevada State Constitution.

26 Supporting facts: Defendant was found guilty after a jury trial. Trial counsel never informed
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1 him of his right to appeal and did not appeal his conviction even though he expressed unhappiness with
2 the trial results.

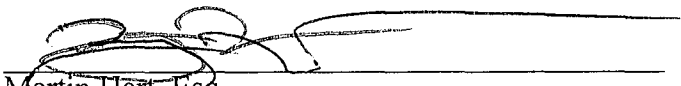
3 c) Ground Three: Defendant's trial counsel did not call potential witnesses at trial.

4 Supporting facts: Counsel's failure to call witnesses to the event that contradicted the testimony of the
5 victim resulted in Due Process violations and in violation of the Sixth, Eighth and Fourteenth
6 Amendments of the U.S. Constitution and the Nevada State Constitution.

7 d) Ground Four: Trial counsel was ineffective for failing to raise the issue of prosecutorial
8 misconduct by the State, for failure to preserve exculpatory evidence and to file a motion to potential
9 exculpatory evidence.

10 Supporting facts: In the arrest report for the instant case, the officer notes that he reviewed a
11 videotape of the alleged incident that showed that the defendant never pointed the weapon and the video
12 was never. This along with testimony from other witnesses that were not interviewed would likely have
13 resulted in a different verdict and the failure resulted in Due Process violations and in violation of the
14 Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and the Nevada State Constitution.

15 DATED this 1 day of February, 2011.

16
17 
Martin Hart, Esq.
Nevada Bar No. 005984
229 South Las Vegas Blvd., Ste. 201
Las Vegas, N89101
Attorney for Petitioner
18
19
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21 **NOTICE OF MOTION**

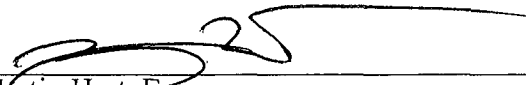
22 TO: STATE OF NEVADA

23 NOTICE is hereby given that the foregoing Petition for Writ of Habeas Corpus will be heard
24 on the 29 day of March 2011, at 8:15 a.m./p.m. in Dept. 17 of District Court.

25
26 
Martin Hart, Esq.
27
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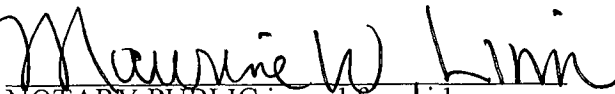
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3 **VERIFICATION**

4 Martin Hart, Esq., being first duly sworn, according to law, deposes and says: that Petitioner
5 RICHARD HODSON personally authorized your Affiant to commence this action; that your Affiant
6 has read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; that the same
7 is true of his own knowledge, except for any matter therein stated upon information and belief and as
8 to those matters therein stated, he believes them to be true.

9
10 
11 Martin Hart, Esq.

12 SUBSCRIBED and SWORN to before me
13 this 1 day of Feb., 2011.



15 
16 NOTARY PUBLIC in and for said
17 COUNTY and STATE

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. STATEMENT OF FACTS**

20
21 On February 16, 2007, Defendant was charged, by way of Information with a count of Assault
22 With a Deadly Weapon. The charges stem from an incident which occurred outside the Premier
23 Nightclub on June 12, 2006.

24 Defendant was accused of threatening Richard Pena, the owner of the nightclub with a firearm.
25 Also present were security guards for the club that approached Defendant and a friend as he retreated
26 to his vehicle. Defendant never pointed the firearm at anyone and held it at his side to stop the security
27

1 and Pena from advancing on him. Defendant acted in self defense only. Much of the video was not
2 turned over to the police. The witnesses against defendant were Pena and his employees that followed
3 defendant out to his vehicle as he retreated.

4 5 **II. STATEMENT OF PROCEDURAL FACTS**

6 Following the preliminary hearing on July 16, 2007, Richard Hodson was bound up on one
7 count of "Bomb Threat." On July 30, 2007, Hodson pled not guilty in District Court and invoked the
8 60 day rule. Trial was set for August 20, 2007, with a calendar call date of August 17, 2007. The case
9 was transferred to Department 18. Trial commenced on August 23, 2007 and lasted one day. A jury
10 verdict of Guilty on the charge of Bomb Threat was returned August 23, 2007.

11 Hodson filed his Notice of Appeal on December 17, 2007. The direct appeal, Supreme Court
12 Case Number 50759, was filed on April 2, 2008. Only two issues were raised in the appeal: 1) that
13 Hodson's statements were protected speech under the First Amendment because he did not intend his
14 joke to cause an immediate breach of the peace or mass pandemonium; and, 2) that the jury instructions
15 given to the jurors were deficient, misleading, and improper.

16 In an unpublished slip order, the Nevada Supreme Court rejected the contention that Hodson's
17 alleged statement was protected speech. *See* Slip Order, Hodson v. State, 2009 WL 1424492, attached
18 hereto as Exhibit "B."

19 Regarding the jury instruction issue, the Nevada Supreme Court stated that Hodson's counsel
20 "did not request an instruction on his theory of the case, he did not object to the jury instructions, and
21 he did not object to the comments the prosecutor made during closing argument." Exhibit "B." The
22 Court noted that "failure to object to a jury instruction ... generally precludes appellate review," unless
23 there is plain error and concluded that Hodson had failed to demonstrated plain error. *Id.* (Internal
24 Citations Omitted).

25 The Nevada Supreme Court filed an Order of Affirmance on January 8, 2009.
26
27
28

III. LEGAL ARGUMENT

A. TRIAL COUNSEL WAS INEFFECTIVE AND THEY DID NOT PERFORM SUFFICIENT PRETRIAL INVESTIGATION.

Pursuant to the Sixth Amendment of the U.S. Constitution, a defendant is entitled to effective assistance of counsel at all critical stages of a criminal case. To establish ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance "fell below an objective standard of reasonableness" and that counsel's "deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687-688 (1984). In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691., 104 S.Ct. at 2066.

In the instant case, trial counsel did not contact potential favorable witnesses nor interview witnesses for the prosecution prior to the trial.

B. TRIAL COUNSEL DID NOT PERFECT AN APPEAL NOR INFORM DEFENDANT OF HIS RIGHT TO APPEAL AFTER THE JURY VERDICT

In Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000), the Court reaffirmed that counsel has a constitutional duty to file an appeal when requested. *Id.* at 477. Specifically, when an appeal is not requested, the Court held, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480.

Defendant expressed to his counsel that he was unhappy with the jury verdict yet his trial counsel did not file an appeal nor did they inform defendant of his right to appeal his conviction.

C. TRIAL COUNSEL'S FAILURE TO CALL WITNESSES AT TRIAL THAT SUPPORTED HIS ALLEGATIONS THAT THE NAMED "VICTIM" AND HIS EMPLOYEES WERE THE AGGRESSORS CONSTITUTED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

To establish ineffective assistance of counsel, a petitioner must demonstrate that counsel's

1 performance "fell below an objective standard of reasonableness" and that counsel's "deficient
2 performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687-688 (1984).

3 Defendant's trial counsel was clearly ineffective for failing to offer any supporting witnesses
4 to his version of the events that transpired.. Counsel's performance was deficient and prejudiced
5 defendant.

6 "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of
7 the case so long as there is some evidence, no matter how weak or incredible, to support it." Williams
8 v. State, 99 Nev. 530 (1983). If a defense theory of the case is supported by some evidence which, if
9 believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes
10 it from the jury's consideration and constitutes reversible error. *See* Allen v. State, 98 Nev. 354 (1982);
11 *See also* Barger v. State, 81 Nev. 548 (1965).

12 Despite the fact that the evidence supported the defense's theory of the case, trial counsel never
13 called witnesses nor used that argument to support giving the "reasonable person" instruction to the
14 jury. The Nevada Supreme Court has consistently held that the defense has the right to have the jury
15 instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that
16 evidence may be. Furthermore, there is strong support for the "reasonable person" test to apply in this
17 matter.

18 In failing to effectively put this issue before the trial court, trial counsel substantially increased
19 the risk that the jury would convict defendant.

20
21 **D. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE**
22 **PROSECUTORIAL MISCONDUCT AND/OR MOTION TO DISMISS FOR**
DESTRUCTION/FAILURE TO PRESERVE EVIDENCE.

23 Trial counsel failed to address the issue of prosecutorial misconduct. Prosecutorial misconduct
24 can and will result in the reversal of convictions when it denies defendants their right to a fair trial. *See*
25 McGuire v. State, 100 Nev. 153 (1984). To determine if prosecutorial misconduct was prejudicial, this
26 court examines whether a prosecutor's statements and or action so infected the proceedings with
27

1 unfairness as to result in a denial of due process. Thomas v. State, 120 Nev. 37, 47 (2004).
2 Furthermore, in cases where there is not overwhelming evidence of guilt, prosecutorial misconduct is
3 not harmless. See Morris v. State, 112 Nev. 260, 913 P.2d 1264 (1996) (Emphasis Added); see also
4 Anderson v. State, 121 Nev. 511, 118 P.3d 184 (2005). In Morales v. State, 122 Nev. 966 (2006), the
5 Nevada Supreme Court held that cumulative improper statements by the prosecutor compelled reversal:

6
7 We conclude that this comment was wrong and improper and that,
8 despite the defense's timely objection and the action of the district
9 court in sustaining the objection, this comment aggravated the impact
of the other improper arguments made by the State in closing
argument. Id. at —, 143 P.3d 468.

