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IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDYS MARTINEZ,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA)
)
Respondent.)
_____)

Supreme Court Case No.:75760
District Court No.: C226586
e-file

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 and must be disclosed.

1. Attorney of Record: Betsy Allen
2. Publicly-held Companies Associated: None
3. Law Firm(s) Appearing in the Court(s) Below: Law Office of Betsy Allen

DATED this 26th day of October, 2018.

s/s Betsy Allen
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I. STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the instant matter pursuant to Nev. Rev. Stat. § 177.015(3). The Appellant appeals from his Findings of Fact, Conclusions and Law and Order, which was entered on May 18, 2018. Pursuant to NRAP 4(b)(1), the Appellant filed a timely notice of appeal on April 27, 2018. Appellant filed three Motions to Expand the Briefing Schedule.

II. ROUTING STATEMENT

This case invokes the original jurisdiction of the Nevada Supreme Court as it involves a Life sentence. This is a post-conviction appeal.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Petitioner request for State post-conviction relief is entitled to full consideration on the merits based on the principles of equitable tolling

- A. Extraordinary circumstances external to Martinez, prevented him from timely filing a post-conviction writ.

1. Martinez was unable to speak, read or write English...

2. Martinez lacked meaningful access to the prison law library.

3. Martinez could not obtain a copy of his appellate case file.

- B. Martinez exercised reasonable diligence in pursuing his rights.

III. Martinez's claims for ineffective assistance of counsel should be decided on the merits.

STATEMENT OF THE CASE

A. State Court Proceedings

On September 29, 2006, Petitioner FREDYS A. MARTINEZ [hereinafter “Petitioner” or “Martinez”] was charged by way of Grand Jury Indictment with Count 1- Burglary While in Possession of a Deadly Weapon (Felony-NRS 205.060); Count II- Burglary With Use of a Deadly Weapon, (Felony-NRS 200.481); Count III- First Degree Kidnapping with use of a Deadly Weapon (Felony- NRS 200.310, 200.320, 193.165); and Count IV- Sexual Assault with use of a Deadly Weapon (Felony- NRS 200.364, 200.366, 193.165) for acts committed on August 16, 2006 against the alleged victim in this case, Bianca Hernandez. (PA001-003).

Petitioner’s 2-day jury trial began on April 11, 2007. On April 12, 2007, the jury (after deliberating for no more than 30 minutes) found Petitioner guilty of Counts 1, II, and III and found not guilty of Court IV. The sentencing occurred on May 24, 2007 at which time Petitioner was sentenced as follows: Count I- Sixty (60) to One Hundred Eighty (180) months; Count II- Forty Eight (48) to One Hundred Twenty (120) months to run concurrently with Count I; Count III- Sixty (60) months to Life, plus an equal and consecutive term of Sixty (60) months of Sixty months to Life for the use of a deadly weapon; the entire sentence to run

concurrently to Counts I and II. Petitioner was given credit for two hundred eighty-one (281) days for time served. (PA004-005).

The Judgment of Conviction was filed on May 31, 2007. A Notice of Appeal was filed on June 5, 2007. Appellant's Opening Brief was filed on December 12, 2007. The Nevada Supreme Court concluded that Petitioner's arguments lacked merit and affirmed Petitioner's conviction on May 7, 2008. (PA006-012).

On October 23, 2009, Martinez filed a motion for additional funds so he could continue to pursue a defense in his case. In a hearing held on the matter on November 9, 2009, the district court denied the motion noting that the circumstances did not warrant a relief because the time for filing a post-conviction writ had passed. (PA013-018). An Order denying the requested relief was filed on January 9, 2010. (1a).

On April 2, 2010, Petitioner filed a motion for appointment of counsel (presumably in connection with the desire to file a post-conviction writ of habeas corpus). (PA019-021). In response, the State filed an opposition primarily arguing that Petitioner's request was frivolous because any petition for post-conviction relief for which he sought the assistance of counsel was time-barred. (PA022-025) At the hearing on the matter held on April 14, 2010, Petitioner's motion was

denied and the associated order was filed on April 24, 2010. (PA026-027). Petitioner filed a Notice of Appeal on April 22, 2010. (PA028-0037).

Simultaneous to the Notice of Appeal, Petitioner filed a Motion to Vacate Judgment of Conviction on April 21, 2010. Petitioner argued that he did not get a fair trial because his statements to the jury were not interpreted and constituted a denial of due process. The district court denied his motion on May 5, 2010, noting that Petitioner should have filed a Writ of Habeas Corpus but also noted that even if a petition had been filed, it would have been denied as time-barred given the Remittitur in his case had issued in 2008. (PA038). An Order denying the motion was filed on May 21, 2010. (PA032).

