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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Case No: 75760

APPELLANT'S APPENDIX
Volume II

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CERTIFICATE OF SERVICE

FREDYS A. MARTINEZ,

Petitioner-Appellant,

v.

JACK PALMER, et al.,

Respondents-Appellees.

CA No. 13-15537

D.C. No. 3:10-cv-00777-LRH-VPC
District of Nevada, Reno

I hereby certify that on September 3, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants.

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CA NO. 13-15537
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDYS A. MARTINEZ,

Petitioner-Appellant,

v.

JACK PALMER and NEVADA
ATTORNEY GENERAL,

Respondents-Appellees.

DC No: 3:10-cv-00777-LRH-VPC
Nevada (Reno)

*Appeal from the United States District Court
for the District of Nevada*

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I.

STATEMENT OF JURISDICTION

Respondents-Appellees do not contest Petitioner-Appellant Fredys A. Martinez's (Martinez) "Statement of Jurisdiction," Appellant's Opening Brief, pp. 1-2, do not contest the jurisdiction of the district court or of this Court and hereby state such agreement pursuant to FED. R. APP. P. 28(b) and 9th Cir. R. 28-2.2.

II.

STATEMENT OF THE ISSUES

The United States District Court, pursuant to Rule 11 of the Rules Governing Section 2254 Cases, ordered on February 25, 2013 that a certificate of appealability is granted on the following issue:

Whether the court is correct in its determination that equitable tolling is not warranted.

Order, Appellant's Excerpts of Record (EOR) 1, 6.

III.

STATEMENT OF THE CASE

A. State Court Proceedings:

1. District Court Clark County, Case No. C226586:

On May 31, 2007, in District Court Clark County, Nevada, Case No. C226586, Judgment of Conviction was entered against Martinez after a trial by jury for the following offenses: Count 1 – Burglary While in Possession of a

Deadly Weapon (Category B Felony), in violation of NRS 205.060, Count 2 – Battery with use of a Deadly Weapon (Category B Felony), in violation of NRS 200.481, and Count 3 – First Degree Kidnaping with use of a Deadly Weapon (Category A Felony), in violation of NRS 193.165, 200.310, and 200.320. See Judgment of Conviction, EOR 460-61.

2. Nevada Supreme Court, Case No. 49608, Direct Appeal:

Martinez filed a timely notice of appeal and raised a number of issues not relevant to the instant appeal. See Appellant's Opening Brief, EOR 467-79.

On May 7, 2008, the Nevada Supreme Court entered its Order of Affirmance. EOR 25-31.

Remittitur issued on June 3, 2008. EOR 497.

There is no record of Martinez seeking a petition for writ of certiorari with the United States Supreme Court challenging the affirmance of his conviction.

3. District Court Clark County, Case No. C226586, Post-conviction proceedings:

On April 21, 2010, Martinez filed a *pro per* Motion to Vacate his Judgment of Conviction. EOR 543-47. The court denied the motion without requiring a response from the State on May 5, 2010, noting: “Defendant should have filed a Writ of Habeas Corpus but such a petition would be time barred now anyway as Remittitur issued in his case in 2008.” Findings of Fact, Conclusions of Law and

Order, EOR 595, ¶ 6; see also Order Denying Defendant's Pro Per Motion to Vacate a J.O.C., EOR 564-65.

On April 30, 2010, Martinez filed a *pro per* Petition for Writ of Habeas Corpus in the District Court Clark County, Nevada, asserting the following grounds for relief:

- I. The Right to a Fair Trial, U.S.C.A. Const. Amend 6th & 14th.
- II. Miranda Rights, U.S.C.A. Const. Amend 5th.
- III. Fundamental Miscarriage of Justice, Cause and Prejudice.
- IV. A Catch All Claim, Ineffective Appeal Counsel Omitted Trial Counsel Claim.

EO 548. Therein, Martinez did not allege any facts which would give rise to any cause for an untimely filing of his state petition. Specifically, Martinez did not assert any misconduct on the part of his appellate counsel in failing to notify him of the completion of direct appeal proceedings. Nor, did Martinez assert any difficulties in filing his federal petition due to any difficulties with the English language.

On July 9, 2010, the State filed its Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus asserting Martinez's petition was untimely and that he had not demonstrated good cause or actual prejudice sufficient to overcome the one-year time bar. EOR 589-93.