10 The Strickland standard for determining ineffective assistance of counsel applies to the
11 performance of appellate counsel, as well. "To establish prejudice based on the deficient assistance
12 of appellate counsel, the [petitioner] must show that the omitted issue would have a reasonable
13 probability of success on appeal." Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102 (1996).
14 Defense attorneys who fail to raise any instances of prosecutorial misconduct on appeal are remiss
15 in their duties pursuant to Stickland. See Howard v. State, 106 Nev. 713, 719; 800 P.2d 175, 179
16 (1990). This is because prejudicial prosecutorial conduct constitutes reversible error. Ross v. State,
17 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990).

18 Trial counsel should have been aware that not all the video was retained by the prosecution
19 and their agents. This resulted in the loss of exculpatory evidence that would likely have resulted in
20 a different verdict. Additionally, trial counsel did not file an appeal nor inform defendant of his
21 right to appeal based on the failure by the State..

22 Based upon the foregoing, obvious prejudicial misconduct, counsel's failure to address these
23 issues constitutes ineffective assistance of counsel. Had these issues been raised on appeal, there
24 was a strong likelihood of success, therefore, reversal of the conviction is warranted.


25 CONCLUSION

26 Petitioner respectfully submits that he was denied the right to effective assistance of counsel
27 that resulted in Due Process violations and in violation of the Sixth, Eighth and Fourteenth
28

1 Amendments of the U.S. Constitution and the Nevada State Constitution.

2 Based upon the foregoing facts and legal arguments, Petitioner Lazaro Martinez-Hernandez
3 respectfully requests that this Honorable Court reverse his conviction and dismiss this matter with
4 prejudice.

5 DATED this 1 day of February, 2011.

6
7 
8 Martin-Hart, Esq.
9 Nevada Bar No. 005984
229 South Las Vegas Blvd., Ste. 201
Las Vegas, N89101
Attorney for Petitioner
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CERTIFICATE OF MAILING

Pursuant to NEVADA RULES OF CIVIL PROCEDURE 5 (b), I hereby certify that on the
15th day of February, 2011, service of the foregoing PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION) was made this date by depositing a true copy of the same for mailing,
first class mail, at Las Vegas, Nevada addressed as follows:

Howard Skolnik, Director
Nevada Department of Corrections
P.O. Box 7011
Carson City, Nevada 89702

Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

David Roger
Clark County District Attorney
200 South Lewis
Las Vegas, Nevada 89101

Melina G. Campos

44

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Agustin J. Hernandez
CLERK OF THE COURT

1 PCR
2 MARTIN HART, ESQ.
3 Nevada Bar No. 5984
4 The Law Offices of Martin Hart Law, LLC
5 229 South Las Vegas Blvd Ste 200
6 Las Vegas, Nevada 89101
7 (702) 380-4278
8 Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

9 LAZARO MARTINEZ-HERNANDEZ,)

10 Petitioner,)

11 vs.)

12 JAMES "GREG" COX, DIRECTOR)
13 NEVADA DEPARTMENT OF)
14 CORRECTIONS.)

15 Respondent.)

CASE NO.: C230237
DEPT. NO.: XVII
DOCKET NO.:

07C230237
SB
Supplemental Brief
1865584



SUPPLEMENTAL BRIEF FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

16 COMES NOW PETITIONER, LAZARO MARTINEZ-HERNANDEZ, by and through his
17 attorney MARTIN HART, ESQ. of The Law Office of Martin Hart, LLC. and files the following
18 Supplemental Brief to the Writ of Habeas Corpus.

19 This Brief shall serve as an addition to the original Writ for Petition of Habeas Corpus, filed by
20 Petitioner, and shall supplement the arguments therein.

21 I. STATEMENT OF FACTS

22 On February 16, 2007, Defendant was charged, by way of Information with a count of Assault
23 With a Deadly Weapon. The charges stem from an incident which occurred outside the Premier
24 Nightclub on June 12, 2006.

25 Defendant was accused of threatening Richard Pena ("Pena"), the owner of the nightclub with
26 a firearm. Also present were security guards for the club that approached Defendant and a friend as he
27 retreated to his vehicle. Defendant never pointed the firearm at anyone and held it at his side to stop

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CLERK OF THE COURT

1 the security and Pena from advancing on him. Defendant acted in self defense only. Much of the video
2 was not turned over to the police. The witnesses against defendant were Pena and his employees that
3 followed defendant out to his vehicle as he retreated.

4 II. STATEMENT OF PROCEDURAL FACTS

5 The statement of procedural facts previously filed are innaccurate and the following are intended
6 to replace that portion in the previous filing. Following the preliminary hearing on February 6, 2007,
7 Lazaro Martinez-Hernandez was bound up on one count of assault with a deadly weapon. On March
8 5, 2007, Martinez-Hernandez pled not guilty in District Court and waived the 60 day rule. On May 15,
9 2007 Ms. Kolias confirmed as counsel. Trial was set for February 4, 2008, with a calendar call date of
10 January 29, 2008. The case was referred to overflow and transferred to Department 5. Trial
11 commenced on February 4, 2008 and lasted two days, finishing on February 5, 2008. A jury verdict of
12 Guilty on the charge of Assault with a deadly weapon was returned February 5, 2008.

13 On April 10, 2008, Martinez-Hernandez was sentenced to 12 months to 36 months in the
14 Nevada Department of Corrections, which was suspended in favor of probation not to exceed 3 years.

15 On January 21, 2010 Martinez-Hernandez was revoked from probation and his original term of 12 to
16 36 months was imposed with a credit of 96 days. Martinez-Hernandez never filed a notice of appeal
17 or an appeal due to his counsel not informing him of that possibility; even after he expressed
18 dissatisfaction with the jury verdict. A petition for Writ of Habeas Corpus was filed on February 1,
19 2011, and this supplement follows.

20 III. LEGAL ARGUMENT

21 A. TRIAL COUNSEL WAS INEFFECTIVE AND THEY DID NOT PERFORM 22 SUFFICIENT PRETRIAL INVESTIGATION.

23 Pursuant to the Sixth Amendment of the U.S. Constitution, a defendant is entitled to effective
24 assistance of counsel at all critical stages of a criminal case. To establish ineffective assistance of
25 counsel, a petitioner must demonstrate that counsel's performance "fell below an objective standard of
26 reasonableness" and that counsel's "deficient performance prejudiced the defense." Strickland v.
27 Washington, 466 U.S. 668, 687-688 (1984). Defense counsel has a duty "to make reasonable
28

1 investigations or to make a reasonable decision that makes particular investigations unnecessary." Id.
2 at 691. In considering whether trial counsel has met this standard, the court should first determine
3 whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case."
4 Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691.,
5 104 S.Ct. at 2066.

6 In this case, trial counsel did not contact an essential witness and failed to follow up with
7 another favorable witness. Defense counsel also failed to interview any of the prosecution witnesses.

8 Trial counsel was aware of the two essential witnesses prior to trial and only met with one in the
9 presence of Martinez-Hernandez. (See Affidavit attached hereto as Exhibit "A" p1: 11-14).

10 The first essential witness, Manuel Tortosa ("Tortosa"), met with trial counsel and Martinez-
11 Hernandez prior to the trial to discuss what he witnessed. *Id.* Trial counsel was aware that Tortosa was
12 an eyewitness and attempted to have him testify at the trial. (See Select Pages from Trial Transcript
13 Volume I, attached hereto as Exhibit B p. 4: 22-23). However, trial counsel failed to timely file a
14 witness list pursuant to NRS 174.234, and Tortosa was not allowed to testify at trial. (Exhibit B p. 6:
15 14-19). Tortosa was present and willing to testify the morning of the trial. (Exhibit A p.1: 15). The
16 potential testimony of Mr. Tortosa would have directly corroborated Martinez-Hernandez's defense.
17 (Exhibit A p.1:14-15). The Nevada Supreme Court in, Sanborn, recognizes that a defendant's
18 testimony is "strongly devalued by the absence of corroborative evidence that would have been
19 presented by diligent and effective counsel." Sanborn v. State, 107 Nev.399, 812 P.2d 1279, 1283. In
20 an analysis of Strickland, the Nevada Supreme Court determined:

21 Sanborn's defense was clearly prejudiced by his
22 counsel's failure to develop and present evidence which
23 would have corroborated Sanborn's testimony and
24 discredited the state's expert witness. Because of
25 counsel's lack of due diligence, Sanborn was deprived of
the opportunity to present testimony material to his
defense, and we are therefore unable to place confidence
in the reliability of the verdict.

26 Id. citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct.2052, 2064, 80 L.Ed.2d 674 (1984).

27 Similarly, Martinez-Hernandez was clearly prejudiced by his counsel's failure to develop and

1 present evidence through the testimony of Tortosa which would have corroborated his testimony.
2 Martinez-Hernandez testified that he confronted Pena at the door and Martinez-Hernandez was pushed
3 and threatened with a flashlight by at least two security guards as he was chased to his vehicle. (Exhibit
4 B p. 163-164; 20-18). Martinez-Hernandez also testified at trial that Tortosa was with Richard Pena
5 at the door with other security. (Exhibit B p.163: 1-2). Because of this action Martinez-Hernandez told
6 Pena and the two security guards that were threatening him that he had a gun. (Exhibit B p. 164-165:
7 18-2). He testified that he never threatened anyone or pointed the gun at anyone, only removed the gun
8 from the holster. (Exhibit B p. 167: 7-16 and p. 168: 20-23). Martinez-Hernandez also testified that
9 he is the one that called for the police to come and assist. (Exhibit B p. 165: 23-25). Martinez-
10 Hernandez testified that he called and waited for police because he "didn't do anything" and he knows
11 Pena and was concerned that he would "have made up lots of things." (Exhibit B p. 167-168: 22-4).
12 This testimony clearly contradicts Pena's testimony and could have been corroborated by Tortosa had
13 trial counsel merely filed the witness list in time pursuant to NRS 174.234. Martinez-Hernandez was
14 unable to perfect his defense that Pena and his guards were the initial aggressors and that he never
15 threatened and pointed the gun at Pena because of this fundamental error of trial counsel.