Petitioner then filed a Petition for Writ of Habeas Corpus on April 30, 2010 and argued that he was entitled to relief because his trial proceedings were fundamentally unfair. (PA044-050) In response, the State filed an opposition arguing that Petitioner's Writ should be denied as time-barred pursuant to NRS 34.726(1). The State also argued that the petitioner had not set forth a good cause reason for the untimely filing or otherwise demonstrated that he suffered actual prejudice sufficient to overcome the mandatory time bar. (PA051-54). The district court agreed with the State and denied Martinez's Petition at a hearing held on July 14, 2010. (PA056-061). Martinez appealed the district court to no avail as the

Nevada Supreme Court upheld the district court's order and issued an Order of Affirmance on July 13, 2011. Remittitur issued on August 10, 2011. (PA062-067).

After filing other motions that were deemed to be untimely or fugitive, Petitioner Martinez then sought federal court relief.

B. Federal Court Proceedings

On December 14, 2010, Petitioner filed a federal post-conviction writ of habeas corpus pursuant to U.S.C. §2254 by a person in state custody and was assigned Case No. 3:10-cv-00777-ECR. (PA 390-413). Petitioner also filed a motion for appointment of counsel which was granted on August 19, 2011. (PA 414-420). Counsel for Petitioner filed a First Amended Petition for Writ of Habeas Corpus on March 13, 2010. In the Supplemental Petition, counsel argued that: (1) Martinez's convictions for First Degree Kidnapping and Battery with Use of a Deadly Weapon violate the Fifth Amendment's prohibition against double jeopardy; (2) The State committed prosecutorial misconduct during closing arguments in violation of Martinez's right to due process and a fair trial guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution; (3) Martinez was in custody in violation of his due process rights pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution because evidence adduced at trial was insufficient to prove Kidnapping in the First Degree beyond a reasonable doubt; (4) Martinez was deprived of a fundamentally fair trial guaranteed by the

Sixth and Fourteenth Amendments due to the lack of a court interpreter; and (5) Martinez was in custody in violation of his Sixth Amendment right to the effective assistance of counsel because counsel failed to adequately investigate the availability of relevant witnesses and to present a theory of defense to the jury. (PA 421-436).

In response, the Attorney General's Office (AG) filed a motion to dismiss the petition on August 6, 2012. The AG argued that the federal petition was untimely because it was not filed within the one-year statute of limitations period set forth in U.S.C. § 2244(d)(1); the federal petition was procedurally defaulted because the issue of Petitioner's un-timely filing of a post-conviction writ had already been decided by the state supreme court; and the federal petition should be dismissed because it contained claims that had not been exhausted in state court. (EOR 60-67).

On November 26, 2012, counsel for Petitioner filed an opposition to the AG's motion to dismiss. Petitioner's Opposition argued that the Petition should not be dismissed because the Petition was timely filed under U.S.C. § 2244 pursuant to the doctrine of equitable tolling. Martinez urged that circumstances beyond Martinez's control caused the petition to be filed late. These circumstances included attorney neglect; Martinez's inability to speak, read, and write the English language; and lack of meaningful access to the prison law library and materials.

Petitioner also argued that the claims raised in the Petition should be deemed as exhausted and not procedurally defaulted because good cause for the delay in filing had been shown. (PA 467-475). A Reply brief in support of the AG's motion to dismiss was filed on December 5, 2012.

On February 25, 2013, the U.S. District Court granted the AG's motion to dismiss the Petition. It agreed with the AG and found that Petitioner's action was untimely, and that equitable tolling was not warranted. The federal district court therefore granted the AG's motion to dismiss with prejudice and further ordered that a certificate of appealability be granted on the issue of whether the court was correct regarding its determination that equitable tolling was not warranted. A Notice of Appeal to the Ninth Circuit was filed on March 25, 2013. (PA 445-446)

Appellant's Opening Brief was filed with the Ninth Circuit Court of Appeals on September 3, 2013 in Case No. 13-1557. (CR 6-1-OB). The issue presented was whether the time Martinez had to file a post-conviction writ for habeas corpus relief should have been tolled from August 5, 2008 to December 10, 2010 based on the doctrine of equitable tolling because of extraordinary circumstances. Appellant once again contended that he could establish the exercise of due diligence in pursuing federal post-conviction relief in a timely manner, but was hindered due to his attorney's neglect in failing to forward the appellate case file to him, his

inability to read, write, and speak English, and the lack of access to the prison library coupled with the lack of Spanish materials in the prison law library.