16 Failing to comply with the statutory requirements of NRS 174.234 is similar to that of missing
17 a statute of limitations. Competent counsel are aware of the requirement to file a witness list and the
18 potential implications of having witnesses excluded if one is not filed. Martinez-Hernandez asserts that
19 on its face failing to file a witness list, and having essential witnesses excluded, meets the definition of
20 ineffective assistance of counsel in its most basic and elementary form.

21 The second witness, Lynn Cervantes ("Cervantes"), was never contacted by trial counsel despite
22 being informed of her and her particular knowledge by both Martinez-Hernandez and Tortosa. (Exhibit
23 A p.1: 23-25). Cervantes has specific knowledge of conversations between Beatriz Hernandez, a
24 witness for the State, and Pena, the alleged victim, regarding alteration, doctoring or elimination of the
25 video surveillance for this incident. (Exhibit A p.1: 19-20). Cervantes was an employee of Pena and
26 was told not to get involved if she wanted to keep her employment. (Exhibit A p.1: 17-18). Despite the
27
28

1 potential for retribution, Cervantes was present the morning of trial and was willing to testify. (Exhibit
2 A p.1: 22-23). The Nevada Supreme Court in Sanborn, tells us we need to look at counsel's
3 performance as a whole to determine if trial counsel was ineffective. Sanborn, 812 P.2d at 1283. In
4 Sanborn, the Nevada Supreme Court found that despite trial counsel's use of an investigator to "some
5 degree" did not constitute a sufficient investigation, because potential witnesses were not contacted.
6 Id., at 1284. It is unclear whether trial counsel in the instant case used an investigator, but it is clear that
7 they had knowledge of Cervantes and never contacted her to see what she would testify to. This is
8 evidenced by their failure to list Cervantes on the improperly filed witness. (See Defendant's List of
9 Witnesses Exhibit "C").

10 Martinez-Hernandez's defense was prejudiced by trial counsel's failure to present evidence thru
11 the testimony of both Cervantes and Tortosa, which would have discredited Pena's testimony as well
12 as corroborated Martinez-Hernandez's testimony. But for Counsel's failure to investigate and timely
13 file a witness list, Martinez-Hernandez would have been able to present a full and competent defense
14 to the jury. "Because of counsel's lack of due diligence," Martinez-Hernandez "was deprived of the
15 opportunity to present testimony material to his defense," and this Court should not place any
16 confidence of the "reliability of the verdict." Id. citing Strickland v. Washington, 466 U.S. 668, 687,
17 104 S.Ct.2052, 2064, 80 L.Ed.2d 674 (1984).

18 **B. TRIAL COUNSEL DID NOT PERFECT AN APPEAL NOR INFORM DEFENDANT**
19 **OF HIS RIGHT TO APPEAL AFTER THE JURY VERDICT**

20 In Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000), the Court reaffirmed that
21 counsel has a constitutional duty to file an appeal when requested. Id., at 477. Specifically, when an
22 appeal is not requested, the Court held, "counsel has a constitutionally imposed duty to consult with
23 the defendant about an appeal when there is reason to think either (1) that a rational defendant
24 would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that
25 he was interested in appealing." Id. at 480.

26 Defendant expressed to his counsel that he was unhappy with the jury verdict yet his trial
27 counsel did not file an appeal nor did they inform defendant of his right to appeal his conviction.

1 There were several appealable issues as is evidenced by this petition. The first and most obvious
2 issue is the trial court's decision to exclude the testimony of Tortosa which would have corroborated
3 Martinez-Hernandez's testimony and defense. The next appealable issue is the admission of
4 corrupted, altered surveillance video, attached to the argument of prosecutorial misconduct by not
5 collecting and preserving essential evidence. Another issue ripe for appeal was the absence of an
6 instruction that allowed for the jury to contemplate the defense presented, a lesser included offense,
7 or the "reasonable person" instruction. And the last appeal issue should have been the ineffective
8 assistance of counsel resulting from the lack of investigation, failure to call witnesses, failure to
9 object to prosecutorial misconduct resulting from the corrupted/altered/un-preserved/destruction of
10 surveillance video, and failure to submit appropriate jury instructions.

11 **C. TRIAL COUNSEL'S FAILURE TO CALL WITNESSES AT TRIAL THAT**
12 **SUPPORTED HIS ALLEGATIONS THAT THE NAMED "VICTIM" AND HIS**
13 **EMPLOYEES WERE THE AGGRESSORS CONSTITUTED INEFFECTIVE**
14 **ASSISTANCE OF TRIAL COUNSEL.**

15 To establish ineffective assistance of counsel, a petitioner must demonstrate that counsel's
16 performance "fell below an objective standard of reasonableness" and that counsel's "deficient
17 performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687-688 (1984).

18 Defendant's trial counsel was clearly ineffective for failing to offer any supporting
19 witnesses to his version of the events that transpired. The Nevada Supreme Court in, Sanborn,
20 recognizes that a defendant's testimony is "strongly devalued by the absence of corroborative
21 evidence that would have been presented by diligent and effective counsel." Sanborn v. State, 107
22 Nev.399, 812 P.2d 1279, 1283. The argument for ineffective assistance of counsel regarding the
23 calling of witnesses is directly tied to the argument of failure to investigate and requires some
24 overlap and recognition of the other. Most courts, including the Nevada Supreme Court in Sanborn
25 and Love, intertwine the two concepts in explanation and ruling. See Sanborn v. State, 107 Nev.399,
26 812 P.2d 1279.

27 The Nevada Supreme Court, in Love used the reasonably effective assistance standard
28 explained in Strickland and affirmed the district court's analysis of the totality of the facts when it

1 decided that counsels failure to personally interview witnesses and the subsequent decision not to
2 call those witnesses constituted ineffective assistance of counsel. State v. Love, 109 Nev. 1136, 865
3 P.2d. 322; see Strickland v. Washington, 466 U.S. 668 (1984). "[a] verdict or conclusion only
4 weakly supported by the record is more likely to have been affected by errors than one with
5 overwhelming record support." Strickland, 466 U.S. at 696. The Love court applied the quote
6 above to the facts of its case: "The weak record in this case makes us extremely hesitant to reject the
7 district court's finding of ineffective assistance." Love, 865 P.2d at 324. In its analysis it recognized
8 that the only damaging testimony came from a jailhouse informant and a hearsay statement made by
9 an unknown stranger (there was no other physical evidence) and an alibi witness who would have
10 placed Love away from the scene had they been called. Id. This lack of evidence and the failure of
11 counsel to call witnesses was enough for the Nevada Supreme Court to find Love was prejudiced by
12 his counsel's ineffective representation. Id.

13 Similarly, in the instant case all we have is the testimony of the alleged victim, his employee
14 and a corrupted/un-preserved surveillance video. We have trial counsel who failed to call two
15 witnesses. The first, Tortosa, would have corroborated Martinez-Hernandez's testimony, potentially
16 creating reasonable doubt for the jury. The Second, Cervantes an employee of the alleged victim,
17 was threatened not to get involved if she wanted to keep her employment. (Exhibit A p.1: 17-18).
18 Cervantes overheard conversation regarding alteration, doctoring, or elimination of key physical
19 evidence by the two witnesses for the state. (Exhibit A p.1: 19-20). Despite this she was willing and
20 ready to testify the morning of trial. (Exhibit A p.1: 22-23). This testimony would have clearly
21 damaged the state's case and could have potentially created reasonable doubt for the jury. The
22 similarities between this case and Love are undeniable and constitute a reversal in this case.

23 **D. THE TRIAL COURT'S FAILURE TO GIVE ANY JURY INSTRUCTIONS**
24 **REGARDING THE DEFENSE'S THEORY OF THE CASE IS REVERSIBLE ERROR**
25 **PER SE.**

26 "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of
27 the case so long as there is some evidence, no matter how weak or incredible, to support it." Williams

1 v. State, 99 Nev. 530 (1983). If a defense theory of the case is supported by some evidence which, if
2 believed, would support a corresponding jury verdict, failure to instruct on that theory totally
3 removes it from the jury's consideration and constitutes reversible error. See Allen v. State, 98 Nev.
4 354 (1982); See also Barger v. State, 81 Nev. 548 (1965). In Moore v. State, 105 Nev. 378, 776 P.2d
5 1235 (1989), the Nevada Supreme Court recognized in some circumstances, fairness to the defendant
6 requires that the district court instruct the jury on a lesser-related offense is to give the trier of fact an
7 option "other than conviction or acquittal when the evidence shows that the defendant is guilty of
8 some crime but not necessarily the one charged...." Id. At 383, 776 P.2d at 1238 (quoting People v.
9 Geiger, 35 Cal.3d 510, 199 Cal.Rptr. 45, 674 P.2d 1303 (1984)). This option protects the interests of
10 both the defendant and the state. Id.