On October 3, 2013, the AG's office filed an Answering Brief. (PA105-134). It argued that the federal district court's decision to dismiss the Petition should be upheld because the time to file a petition had expired in August 2008; Martinez filed a petition approximately sixteen (16) months late in December 2010; and Martinez had presented no evidence or argument to support his contention that equitable tolling was appropriate in this case. Specifically, the Answering Brief noted that Martinez either on his own, or with the help of others, had managed to draft a number of communications in English during the applicable statute of limitations period, including, but not limited to, inmate requests, correspondence to the district attorney's office requesting records, informal prison grievances, correspondence to his appellate counsel and correspondence to the Nevada supreme court. The Answering Brief further argued that Martinez also presented communications to his counsel and others that demonstrated he was aware of the statute of limitations issue but for unknown reasons, did not make the filing of a petition a priority during the applicable period.

In a Memorandum opinion (unpublished) filed on April 14, 2015, the Ninth Circuit affirmed the federal district court's order and held that Martinez did not demonstrate a sufficient reason for the untimely filing of a post-conviction writ.

(PA135-137). Martinez then filed a motion for recall of mandate on May 15, 2015 which was denied by the Ninth Circuit on June 8, 2015. (PA138).

C. Subsequent State Court Filings

Shortly after Petitioner's federal appeal was denied, he once again began filing motions in the Eighth Judicial District Court. At a hearing held on December 28, 2015, the district court denied multiple motions that had been filed by Petitioner up to that point including: a Pro-Per Motion for enlargement of time; Pro Per Motion for production of transcripts at state's expense; Pro Per Motion to extend prison copy-work limit; Pro Per Motion for appointment of counsel; Pro Per Motion for order of delivery of records; Pro Per Motion for order of delivery of records; Pro Per Motion for order to produce prisoner transcripts and record (all denied because they appeared to be related to Petitioner's federal case); and Pro Per Motion to the court asking "where are the records of my criminal case?" (denied because Martinez had to be more specific as to which records he was seeking, and if connected to a post-conviction writ, why such request would not be time-barred). The Order was filed on January 11, 2016. (PA139-141). Petitioner appealed this Order and his appeal was dismissed by the Nevada Supreme Court as evidenced by an Order filed on April 13, 2016. (PA142-144)

Petitioner continued to file a series of pro-per motions with the district court. On May 16, 2016, a hearing was held to address the multiple motions Petitioner

had filed up to that point. The court denied all Motions as time-barred and successive and ruled that Petitioner had not shown any basis for the appointment of counsel. (PA146-148).

Another set of Petitioner's motions came on for hearing before the court on June 1, 2016. At that hearing, the court ruled on Defendant's Pro Per Motion for Appointment of Counsel and Pro Per Motion of "Miscarriage of the Court of District Court, Clark County, Nevada" without requiring oral argument or a response from the State. As to the Pro Per Motion for Appointment of Counsel, the court denied the motion without prejudice because there was nothing on file, no argument, and no reason to consider said motion. As to the Pro Per Motion of "Miscarriage" of the Court of District Court Clark County, Nevada, the motion was also denied without prejudice because the motion was vague and impossible for the Court to consider. (PA167)

At or around the time of the June 1, 2016 hearing, Petitioner filed another set of motions which included Pro Per Motion for Production of Transcripts at State Expense-Declaration of Jose Castillo; (28a) Pro Per Motion for Production of Transcripts at State Expense- Brady Transcripts-investigation of clothing and footwear of Bianca Marina Hernandez; (28c) Pro Per Motion for Production of Transcripts of Fuller, Clayton, MD at State's Expense, (28b) and Motion for Appointment of Counsel (28). Petitioner argued that he needed the transcript

information in support of a petition for writ of habeas corpus and motion for a new trial based on his contention that he was actually innocent of the crimes for which he had been convicted. Although Petitioner had previously made this same argument or similar arguments in prior pleadings, this time, the court was persuaded to allow him to proceed. At a hearing held on June 27, 2016, the court ordered that Petitioner could proceed in forma pauperis and further ordered that his Pro Per Motion to Appoint Counsel be granted. (PA167)

STATEMENT OF FACTS

Bianca Hernandez and David Martinez were involved in a romantic relationship (akin to a common law marriage) for approximately ten (10) years. They had a son together named Franklin who was sixteen years old in 2006. (PA235). Freddys Martinez (“Freddy”) was David’s younger brother. Freddys had moved in with David, Bianca and their son when Franklin was approximately three months old. (PA250). Freddys lived with them for approximately ten years in an apartment until David moved out when the couple split up in approximately 2003. (PA250). At some point after the breakup, Bianca began dating Jose Castillo and had dated him for approximately three to four years. (PA224, 250).

Freddys continued to live with Bianca and Franklin in a mobile home owned by Bianca located on Lake Mead Blvd. in Las Vegas for approximately three additional years after her breakup with David. Sometime after the breakup with

David, Bianca briefly moved in with Jose until she obtained the mobile home. (PA253). Approximately four months before the August 2006 incident, Bianca and her son moved out of the mobile home again to live with Jose Castillo in an apartment. She only told Freddy that she was moving to another place without providing further details and never told Freddy about her relationship with Jose. (PA236, 253). (As a point in fact, Bianca never admitted to a relationship with Jose other than as “friends” when she gave a statement to police after the alleged incident that occurred in this case. (PA255). According to Bianca, she and Freddy never shared a sexual relationship. (PA247). (This is disputed by Freddy who told police that he and Bianca shared an intimate relationship). At some point, Jose and Freddy, who both believed they were in an exclusive relationship with Bianca, each began to suspect she was seeing someone else. (PA227).

As of August 2006, Bianca and Freddy were still communicating on good terms. Freddy continued to live in the mobile home which belonged to Bianca and she would still visit him there. (PA257). As a matter of fact, Bianca had visited him a few days before the events of August 16, 2006. (PA258).

On the morning of August 16, 2006 at approximately 5:30 a.m., Freddy showed up at the home that Bianca shared with Jose Castillo and her son. (PA238). Bianca had gone outside to warm up her car because she was going to drive Jose to work. As she was sitting in the driver’s seat, Freddy opened the car door with a

knife in his hand and told her to drive away as he “stabbed” her in the leg with a knife. The “stab” was superficial, and Bianca believed it was meant more to scare her than hurt her as the “stab” did not puncture her leg. (PA260). After driving for a few blocks, Freddys told her to stop the car, put her in the back seat, and then he began driving the car. After driving for a few blocks, Freddys stopped the car again and “forced” Bianca to get into the front passenger seat. As Freddys continued to drive, Bianca saw a police car, and made an attempt to honk the car horn, but was unsuccessful in attracting police attention. Freddys then allegedly pulled the car over and hit Bianca in the face. (PA261).

As Freddys continued to drive, he got on the northbound I-15 freeway headed towards Mesquite. At some point, Freddys exited the freeway, allegedly forced Bianca into the back seat, and had alleged nonconsensual sex with her. Afterwards, Freddys continued to drive towards Mesquite. As they reached the city limits, Freddys stopped at a gas station to get gas. Because he apparently did not have any money, he got out of the car and headed to the pump area with a gallon container to ask others if they would give him some gas. After someone gave him gas, Freddys next went to an apartment complex in Mesquite. There was a construction site there where Freddys had worked before and he was apparently looking for some friends. (PA245-248). After Freddys exited the vehicle, Bianca was able to get help from others and went inside an apartment at which time she

called the police. When the police showed up, they found Freddys Martinez in a white truck and detained the vehicle. (PA274). He was later arrested without incident. (PA305-306).

ARGUMENT

I. STANDARD OF REVIEW

Ineffective assistance of counsel has long been measured by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). In Strickland, the United States Supreme Court established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a petitioner's claim of ineffective assistance of counsel.

First, the petitioner must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the petitioner. This requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial whose result is reliable. Unless both showings can be made, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

The Nevada Supreme Court has held, “claims of ineffective assistance of counsel must be reviewed under the reasonably effective assistance standard articulated by the U.S. Supreme Court in Strickland, thus requiring the petitioner to show that counsel’s assistance was deficient and that the deficiency prejudiced the defense.” *See, Bennet v. State*, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

"The defendant carries the affirmative burden of establishing prejudice." Riley v. State, 110 Nev, 638, 646, 878 P.2d 272, 278 (1994). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a petitioner must show a reasonable probability that, but for counsel’s error, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine the confidence in the outcome. *See, Kirksey*, 112 Nev. at 980, 923 P.2d at 1102. “Strategy or decisions regarding the conduct of a defendant’s case are virtually unchallengeable, absent extraordinary circumstances.” Mazzan v. State, 105 Nev. 745, 783 P.2d 430 (1989); Olausen v. State, 105 Nev. 110, 771 P.2d 583 (1989).

II. PETITIONER’S REQUEST FOR STATE POST-CONVICTION RELIEF IS ENTITLED TO FULL CONSIDERATION ON THE MERITS BASED ON PRINCIPLES OF EQUITABLE TOLLING.

NRS 34.726, states in pertinent part:

1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry

of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

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

Since the time of dismissal of Martinez's post-conviction writ by the district court in 2009, there have been a number of cases in support of his claim that his post-conviction writ should not have been time-barred based on equitable tolling grounds.