11 A defendant in Nevada has a right to a jury instruction on such a lesser included offense as
12 long as there is some evidence to support the offense. Rosas v. State, 122 Nev. 1258, 1260, 147 P.3d
13 1101, 1103 (2006). The Nevada Supreme Court found that "the right of defendants to jury
14 instructions on lesser included offenses was recognized as well, and it is 'beyond dispute that the
15 defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury
16 rationally to find him guilty of the lesser offense and acquit him of the greater.'" Id. at 1105, quoting
17 Keeble v. United States, 412 U.S. 205, 208, 93 S.Ct. 1993. (Citation omitted). In Rosas, the Court
18 found that with *any* foundation in the record for the defense theory, the court is required to instruct
19 the jury consistent with that defense and lesser included charge. Rosas, 122 Nev. at 1268, 147 P.3d
20 at 1108.

21 Defense counsel failed to ask for, and the trial court failed to provide, a jury instruction on
22 Drawing a Deadly Weapon in a Threatening Manner, which says: [a] person having, carrying or
23 procuring...any gun or other deadly weapon, who, in the presence of two or more persons, draws or
24 exhibits any of such deadly weapons in a rude, angry or threatening manner not in necessary
25 self-defense, or who in any manner unlawfully uses that weapon in any fight or quarrel, is guilty of a
26 misdemeanor. NRS 202.320.

1 The Court only needs to look at the exhibits presented by the state in conjunction with the
2 testimony of Martinez-Hernandez. The prosecution presented 3 still photographs (State's Exhibits 1-
3 3) taken from the security footage that shows Martinez-Hernandez with something in his hand down
4 at his side (See photos attached hereto as Exhibit D (D1-D3)). The State presented no video or
5 picture evidence of Martinez-Hernandez pointing anything at anyone. On the contrary, the evidence
6 presented supports Martinez-Hernandez's testimony that he merely removed the gun from its holster.
7 It was the jury's job look at all the evidence and determine which crimes, if any, Martinez-Hernandez
8 was guilty of. Except they were missing a crucial tool. They were missing an essential jury
9 instruction, of a lesser included charge, which would have allowed them to consider the more
10 appropriate charge of drawing a deadly weapon in a threatening manner.

11 Despite the fact that the evidence supported the defense's theory of the case, trial counsel
12 never called witnesses nor used that argument to support giving the "reasonable person" instruction
13 to the jury. The Nevada Supreme Court has consistently held that the defense has the right to have
14 the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or
15 incredible that evidence may be. Furthermore, there is strong support for the "reasonable person"
16 test to apply in this matter.

17 Failing to effectively put the proper instructions before the jury, the trial court and trial
18 counsel substantially increased the risk that the jury would convict Martinez-Hernandez only on the
19 assault with a deadly weapon, in stark discord with the current case law.

20 **E. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE**
21 **PROSECUTORIAL MISCONDUCT AND/OR MOTION TO EXCLUDE/DISMISS**
22 **FOR DESTRUCTION/FAILURE TO PRESERVE EVIDENCE.**

23 Trial counsel failed to address the issue of prosecutorial misconduct. Prosecutorial
24 misconduct can and will result in the reversal of convictions when it denies defendants their right to a
25 fair trial. See McGuire v. State, 100 Nev. 153 (1984). To determine if prosecutorial misconduct was
26 prejudicial, the Nevada Supreme Court examines whether a prosecutor's statements and or action so
27 infected the proceedings with unfairness as to result in a denial of due process. Thomas v. State, 120
28 Nev. 37, 47 (2004). Furthermore, in cases where there is not overwhelming evidence of guilt,

1 prosecutorial misconduct *is not* harmless. See Morris v. State, 112 Nev. 260, 913 P.2d 1264 (1996)
2 (Emphasis Added); see also Anderson v. State, 121 Nev. 511, 118 P.3d 184 (2005).

3 The Strickland standard for determining ineffective assistance of counsel applies to the
4 performance of appellate counsel, as well. "To establish prejudice based on the deficient assistance of
5 appellate counsel, the [petitioner] must show that the omitted issue would have a reasonable
6 probability of success on appeal." Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102 (1996).
7 Defense attorneys who fail to raise any instances of prosecutorial misconduct on appeal are remiss in
8 their duties pursuant to Strickland. See Howard v. State, 106 Nev. 713, 719; 800 P.2d 175, 179
9 (1990). This is because prejudicial prosecutorial conduct constitutes reversible error. Ross v. State,
10 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990).

11 In Sparks v. State, 104Nev.316, 759 P.2d 180 (1988), the Nevada Supreme Court "held that a
12 conviction may be reversed when the state loses evidence if the defendant is prejudiced by the loss."
13 Sanborn, 812 P.2d at 1285 quoting Sparks v. State, 104Nev.316, 759 P.2d 180 (1988). The
14 surveillance video collected by the prosecution or their agents is incomplete in time and
15 corrupted/tampered with evidenced by its jumps spatially in time when played continuously.
16 (Exhibit B p. 94-95: 22-18). The trial court recognized this when it posed a question to Pena of
17 whether he knew how these time discrepancies happened. (Exhibit B p. 96: 16-19). Trial counsel
18 presumably was aware that not all the video was retained by the prosecution **and/or their agents**
19 and/or the video was corrupted/alterd and yet the issue was not objected to nor was a motion to
20 dismiss filed. This resulted in the loss of exculpatory evidence that would likely have resulted in a
21 different verdict. This oversight by trial counsel is only compounded by the lack of investigation and
22 calling of the witness Cervantes as her testimony is directly relevant to possible reasons the video is
23 corrupted and at a minimum would have allowed the jury to weigh the evidence through the lens of
24 the testimony of Pena and Cervantes in relation to the video. Additionally, trial counsel did not file
25 an appeal nor inform defendant of his right to appeal based on the failure to collect and preserve
26 evidence by the State and its agents.

1 Based upon the foregoing, obvious prejudicial misconduct, trial counsel's failure to address
2 these issues constitutes prosecutorial misconduct in addition to the ineffective assistance of counsel.
3 Had these issues been addressed before or during trial and raised on appeal, there was a strong
4 likelihood of success, therefore, reversal of the conviction is warranted.

5 **CONCLUSION**

6 Petitioner respectfully submits that he was denied the right to effective assistance of counsel
7 that resulted in Due Process violations and in violation of the Sixth, Eighth and Fourteenth
8 Amendments of the U.S. Constitution and the Nevada State Constitution. Based upon the foregoing
9 facts and legal arguments, Petitioner Lazaro Martinez-Hernandez respectfully requests that this
10 Honorable Court reverse his conviction and dismiss this matter with prejudice.

11 DATED this 10 day of May, 2012.


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14 
15 Martin Hart, Esq.
16 Nevada Bar No. 005984
17 229 South Las Vegas Blvd., Ste. 201
18 Las Vegas, N89101
19 Attorney for Petitioner
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EXHIBIT A

1 STATE OF NEVADA)
2) ss.
3 COUNTY OF CLARK)

Lazaro Martinez C230327

4 **AFFIDAVIT**

5 I, Marcy Valle, being duly sworn says: That at all times herein Affiant was over 18 years
6 of age, not a party to nor interested in the proceeding in which this Affidavit is made.

7 I further state that I have interviewed witnesses in case C230327. Through conducting
8 interviews with at least 2 witnesses I have gathered information that indicates that defense
9 witnesses existed and were not duly interviewed and used in Mr. Lazaro Martinez' defense. Both
10 subjects witnessed information of critical importance to the defense of Lazaro Martinez.

11 One witness, Manuel Tortosa, stated that he visited Lazaro Martinez' attorney's office
12 with him and explained to the attorney what had occurred. Manuel Tortosa was present during
13 the incident and had a first hand view to the events, his presence is also confirmed by the partial
14 surveillance video that was produced. His testimony would corroborate Lazaro Martinez'
15 defense. Manuel Tortosa was also present during the trial believing he would be called. Manuel
16 was not called to testify.

17 Lynn Cervantes was an employee of Richard Pena, the victim, and she stated she was
18 threatened not to get involved in Lazaro Martinez' case if she wanted to keep her employment.
19 Lynn Cervantes also overheard conversations between Beatriz Hernandez and Richard Pena
20 referring to the alteration, doctoring, or elimination of the video surveillance for this incident.

21 The video has been a central issue to the case as it would either support or refute the
22 allegations of the victim. Lynn Cervantes stated she was present for the trial under the
23 impression that she may be called. She was not called to testify. According to Manuel Tortosa
24 and the defendant prior counsel also knew of the existence of Lynn Cervantes as they mentioned
25 her as a witness to during their meeting(s).

26 Further, the affiant says naught.

27 ///

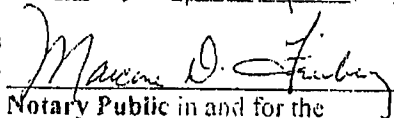
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Signature of Affiant

SUBSCRIBED AND SWORN to before me
this 8th day of February, 2012.



Notary Public in and for the
County of Clark, State of Nevada

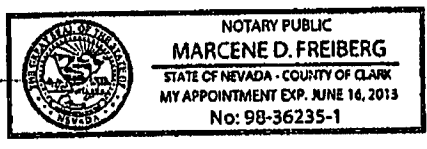


EXHIBIT B

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A. J. Schuman
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

LAZARO MARTINEZ-HERNANDEZ,

Defendant.

CASE #C230237

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE
MONDAY, FEBRUARY 4, 2008

**ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS:
TRIAL BY JURY
VOLUME I**

APPEARANCES:

For the State:

MICHELLE L. THOMAS, ESQ.
DANIEL WESTMEYER, ESQ.
Deputy District Attorneys

For the Defendant:

CHRISTINA A. DIEDOARDO, ESQ.
MARINA E. KOLIAS, ESQ.

Also Present:

Court Interpreter:

ALEX ANDRADE

RECORDED BY: RACHELLE HAMILTON, Court Recorder

1 MONDAY, FEBRUARY 4, 2008, AT 10:06 A.M.

2
3 THE COURT: All right, we're here in State vs. Martinez-Hernandez. Mr.
4 Martinez-Hernandez is present with the court interpreter and Ms. Kolas and
5 DiEdoardo, and the State's represented by Mr. Westmeyer and Ms. Thomas. And
6 we have an issue regarding notices of witnesses by the defense; Mr. Westmeyer.

7 MR. WESTMEYER: That's correct, Judge. As we discussed previously I
8 received notice on Friday afternoon that the defense wished to call, in addition to
9 the Defendant, two other witnesses. These witnesses were never -- the witness list
10 for the defense was never filed with the Court. I received a copy of a fax indicating
11 that they wish to call these witnesses Friday afternoon. I didn't actually see it
12 myself until this morning and I'm asking that any witnesses other than the
13 Defendant be excluded as not timely filed, and pursuant to NRS 174.234, Judge.

14 MS. DIEDOARDO: Certainly, Your Honor, I mean what we would state with
15 regard to Mr. Maceo, the State was on notice that he might be called as a witness
16 since he's the individual that in their own victim statement is -- that gives rise to this
17 entire affair. He's the guy who was originally hit by a bottle and who then calls Mr.
18 Martinez-Hernandez to come to the scene and what gives -- and that's undisputed.

19 The State either knew about this or could have discovered it through
20 some elementary investigation. I think it's clearly a reasonable foreseeable
21 witness.

22 With regard to the other individual that the defense is seeking to bring
23 in, he was an eye witness that it's my understanding Mr. Tortosa [phonetic] -- okay,
24 Court's indulgence for a moment, Your Honor.

25 Your Honor, if the State's -- if the Court's inclined to note that -- to go

1 with the State's objection to Mr. Tortosa in the defense's case in chief, we would
2 ask leave to present him as a rebuttal witness. I think the --

3 THE COURT: You don't get to present rebuttal. They go, you go; that's not
4 rebuttal, that's your case in chief. So that's not rebuttal. You don't --

5 MS. DIEDOARDO: Understood, Your Honor.

6 THE COURT: They have rebuttal, you don't have rebuttal.

7 MS. DIEDOARDO: Understood, Your Honor.

8 THE COURT: That argument won't work with me either.

9 MS. DIEDOARDO: Understood, Your Honor. Then I think at this point, Your
10 Honor, I think what we would ask -- I mean we would ask of course that the Court at
11 its discretion to allow us to present both of them, but if the Court is inclined to grant
12 the State's motion in part that it allow us to present Mr. Maceo given that Mr. Mr.
13 Maceo is referenced in both the statement of the victim and in the police report.

14 THE COURT: Okay.

15 MS. DIEDOARDO: And the State was on reasonable notice.

16 THE COURT: All right, Mr. Westmeyer, let me hear from you.

17 MR. WESTMEYER: Well Judge, I believe the proper remedy here for
18 174.234 is listed in 174.295: The judge may prohibit the party from introducing in
19 evidence the material not disclosed. That's what I'm asking for in this case.

20 THE COURT: Did you know about Maceo? Is he in the discovery?

21 MR. WESTMEYER: I don't believe he's mentioned by name.

22 MS. DIEDOARDO: Yes, he is.

23 MR. WESTMEYER: I think what it says, and --

24 THE COURT: Somebody show me.

25 MS. DIEDOARDO: Your Honor, he's not mentioned specifically --

1 MS. KOLIAS: No he is -- right here.

2 MS. DIEDOARDO: Okay, Your Honor if I may approach. I'm looking here at
3 page 14 of the voluntary statement.

4 [Colloquy]

5 THE COURT: Let's see, where is it?

6 MS. DIEDOARDO: About midway down the page, Your Honor. I think the
7 statement reads his friend, and there's an open paren and it says Alexander --

8 THE COURT: Alexander Maceo was -- okay.

9 MS. DIEDOARDO: Thank you, Your Honor.

10 THE COURT: All right, well here's what we're going to do. The one whose
11 names was mentioned in the report, he can come in. The State -- is he here?

12 MS. KOLIAS: Yes, Your Honor.

13 THE COURT: Okay, well you all -- somebody can go out and chat with him
14 and find out what he's going to say. The other one pursuant to 174.234, no? Not
15 on the list?

16 MS. DIEDOARDO: It's not on the list, Your Honor, that is true.

17 THE COURT: The list was late, the list is -- shall be filed five days before.
18 The State always gives you notice of their witnesses and their information because
19 it's attached, so that argument won't work with me either. So as long as the State
20 has an opportunity to talk to Maceo beforehand --

21 MS. KOLIAS: I'd like to see the State's witnesses, Your Honor, because I did
22 not receive notice of theirs until I called on Friday what witnesses. They -- it was
23 not --

24 THE COURT: Did you not get a copy of an information with the witness list
25 attached?

1 Q And did you ask the video technician to provide to Metro any videotape
2 from the incident with Mr. Maceo?

3 A No, nobody asked me for that.

4 Q Okay. When the police arrived was Mr. Martinez-Hernandez still on the
5 property?

6 A Yes.

7 Q Okay, was he doing any -- where was he -- lay a foundation -- if you
8 recall?

9 A He was right there with -- and the policeman came and he has the gun -
10 - he has a gun in the car, he put in the car.

11 Q Okay, so at this point in time Mr. Martinez-Hernandez, it's your
12 recollection that he's not -- he doesn't have the gun on him at this point, is that
13 correct?

14 A It is with the gun now.

15 Q This picture you say he's got the gun?

16 A Yes. Yes.

17 Q Okay well why are all these -- there are other people standing around,
18 and the record at the time shows on this is now showing at times four as 4:02:06 --
19 04:02:06. I notice there's a number of people standing around but no one seems to
20 be running, does that seem odd to you?

21 A This guy here. These other people.

22 Q Okay. You say he's running but he seems to just be -- I mean I realize
23 it's a still camera -- perhaps let's -- we can play the tape forward and see. Now
24 we're up to .16, and now it's back to .401, now back to 4 o'clock at 052.

25 A What you see different time because the camera runs, it won't stay in

1 one position, it rotates back and forth.

2 Q Well I recognize that, Mr. Pena. I'm not concerned with the camera
3 oscillating, I'm concerned with the discrepancies as to the time. I notice that now
4 we're at 04:01:14 -- 16 seconds, excuse me.

5 Mr. Pena, have you had incidents where people display firearms in front
6 of the club before this instance?

7 A No.

8 Q Okay.

9 A Not that I recall.

10 Q Not that you recall. Now we're looking at 4:01. Is the tape -- apparently
11 the tape is now -- oh, may we continue to play it, please? And now we're at 4:01.

12 You mentioned earlier that the tape -- that the reason the times were
13 different is because the camera was oscillating, and I guess I'm just not clear on
14 how the oscillating camera would have to do with the time going forward.

15 A The time rotated as you see. We didn't stop at hitting the top. The
16 cameras keep going and going. You can see the seconds going.

17 Q Right but it's -- but sir, the problem is that the second -- that the time is
18 going forwards and backwards, that's been the difficulty here.

19 MR. WESTMEYER: I object, Judge, is there a question pending?

20 MS. DIEDOARDO: Well what I'm trying to find out is what's his explanation
21 for that.

22 THE COURT: Do you have more than one camera, or is it just one?

23 THE WITNESS: One outside, yes.

24 THE COURT: One outside?

25 BY MS. DIEDOARDO:

1 Q So this would be the only camera then, Mr. Pena?

2 A The only camera, yes.

3 Q Okay, so just so that we're clear, following up counsel's question, you
4 don't have any explanation for why the tape is moving faster then slower, and then
5 why the time keeps moving?

6 A That's the way the manufacturing makes any cameras in any casinos or
7 anywhere. Unfortunately I only have one camera and that's the evidence we
8 provide.

9 Q Okay so it's your testimony that cameras in all casinos in Las Vegas,
10 the time code will go forward and backwards? That's what I heard you say.

11 A I didn't say that, I just --

12 MR. WESTMEYER: I'm going to object to that. I don't think there's any
13 foundation for that.

14 MS. DIEDOARDO: That restates what the witness said. We can do a read
15 back but I think that's what he just said.

16 THE COURT: No we're not doing any read backs. Do you have any idea --
17 let's finally -- this is the last time we're going to bring this up. On the video that we
18 see there's some portions that show the time at one time and then a time in another
19 time; do you have any idea how that happened?