In Holland v. Florida, 560 U.S. 531, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) it was held that "a prisoner who files his federal petition for writ of habeas corpus after [the federal applicable statute's] one-year statute of limitations has expired may be entitled to equitable tolling". Id. at 649. A habeas petitioner is "entitled to equitable tolling only if he shows '(1) that he has been (1) pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Id. "The diligence required for equitable tolling purposes is "reasonable diligence, not maximum feasible diligence. Id. at 653. (*citations omitted*). Reasonable diligence requires only "the effort that a reasonable person might be expected to deliver under his or her particular

circumstances." Doe v. Busby, 661 F.3d 1001, 1015 (9th Cir. 2011). "To determine if a petitioner has been diligent in pursuing his petition, courts consider the petitioner's overall level of care and caution in light of his or her particular circumstances." Id. at 1013. "A petitioner's lack of knowledge that his state habeas petition has been denied can constitute an extraordinary circumstance that prevents timely filing. Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009).

The grounds for equitable tolling "are highly fact-dependent." Sossa v. Diaz, 729 F.3d 1225, 1237 (9th Cir. 2013) (*citation omitted*). They do require, however, the occurrence of an "extraordinary circumstance." Miles v. Prunty, 187 F.3d 1104 (9th Cir. 1999). "Extraordinary circumstances exist if circumstances beyond a prisoner's control make it impossible to file a petition on time." Id. Equitable tolling is appropriate where "it would have technically been possible for a prisoner to file a petition, but a prisoner would have likely been unable to do so." Gibbs v. Legrand, 767 F.3d 879, 888 (9th Cir. 2014) (*quoting Harris v. Carter*, 515 F.3d 1051, 1054 n.5 (9th Cir. 2008)). "At bottom, the purpose of equitable tolling is to 'soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having his day in court.'" Rudin v. Myles, 781 F.3d 1043, 1055 (9th Cir. 2015).

To this end, it has been determined that prison officials' delay in providing the petitioner with his prison account certificate was not an extraordinary

circumstance. *See: Grant v. Swarthout*, 862 F.3d 914 (9th Cir. 2017). However, compare *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009), in which the court determined that it was unrealistic to expect a habeas petitioner to prepare and file a meaningful petition on his own within the limitations period without access to his legal file and *Fue v. Biter*, 842 F.3d 650 (9th Cir. 2016), in which it was determined that a petitioner's lack of knowledge of denial of his state petition, if proven, would entitle him to equitable tolling.

As with other equitable considerations, determining whether a petitioner acted with reasonable diligence is a fact-specific inquiry. *Holland*, 560 U.S. at 649–50, 130 S.Ct. 2549; *Busby*, 661 F.3d at 1011. This is "not the arena of bright-lines and dates certain." *Busby*, 661 F.3d at 1015. Diligence was the basis for equitable tolling which permitted a state prisoner serving a life sentence to file a petition for writ of habeas corpus in federal court more than six years after the statutory filing deadline had passed because of egregious attorney conduct in the handling of his case. *See: Luna v. Kernan*, 784 F.3d 640 (9th Cir., 2015).

Diligence was also a factor in the remand of an appeal of a post-conviction writ dismissed as time-barred in *Gibbs v. Legrand*, 767 F.3d 879 (9th Cir., 2014). In *Gibbs*, a Nevada case, it was shown that petitioner's counsel did not inform him that state post-conviction proceedings had ended, even though petitioner wrote his counsel repeatedly for updates, and even though time in which to file a federal

habeas petition was swiftly winding down. As a result, the petitioner did not learn that the time for him to file his federal petition had begun until the limitations period was over. The appellate court concluded that counsel's misconduct was an extraordinary circumstance which caused petitioner's inability to timely file his federal petition, and that petitioner exercised his reasonable diligence in pursuit of his post-conviction rights. Id.

Although Nevada state courts may not follow the exact same standard as the federal court system, the underlying principles for allowing relief due to extraordinary circumstances are similar. An aggrieved party must show that an impediment external to the defense prevented him from complying with the procedural requirements. See: Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). An impediment external to the defense may be shown when the factual or legal basis for a claim was not reasonably available to be presented in a timely petition or when some interference by officials made compliance impracticable. Id.

A petitioner must also show good cause for the delay. To demonstrate good cause to excuse the untimely petition, a party seeking relief must also demonstrate that the delay was not his fault and that dismissal of the petition as untimely would unduly prejudice him. See NRS 34.726(1)(a), (b). Flowers v. State, No. 70933 (Nev. 2017). *See also*, Trinidad v. State, No. 71338 (Nev. App., 2017) in which it was found that the defendant showed good cause to overcome the procedural bar

even though his petition was filed 19 months late because he asked counsel to file an appeal on his behalf and he filed his petition within a reasonable time of learning counsel had not filed an appeal on his behalf.

In the instant matter, Martinez can demonstrate that he is entitled to equitable tolling in the filing of his post-conviction writ. Evidence suggests that even though his direct appeal was denied in July 2008, he did not receive his file documents from his appellate counsel until January, 2010. That Martinez was attempting to be diligent in his pursuit for relief is evidenced by the fact that he almost immediately thereafter filed pleadings in state court. As noted above, on April 2, 2010, Petitioner filed a motion for appointment of counsel in furtherance of filing a post-conviction writ of habeas corpus and on April 21, 2010, Petitioner filed a Motion to Vacate Judgment of Conviction. Moreover, it is well-documented that Petitioner made continuous requests of the court both before and after April 2010 for various forms of relief. (*See above section on procedural history of this case*). As such and in consideration of the other factors, raised in this pleading, Petitioner should be granted an evidentiary hearing in support of his desire to pursue post-conviction relief.

A. Extraordinary Circumstances External to Martinez, Prevented Him From Timely Filing a Post-Conviction Writ.

1. Martinez Was Unable To Speak, Read, or Write English.

A prisoner's lack of English-language abilities may render him unable to file a timely petition. In Mendoza v. Carey, 449 F.3d 1065 (9th Cir. 2006), the Ninth Circuit acknowledged that the "combination of (1) a prison law library's lack of Spanish-language legal materials, and (2) a petitioner's inability to obtain translation assistance before the one-year deadline" could constitute extraordinary circumstances sufficient to warrant equitable tolling. Id. at 1069.

Martinez' inability to speak, read, or write English has been apparent throughout his legal proceedings. Additionally, Martinez advised the prison of the difficulties he was having with the law library on a number of occasions as evidenced by exhibits included in the appendix. Martinez was unable to speak, read or write in the English language at the time he was attempting to prepare and file his state petition. He was also a pro se litigant during the times relevant to the filing of his petition.

The Ninth Circuit has recognized that where the defendant had a third grade education and was illiterate consideration of an equitable tolling claim was warranted. Brown v. Roe, 279 F.3d 742, 745-46 (9th Cir. 2002). In Brown, the Ninth Circuit found that the defendant should have been given the benefit of doubt regarding his claim that he was not provided adequate access to legal assistance, and the district court abused its discretion in refusing to allow him the chance to present a new argument in his objections to the magistrate judge's findings and

recommendation. Id. at 746. The Ninth Circuit reversed and remanded for consideration of Brown's equitable tolling claim and appropriate development of the record. Id. Like the defendant in Brown, Martinez contends that he should be allowed further development of the claim that he could not read, write or speak English during the relevant time period of his appellate and post-conviction filings at an evidentiary hearing.

2. Martinez Lacked Meaningful Access to the Prison Law Library.

States must provide inmates with "meaningful access" to the courts. Bounds v. Smith, 430 U.S. 18 817, 823 (1977) (*citing* Ross v. Moffit, 417 U.S. 600, 616 (1974)). This right of access requires that the state provide prisoners with "adequate law libraries or adequate assistance from persons trained in the law." Id. at 828. When determining whether a program adopted by a state meets this standard a court must look at the plan as a whole. Id. at 831. The Supreme Court in Bounds affirmed inmates' right of access to the courts and held that "law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Id. at 821, 825. Later, the Court narrowed the scope of Bounds and held that an inmate must "establish relevant actual injury," which may be accomplished by "demonstrat[ing] that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim."

Lewis v. Casey, 518 U.S. 343, 351 (1996). However, Lewis and Bounds continue to require that prisoners be provided sufficient "tools ... that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." Hebbe v. Pliler, 627 F.3d 338, 342-3 (9th Cir. 2010).

Martinez was denied meaningful access to the law library, legal assistance, and case documents on several occasions. These reported occasions are as follows:

- March 14, 2009 - Martinez filed an NDOC Informal Grievance against the law library for failing to make legal copies for him. (Letter exhibit.)

- March 27, 2009 - Martinez wrote a letter to appellate attorney Kedric Basset regarding his trouble getting copies from the law library and the grievance he filed, asking Basset to call and request these copies for him.

- July 21, 2009 - Martinez filed an NDOC Informal Grievance against the law library supervisor for not wanting to make copies of his letters.

- April 11, 2010 - Martinez wrote a letter to the State Bar complaining of the Correctional Center law library discriminating against him because he is Hispanic, for failing to provide someone who could completely assist Hispanic inmates, and for failing to provide legal materials in Spanish.

(See PA164-208).

Due to Martinez's inability to communicate in English, Martinez was effectively denied meaningful access to the law library and legal assistance.

Additionally, Martinez was unable to obtain his legal file for the time he was incarcerated prior to the filing of his petition. Martinez had to find other inmates who were able to translate for him and help him to communicate with the English-

speaking inmates who were aiding him in the preparations of his petition. (PA209-212).