20 THE WITNESS: No, ma'am.

21 THE COURT: Thank you. Move on.

22 MS. DIEDOARDO: Okay, fair enough, Your Honor.

23 BY MS. DIEDOARDO:

24 Q Mr. Pena, can you show us the specific time on the tape where you
25 believe Mr. Martinez-Hernandez had the gun?

1 Q Okay and when you walked to the door, who was at the door?
2 A Richard Pena, Manuel Tortosa and another security.
3 Q Okay, did you go directly to the door?
4 A Yes.
5 Q Okay, and when you went to the door what happened after that?
6 A I asked why they didn't call the ambulance and the police.
7 Q Okay, did anybody have anything in their hands -- did Mr. Pena have
8 anything in his hands when you went to talk to him?
9 A Not at that moment.
10 Q Okay, did Beatrice Hernandez have anything in her hands at that time?
11 A She was not there.
12 Q Okay, you said that she was there. Was she there or was she not
13 there?
14 A Manuel Tortosa and another security, not her.
15 Q Okay, very good. Then after -- did you have words with Mr. Pena?
16 THE COURT: That's a yes or no answer. Did you have words with Mr. Pena?
17 BY MS. KOLIAS:
18 Q Yes or no?
19 A No.
20 Q Did you have any conversation with Mr. Pena?
21 A Yes.
22 Q Okay, and what was said during your conversation?
23 A The problem as to why the police and the ambulance were not called,
24 and he told me get out of my business and he pushed me.
25 Q Okay, and after he pushed you what happened after that?

1 A He --

2 THE INTERPRETER: Interpreter would like to clarify something, Your Honor.

3 THE COURT: Sure.

4 [Colloquy]

5 THE WITNESS: Richard Martinez had a flashlight just like the other security.

6 BY MS. KOLIAS:

7 Q Is this another person?

8 A Yes.

9 Q Okay so when -- after Mr. Pena told -- pushed you and told you to stay
10 out of his business did -- what happened after that? More people came or what?

11 A No the other security.

12 Q The other security, this other Mr. Martinez, correct?

13 A I don't know his name.

14 Q Okay, so another person came up? Another security person came up?

15 A Yes.

16 Q Okay and what happened after that?

17 A I was pushed and I was followed all the way to the car with a flashlight
18 like he was going to hit with it, and I said: I have a gun.

19 Q And who did you tell this to?

20 A To them two.

21 Q Who is them two?

22 A The other security who's not been mentioned here.

23 Q Okay, and these were two other securities not mentioned?

24 A No, just one, just one.

25 Q Okay, so did you -- you told them that you had a gun; did you tell Mr.

1 Pena you had a gun?

2 A Yes.

3 Q Where was Mr. Pena when you said I have a gun?

4 A He left running. He went inside and I called the police.

5 Q Okay, did you ever point the gun to Mr. Pena?

6 A Never.

7 Q Where were you standing when you said I have a gun, where were you
8 standing?

9 A I was not running, like they were threatening me so I was like going to
10 my car.

11 Q Where were you when you said I have a gun? Were you standing by
12 your car? Were you standing by the door? Were you standing by Mr. Pena?
13 Where were you standing.

14 THE COURT: Hold on. You only get to ask one question at a time, counsel,
15 so where were you standing will work.

16 THE WITNESS: Like close to my car.

17 BY MS. KOLIAS:

18 Q Okay, where was Mr. Pena standing when you said that?

19 A He was facing me with the other security.

20 Q Okay, so were there just two of them facing you?

21 A Yes.

22 Q Okay, and after that, what happened after that?

23 A When I opened the door they left. They left and I called the police.

24 Q And then what happened after that?

25 A The police came, I was talking to the police, they took away my phone, I

1 was thrown to the floor, and I was arrested.

2 Q Where was your gun this whole time?

3 A In my car.

4 Q Okay, did you ever have the gun in your hand?

5 A Yes.

6 Q And tell us when you had the gun in your hand.

7 A When I opened the car door I retrieved it and then they saw it.

8 Q And then what happened after they saw the gun.

9 A They left.

10 Q And you stayed there in the parking lot?

11 A Yes.

12 Q And why did you stay in the parking lot?

13 A Because I have to wait until the police will arrive.

14 Q And why were you waiting for the police to come?

15 A Because I not leave the scene.

16 Q And why did you not want to leave the scene?

17 A Because if I would leave I would be charged with something now

18 because I would be leaving.

19 Q Okay, so you stayed because you wanted to show you were innocent?

20 A Yes.

21 Q And you were the person that called the police, correct?

22 A Yes.

23 Q And why did you call the police?

24 [Colloquy]

25 MS. KOLIAS: Okay, may we approach the bench then? May we approach

1 Your Honor?

2 THE COURT: Okay.

3 [Bench conference -- not transcribed]

4 THE COURT: Ask -- counsel would you re-ask the question at issue, which is
5 -- and then if we -- we'll see how --

6 BY MS. KOLIAS:

7 Q Did you take the gun out of the car?

8 A No.

9 Q Okay, did you take the gun out of the holster?

10 A Yes.

11 Q Did the -- Mr. Pena and the other security guards see it?

12 A Yes.

13 Q And then what did you do?

14 A I left it on the seat.

15 Q Okay, so you left the gun on the seat then?

16 A Yes.

17 Q And you waited for the police to come?

18 A Yes.

19 Q Okay did you wait because you were afraid that -- why did you wait?

20 THE COURT: Why did you wait?

21 BY MS. KOLIAS:

22 Q Why did you wait for the police?

23 A I waited for the police to show that I didn't do anything, and besides that

24 I know him.

25 Q You know who?

1 A I know Richard.

2 Q And what does that have to do with the police?

3 A Because he could have made up lots of things. I don't know, lots of
4 things.

5 Q And in this case did he make up a lot of things?

6 MR. WESTMEYER: I'm going to object at this point, Judge. That's -- he
7 doesn't know what Richard's -- if the testimony is Richard made something up he
8 wouldn't know that. He has no knowledge about what Richard knows.

9 MS. DIEDOARDO: Well Judge, he was here to watch Mr. Pena testify, I think
10 we know -- he can speak to what he's heard Mr. Pena said.

11 THE COURT: And that would be for the jury to decide. And Ms. DiEdoardo,
12 she's doing the witness, she does the objections.

13 MS. DIEDOARDO: Understood Your Honor.

14 THE COURT: She does the answers. She does everything.

15 MS. DIEDOARDO: I apologize, Your Honor.

16 THE COURT: One at a time.

17 The objection is sustained. Don't answer the question. Ask your next
18 question.

19 BY MS. KOLIAS:

20 Q Did you point a gun at Richard?

21 A No.

22 Q Did you threatened Richard and tell him that you were going to kill him?

23 A No.

24 Q Were you just there to find out why your friend wasn't getting any help?

25 A Yes.

EXHIBIT C

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Counsel for Defendant
LAZARO MARTINEZ-HERNANDEZ

**DISTRICT COURT
CLARK COUNTY, NEVADA**

STATE OF NEVADA,

Plaintiff,

CASE NO.: C-230237
DEPT: V
JUDGE JACKIE GLASS

v.

DEFENDANT'S LIST OF WITNESSES

MARTINEZ-HERNANDEZ, LAZARO,
#1493472

TRIAL DATE: 02/04/08
TRIAL TIME: 10:00 a.m.

TO: STATE OF NEVADA

Defendant hereby identifies the following individuals likely to testify as
witnesses in the above-referenced criminal Trial:

1	Lazaro Martinez-Hernandez	The Defendant is likely to testify as to the facts and circumstances of the incident
2	Manuel Tortosa	This witness was at the scene and will testify as to the facts and circumstances regarding the subject incident.
3	Alex Maceo-Sanabria	This witness was at the scene and will testify as to the facts and circumstances preceding the subject incident.
4	LVMPD Person Most Knowledgeable and/or Custodian of Records regarding evidence tape	This person is expected to testify as to the chain of custody of the videotape evidence in this case and the practice, procedures and protocols of LVMPD regarding the same. This witness will likely testify as to whether such protocols were followed in this case as well.

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	Defendant reserves the right to name additional witnesses who may have relevant information as they become known.
	Defendant reserves the right to call any and all witnesses produced and/or identified by the Prosecution .
	Defendant reserves the right to call upon any other witnesses for purposes of rebuttal and impeachment.
	Defendant reserves the right to name any experts prior to trial.
	Defendant reserves the right to supplement this witness list as information is learned.

DATED this 2nd day of February 2008.

KOLIAS LAW OFFICES




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CERTIFICATE OF SERVICE

I certify that on the 17 day of February 2008, I caused the foregoing document entitled DEFENDANT'S LIST OF WITNESSES via facsimile upon the following in the above said cause:

Daniel E. Westmeyer, Esq.
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of KOLIAS LAW OFFICES

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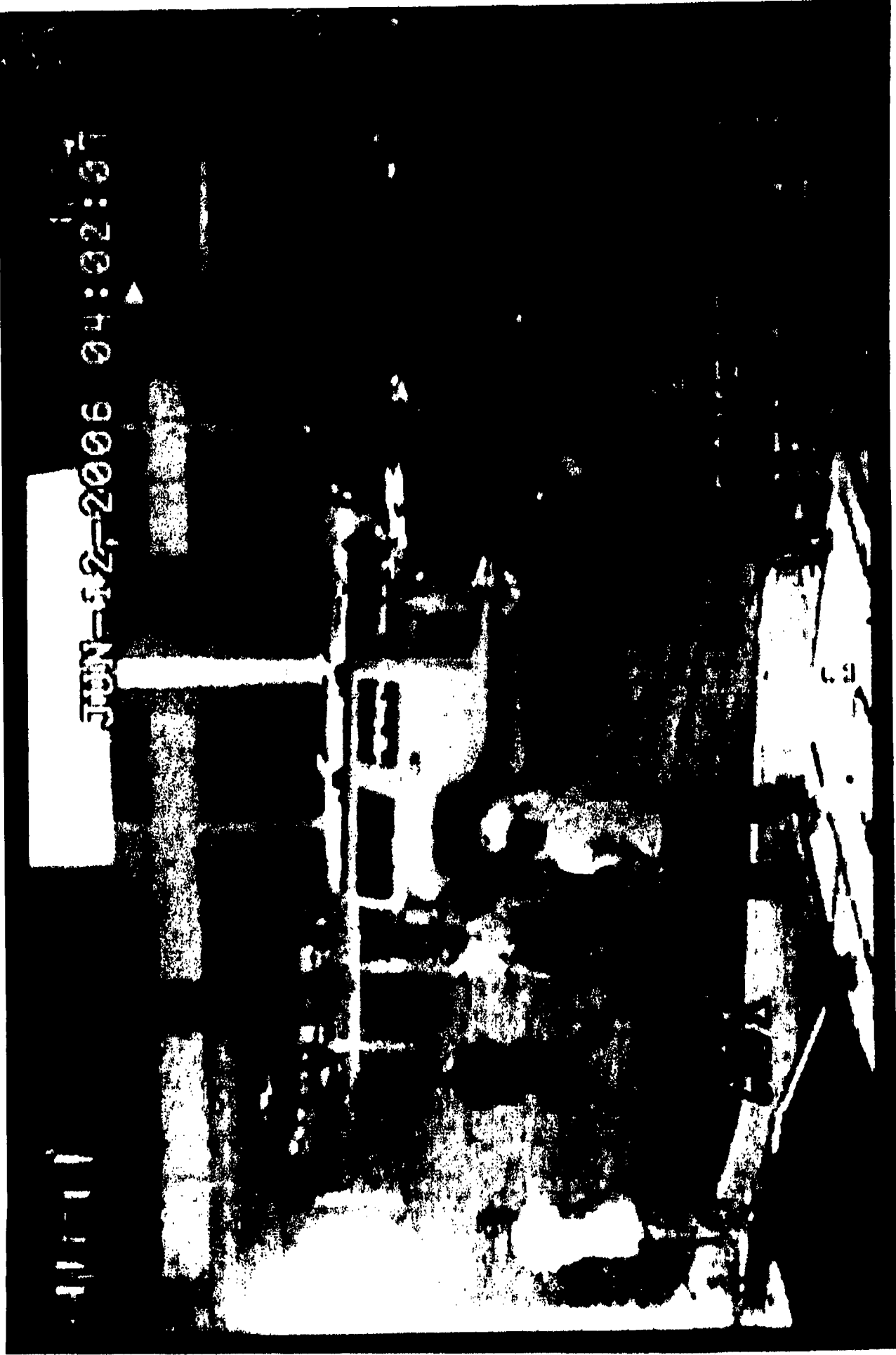
FAX COVER SHEET

DATE:	February 3, 2008
TO:	Daniel E. Westmeyer, Esq. Clark County District Attorney's Office
PHONE NO.:	(702) 671-0907
FAX NO.:	(702) 477-2909
FROM:	Marina E. Kollas, Esq.
# OF PAGES:	<u>4</u> Pages / Including Cover Sheet
REGARDING:	<u>State v. Martinez-Hernandez</u> Case #: C- 230237
DOCUMENTS:	02-03-08 Defendant's List of Witnesses
COMMENTS:	

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EXHIBIT D

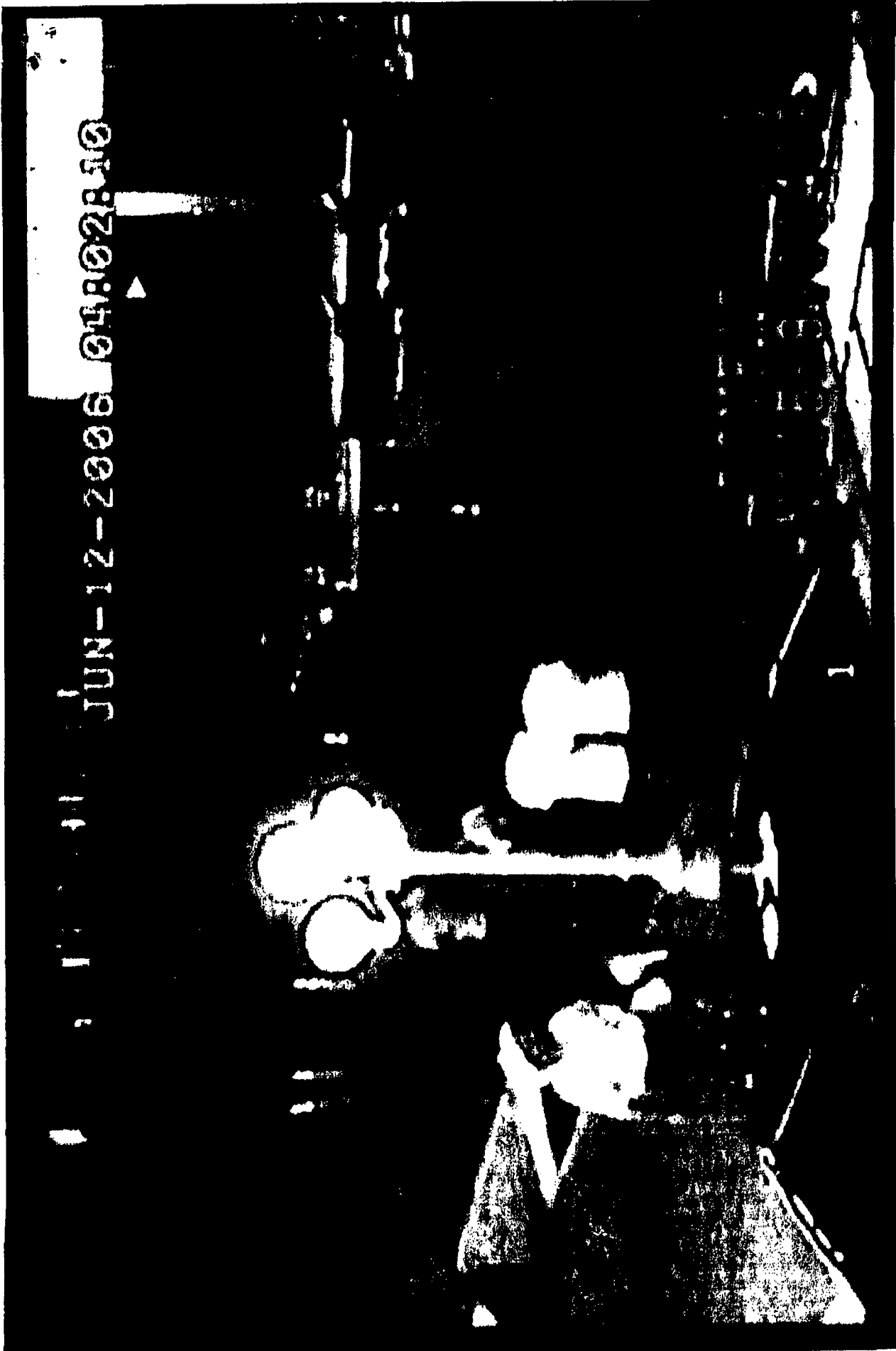
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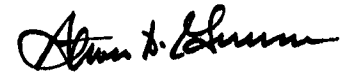
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CLERK OF THE COURT

1 RSPN
2 STEVEN B. WOLFSON
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4 Nevada Bar #001565
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11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10
11 Plaintiff,

12 -vs-

13 LAZARO MARTINEZ-HERNANDEZ,
14 #1493472

Defendant.

CASE NO: C230237

DEPT NO: XVII

15 STATE'S RESPONSE AND MOTION TO DISMISS SUPPLEMENTAL
16 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

17 DATE OF HEARING: AUGUST 17, 2012
18 TIME OF HEARING: 9:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through THOMAS CARROLL, Chief Deputy District Attorney, and
21 hereby submits the attached Points and Authorities in Opposition to Defendant's
22 Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).

23 This response is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

26 ///

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On February 16, 2007, Lazaro Martinez-Hernandez (hereinafter "Defendant") was
4 charged by way of Information with one (1) count of Assault with a Deadly Weapon (Felony
5 – NRS 200.471). Defendant's jury trial began on February 4, 2008. On February 5, 2008,
6 the jury found Defendant guilty of Assault with a Deadly Weapon.

7 Defendant was present in court with counsel on April 10, 2008, and sentenced to
8 twelve (12) to thirty-six (36) months in the Nevada Department of Corrections. This
9 sentence was suspended and Defendant was placed on probation for an indeterminate period
10 not to exceed three (3) years. Defendant was given the following conditions of his
11 probation: (1) submit his person, property, place of residence, vehicle, or areas under his
12 control to search at any time, with or without a search warrant, for evidence of a crime or
13 violation of probation by the Division of Parole and Probation (P&P) or its agent; (2) comply
14 with any curfew imposed by P&P; (3) complete impulse control and anger management
15 counseling as deemed necessary by an evaluation; (4) have no contact whatsoever with the
16 victim or the victim's family; (5) obtain and maintain full-time employment; and (6) not
17 possess any weapons. Judgment of Conviction was filed on April 25, 2008. Defendant did
18 not file a direct appeal.