Further exacerbating matters, in 2007, Lovelock Correctional Center instituted a paging system to access the law library. Inmates were no longer allowed direct access to the law library or to the inmate law clerks who ran the law library. Requests had to be specific, meaning they must include case names and cites, and written on the appropriate form. Additionally, due to Martinez' placement in administrative segregation and/or disciplinary segregation between September 21, 2008 and February 19, 2009, Martinez' ability to access the law library and obtain assistance was further restricted. While in administrative segregation, Martinez could only request, by kite, to have an inmate law clerk visit the segregation unit where he was housed. Even if a visit was arranged, the law clerk still had the ability to deny any requests. No general requests for help would be acknowledged and any materials provided by the law clerks were delivered under the supervision of a correctional officer, through the food hole in the door. This further restriction of his ability to access the law library or obtain legal assistance made it even more difficult for Martinez to receive the documents and assistance necessary to proceed with his case. PA209-212).

3. Martinez Could Not Obtain a Copy of His Appellate Case File.

The United States Supreme Court has recognized that an attorney's egregious misconduct may entitle a petitioner to equitable tolling. Holland v. Florida, 130 S.Ct. at 2562-63. Equitable tolling may not extend to a "garden variety claim of excusable neglect." Id. at 2564, *citing* Irwin v. Dep 't of Veterans Affairs, 498 U.S. 89, 96 (1990). On the other hand, equitable tolling does not require a showing of "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part." Id. at 2574.

In Holland, the Court specifically recognized that a lawyer's failure to notify his client of the state supreme court's final decision was one of several errors that went beyond "simple negligence" and instead "violated fundamental canons of professional responsibility." Id. at 2564. The Court also cited, with approval, several lower court decisions recognizing that equitable tolling was appropriate when an attorney's misconduct obstructed the timely filing of a petition. Id. The Ninth Circuit has previously held that "equitable tolling may be appropriate when a prisoner has been denied access to his legal files." Lott v. Mueller, 304 F.3d. 918, 924 (2002). Without access to his files, it was "unrealistic to expect [a petitioner] to file a meaningful petition on his own within the limitations period." Id. The court concluded the failures of counsel may rise to the level to warrant equitable tolling. Id. at 802.

Martinez was unable to communicate with his appellate counsel, obtain a copy of his case file, and was never updated as to the status of his appeal between June 3, 2008, and sometime in February 2010. Martinez worked diligently to obtain, not only his case file, but also information regarding the outcome of his direct appeal, but was unable to do so, as his appellate attorney did not return his calls or respond to his letters. The following correspondence demonstrates Martinez' attempts to obtain his case file and the status of his appeal:

- January 28, 2009 -Letter to trial attorney Kathleen Hamers asking for her assistance in getting in touch with Kedric Bassett about getting copies of his appeal documents.

- February 5, 2009- Letter to Kathleen Hamers again regarding Kedric Bassett.

- March 27, 2009- Letter to appellate attorney Kedric Bassett regarding his trouble getting copies from the law library and the grievance he filed, asking Bassett to call and request these copies for him.

- May 18, 2009 - Letter to the Supreme Court seeking an appeal of his case.

- December 29, 2009- Letter to the Clark County Clerk of the Court requesting the docket sheet in his case.

- February 1, 2010- Letter to Kedric Bassett stating he has not received anything that Bassett sent him since May 23, 2008.

- February 24, 2010- Letter to the Nevada Supreme Court asking for the status of his appeal and copies of any filed briefs.

- March 15, 2010- Letter to Kedric Bassett asking for the status of his appeal. (PA164-208).

After obtaining some of his paperwork from Bassett in late January 2010, Martinez was able to proceed in filing his state post-conviction petition pleadings

with the help of fellow inmates. (Affidavit) That he attempted to act in a diligent manner is reflected by the fact that his post-conviction writ was filed in April 2010. Martinez' inability to communicate with his appellate attorney, obtain his case files, or the status of his appeal, created an extraordinary circumstance which prevented him from filing his petition in a timely manner.

B. Martinez Exercised Reasonable Diligence in Pursuing His Rights.

Martinez showed reasonable diligence in the pursuit of his rights. In addition to the aforementioned letters, Martinez' attempts to pursue his case included the following:

- November 5, 2008 - Letter to the District Court requesting a copy of his criminal court minutes in Case No. C226586. These minutes were sent on November 14, 2008
- December 18, 2008 - Letter to trial attorney Kathleen Hamers regarding his criminal case. Martinez alleges that he also placed several calls to his appellate attorney, Kedric Bassett, during this period which are not included in this list of correspondence.
- March 14, 2009 - Martinez filed an NDOC Informal Grievance against the law library for failing to make legal copies.
- July 21, 2009- Martinez filed an NDOC Informal Grievance against the law library supervisor for not wanting to make copies of his letters.
- August 26, 2009 - Martinez filed an Inmate Request for more funds to be added to his account for copies and legal mail. Staff responded he would need to obtain a court order for this.
- October 23, 2009- Martinez filed a Motion to make additional funds available for NDOC inmate's legal account.
- January 25, 2010 - Kedric Bassett responded to Martinez' requests for a copy of his appellate case file with the requested documents.