19 Thereafter, P&P provided the Court with a written statement claiming that Defendant
20 violated the terms of his probation. On January 21, 2010, Defendant was again present in
21 court with counsel for a probation revocation hearing. Following the revocation hearing, the
22 Court revoked Defendant's probation and instituted the underlying sentence of twelve (12) to
23 thirty-six (36) months in the Nevada Department of Corrections. Defendant was given
24 ninety-six (96) days credit for time served. The Amended Judgment of Conviction was filed
25 on February 1, 2010. Defendant did not file an appeal from the revocation of his probation.

26 ///

27 ///

28 ///

1 Defendant filed a Motion for Transcripts at State's Expense on August 20, 2010.¹
2 The State filed an opposition on August 27, 2010. On October 5, 2010, the Court denied the
3 motion.

4 On February 1, 2011, Defendant's counsel filed a Petition for Writ of Habeas Corpus.
5 Defendant's counsel then filed a Supplemental petition on May 18, 2012. The State
6 responds as follows:

7 **ARGUMENT**

8 **I DEFENDANT'S PETITION IS TIME BARRED UNDER NEVADA REVISED**
9 **STATUTE 34.726.**

10 Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause
11 shown for delay. Pursuant to NRS 34.726:

12 1. Unless there is good cause shown for delay, a petition that
13 challenges the validity of a judgment or sentence must be filed
14 within 1 year of the entry of the judgment of conviction or, if an
15 appeal has been taken from the judgment, within 1 year after the
16 Supreme Court issues its remittitur. For the purposes of this
17 subsection, good cause for delay exists if the petitioner
18 demonstrates to the satisfaction of the court:

- 17 (a) That the delay is not the fault of the petitioner; and
18 (b) That dismissal of the petition as untimely will unduly
prejudice the petitioner.

19 The Defendant's petition does not fall within this statutory time limitation. The
20 Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain
21 meaning. Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001). As per the
22 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from
23 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
24 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

25 In the instant case, Defendant did not file a direct appeal. The original Judgment of
26 Conviction was filed on April 25, 2008. An amended Judgment of Conviction following the
27

28 ¹ It is possible that Defendant actually attempted to file this document sometime after July 7, 2010, the date he signed it, however, he was still far beyond the thirty (30) day time limitation in which to file an appeal. NRAP 4.

1 revocation of his probation was filed February 1, 2010. Thus, any petition challenging the
2 original conviction had to be filed by Monday April 27, 2009. See Sullivan v. State, 120
3 Nev. 537, 96 P.3d 761, (2004). All of Defendant's claims pertain to this original conviction
4 but his initial petition which he has now supplemented was not filed until February 1, 2011,
5 over a year and a half beyond his April 27, 2009 deadline for filing a timely petition.

6 Additionally, the one-year time limit for preparing petitions for post-conviction relief
7 under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 53 P.3d 901
8 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late
9 despite evidence presented by the defendant that he purchased postage through the prison
10 and mailed the Notice within the one-year time limit.

11 Furthermore, the Nevada Supreme Court has held that the district court has *a duty* to
12 consider whether a defendant's post-conviction petition claims are procedurally barred. State
13 v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070 (2005). The Court found that
14 "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is
15 **mandatory**, [emphasis added]" noting:

16 Habeas corpus petitions that are filed many years after conviction are an
17 unreasonable burden on the criminal justice system. The necessity for a
18 workable system dictates that there must exist a time when a criminal
conviction is final.

19 State v. Eighth Judicial District Court, 121 Nev. at 231, 112 P.3d at 1074. Additionally, the
20 Court noted that procedural bars "cannot be ignored [by the district court] when properly
21 raised by the State." 121 Nev. at 233, 112 P.3d at 1075. The Nevada Supreme Court has
22 granted no discretion to the district courts regarding whether to apply the statutory
23 procedural bars; the rules *must* be applied.

24 In this case, Defendant filed the original and supplemental Petition for Writ of Habeas
25 Corpus outside of the one-year time limit. Defendant's original Judgment of Conviction was
26 filed on April 25, 2008. Defendant did not file the original Petition until February 1, 2011.
27 The instant supplemental petition was filed May 18, 2012. Both are over the one (1) year

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1 time prescribed in NRS 34.726. Absent a showing of good cause for this delay, Defendant's
2 claim must be dismissed because of its tardy filing.

3 **II DEFENDANT HAS NOT SHOWN GOOD CAUSE FOR THE DELAYED**
4 **FILING OF PETITION.**

5 In the instant Petition, Defendant has not established good cause for the delay in filing
6 a late petition. "Generally, 'good cause' means a 'substantial reason; one that affords a legal
7 excuse.'" Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) *quoting Colley v.*
8 State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). "In order to demonstrate good cause,
9 a petitioner must show that an impediment external to the defense prevented him or her from
10 complying with State procedural default rules." Hathaway, 71 P.3d at 506 *citing Pellegrini v.*
11 State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353,
12 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).
13 An impediment external to the defense can be demonstrated by a showing "that the factual or
14 legal basis for the claim was not reasonably available to counsel or that some interference by
15 officials made compliance impracticable." Hathaway, 71 P.3d at 506.

16 In this case, Defendant has not given any legally relevant excuse for failure to file his
17 Petition in a timely manner. Defendant has not stated any facts that would show good cause
18 for not filing his Petition in the required time frame. In fact, Defendant does not even attempt
19 to demonstrate good cause. Defendant has also stated no facts that would show he would be
20 in any way prejudiced by having to comply with the procedural time bar. Therefore, since
21 the Defendant cannot show good cause or actual prejudice for failing to comply with the one
22 year time limit for Petitions, the instant Petition should be dismissed.

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CONCLUSION

Based on the foregoing arguments, the State respectfully requests this Honorable Court to deny Defendant's Supplemental Petition for Writ of Habeas Corpus.

DATED this 2nd day of July, 2012.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ THOMAS CARROLL
THOMAS CARROLL
Chief Deputy District Attorney
Nevada Bar #004232

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response And Motion To Dismiss Supplemental Petition For Writ Of Habeas Corpus (Post-Conviction), was made this 2nd day of July, 2012, by facsimile transmission to:

MARTIN HART, ESQ.
384-6006

BY: /s/ C. Cintola
C. Cintola
Employee of the District Attorney's Office

YK/TC/cc


CLERK OF THE COURT

1 **ORDG**

2 **DISTRICT COURT**

3 **CLARK COUNTY, NEVADA**

4 STATE OF NEVADA,)

5 Plaintiff,)

6 vs.)

7 LAZARO MARTINEZ-HERNANDEZ,)

8 Defendant.)

Case No.: C230237

Dept. No.: XVII

9
10 **ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS**

11 This matter having come on for hearing on the 27th day of November, 2012; Michael
12 Radovic, Esq., appearing for and on behalf of the State; Martin Hart, Esq., appearing for and on
13 behalf of the Defendant; and the Court having heard oral argument of counsel, and being fully
14 advised in the premises;

15 The Court finds that Defendant requested that an appeal be filed and it was not done.
16 Therefore, pursuant to Lozada v. State, the Petition for Writ of Habeas Corpus shall be granted and
17 Defendant shall be allowed to appeal;

18 IT IS HEREBY ORDERED that the post-conviction Writ of Habeas Corpus shall be, and it
19 is hereby Granted.

20 Pursuant to Nev.R.App.P. 4(e), this Court finds that Defendant, Lazaro Martinez-Hernandez
21 is entitled to a direct appeal with the assistance of appointed counsel. Martin Hart, Esq., is hereby
22 appointed as counsel for the direct appeal. The District Court Clerk is directed to prepare and file
23 within five (5) days of the filing of this Order a notice of appeal from the Judgment of Conviction
24 and sentence on behalf of the petitioner that substantially complies with Form 1 in the Appendix of
25 Forms to the Nevada Rules of Appellate Procedure.

26 DATED this 19 day of July, 2013.

27 
MICHAEL VILLANI
DISTRICT COURT JUDGE 

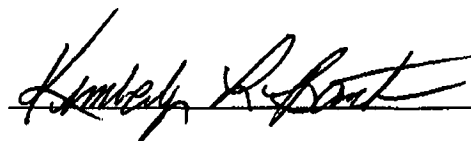
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CERTIFICATE OF SERVICE

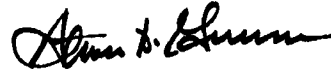
I hereby certify that I served a copy of the foregoing, by mailing, by placing copies in the attorney folder's in the Clerk's Office or faxing as follows:

Michael Radovic, DDA; Via Facsimile: 455-6447
Martin Hart, Esq. - Via Facsimile; 384-6006

A handwritten signature in black ink, appearing to read "Kimberly A. Hart", is written over a horizontal line.

COPY

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAZARO MARTINEZ-HERNANDEZ,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 07C230237

Dept No: XVII

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on July 19, 2013, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on July 22, 2013.

STEVEN D. GRIERSON, CLERK OF THE COURT



Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 22 day of July 2013, I placed a copy of this Notice of Entry in:

The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:

Lazaro Martinez-Hernandez
1716 Weeping Willow Ln.
Las Vegas, NV 89104

Martin Hart, Esq.
229 S. Las Vegas Blvd., Ste. 200
Las Vegas, NV 89101



Heather Ungermann, Deputy Clerk