-February 2, 2010- Martinez wrote a letter to the Nevada Supreme Court asking for his docket sheet and copy of his direct appeal. On this same date, a letter was sent to the District Court asking for his docket sheet, along with court minutes.

-February 3, 2010- Martinez filed an Inmate request to the law library for two complete copies of State Habeas Corpus documents, including appointment of counsel

-February 17, 2010- Martinez wrote a letter to the Nevada Supreme Court asking for his docket sheet.

-April 11, 2010- Martinez wrote four separate letters to the State Bar complaining of: (1) Kathleen Hamers' failure to investigate; (2) Detective Chavez putting pressure on him to make a statement; (3) Judge Bell not having an interpreter to interpret Martinez's statement at trial; and (4) Lovelock Correctional Center law library discriminating against him.

(PA164-208).

Martinez has shown that he pursued his legal rights with reasonable diligence during the relevant periods of time. He can also establish that there were extraordinary circumstances that prevented him from filing his federal petition on time. Because Martinez can show that he was reasonably diligent and that there were extraordinary circumstances that prevented his timely filing of the petition, he is entitled to equitable tolling.

II. MARTINEZ'S CLAIMS FOR INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE DECIDED ON THE MERITS.

Although the Nevada Supreme Court previously affirmed the denial of Petitioner's post-conviction petition as untimely under NRS 34.726., Petitioner has demonstrated good cause and prejudice to overcome the procedural bar and his

petition should be decided on its merits. Petitioner was prejudiced by trial counsel's failure to call relevant witnesses in a defense of his case and appellate counsel was ineffective for failure to provide him with his case file materials in order to enable him to pursue post-conviction relief. Petitioner should be afforded the opportunity to more fully develop these claims.

The Nevada Supreme Court did not afford Martinez the opportunity to prove his alleged basis for "good cause." The prejudice to Martinez is that he was shut out of the state post-conviction process and was unable to obtain review of claims that could dramatically impact his conviction and sentence. The standard for cause is an objective one, meaning that the fault must be external to the defense or his counsel: "The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986).

As noted throughout this pleading, Martinez maintains that any delay in filing his post-conviction petition was due to an impediment external to himself. Martinez's basis for cause is that his lack of English-language ability prevented him from obtaining the assistance and materials necessary to file his Post-Conviction Petition in a timely manner. Additionally, Martinez' placement in administrative segregation September 2008 and February 2009 further restricted

his ability to access the law library and obtain legal assistance. During that five-month period, the only way for Martinez to obtain documents and assistance was to use the kite system to request that an inmate law clerk visit the segregation unit.

No general requests for help would be acknowledged and any materials, if the request was not denied by the law clerk, were delivered through the food hole in the door. This system made it very difficult for Martinez to obtain documents or legal assistance during this period. Moreover, Martinez's inability to speak, read or write English impeded his ability to timely file his habeas petition and prevented him from understanding and proceeding through the intricate post-conviction process, including understanding the imperative deadlines set forth for such filings. Additionally, counsel's failure to provide Martinez with his case file was an external impediment to filing the state petition. This Court should conclude that Martinez has sufficiently demonstrated cause and prejudice to overcome the state procedural default.

CONCLUSION

Based on the foregoing, Petitioner Fredys Martinez requests that this Court find he is entitled to equitable tolling and as such, rule that his Petition for Post-Conviction Relief was timely filed. Martinez further requests that this Court find that the claims raised in his Petition are not procedurally barred as good cause for delay has been shown to explain the reasons for the unintended delay.

Consequently, Petitioner requests an evidentiary hearing on the issue of equitable tolling, or in the alternative, the opportunity to obtain the records and files he has been repeatedly requesting in order to more fully prepare and file a post-conviction writ to detail the impact of ineffective assistance of trial counsel which resulted in his conviction and deprivation of his Sixth Amendment Right to effective assistance of counsel that resulted from appellate counsel's failure to adequately assist him post-conviction.

DATED this _26th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 Edition in Arial 14 point font; or

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2. This brief exceeds the with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix **where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of October, 2018.

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The undersigned hereby declares that on October 27, 2018 a copy of the foregoing APPELLANT'S OPENING BRIEF was delivered to the following:

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