On January 21, 2011, the state district court filed its Findings of Fact, Conclusions of Law and Order denying Martinez's post-conviction petition as time barred pursuant to NRS 34.726. EOR 594-98. Therein, the court noted the delay in Martinez's filing of his petition and found "Defendant pled no facts to explain the delay in filing his petition. Thus, Defendant has not demonstrated good cause to overcome the procedural bar." EOR 596, ¶ 15.

4. Nevada Supreme Court, Case Nos. 57197 and 58023:

Martinez filed a timely Notice of Appeal challenging the order dismissing his post-conviction petition. Martinez filed two separate notices of appeal, resulting in the Nevada Supreme Court docketing, Case Numbers 57197 and 58023. Appellees' Supplemental Excerpts of Record (SEOR) 71 and 74.

On May 9, 2011, Order of Affirmance was entered in the 57197 case upholding the lower court's application of the time bar pursuant to NRS 34.726(1). EOR 11-13.

In an interesting example of the Nevada Supreme Court's regular and consistent application of the procedural bar against untimely petitions, on July 13, 2011, Order of Affirmance was entered in the 58023 case again upholding the lower court's application of NRS 34.726(1). EOR 8-10.

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B. Federal Court Proceedings:

1. United States District Court, District of Nevada 3:10-cv-00777-ECR-VPC:

On December 11, 2010, Martinez caused to be filed his *pro per* Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 resulting in the docketing of the instant action. EOR 98-110.

Counsel was appointed resulting in the filing of a first amended petition. EOR 68-77. Therein, Martinez did not allege any facts which would give rise to any equitable tolling of the AEDPA limitations period statute in spite of the facial deficiency of his petition. Specifically, Martinez did not assert any misconduct on the part of his appellate counsel in failing to notify him of the completion of direct appeal proceedings. Nor, did Martinez assert any difficulties in filing his federal petition due to any difficulties with the English language.

On August 6, 2012, Respondents filed a Motion to Dismiss asserting (a) Martinez's federal petition was untimely filed pursuant to 28 U.S.C. § 2244(d)(1); (b) that Ground Four of his first amended petition was procedurally defaulted; and (c) that Ground Five was never presented in the Nevada state courts resulting in a mixed petition. EOR 60-66.

On November 26, 2012, Martinez filed his Opposition to Motion to Dismiss. EOR 34-49. Therein, for the first time, Martinez claims he is entitled to equitable tolling because: (a) he was unable to speak, read, or write English; (b) he lacked

meaningful access to the prison law library; and (c) he could not obtain a copy of his appellate case file.

Respondent's filed a reply on December 5, 2012. SEOR 89.

On February 25, 2013, the district court filed its Order dismissing Martinez's first amended petition and granting a request for a certificate of appealability. EOR 1-6.

IV.

SUMMARY OF THE ARGUMENT

The AEDPA statute of limitations for Martinez to challenge his Nevada state conviction expired in August of 2009. Martinez filed his federal petition more than 16 months late in December of 2010.

Simply from the portions of the record submitted by Martinez in support of his amended petition and in support of his opposition to Respondents' motion to dismiss in the court below this Court can determine that Martinez was not hampered by any "extraordinary circumstances," due to his lack of English proficiency, which prevented him from filing a timely federal habeas petition. As the record demonstrates Martinez's ability to communicate, whether on his own, or with the aid of an inmate translator, there is no reason for an evidentiary hearing on the issue and Martinez has failed to establish any entitlement to the equitable tolling of the AEDPA statute of limitations.

Similarly, from the record before the court, Martinez's claims of lack of access to the Courts and egregious misconduct on the part of his appellate counsel have no merit. Instead the record reveals Martinez had other priorities during the running of the AEDPA statute of limitations and failed to properly prioritize the filing of his state court post-conviction petition and/or his federal petition challenging his May 31, 2007, conviction for Burglary While in Possession of a Deadly Weapon, Battery With Use of a Deadly Weapon, and First Degree Kidnapping With Use of a Deadly Weapon.

Martinez is not entitled to equitable tolling and the order of the district court dismissing his first amended petition as untimely filed should be affirmed.

V.

ARGUMENT

A. STANDARD OF REVIEW:

The dismissal of a habeas petition based on the statute of limitations is reviewed de novo. *See Shannon v. Newland*, 410 F.3d 1083, 1087, n.3 (9th Cir. 2005), *cert. denied*, 546 U.S. 1181 (2006).

B. MARTINEZ HAS NOT PROVED AN ENTITLEMENT TO EQUITABLE TOLLING:

Martinez acknowledges that pursuant to 28 U.S.C. § 2244(d) his state court judgment became final on August 5, 2008. He further acknowledges that he did not file his federal habeas petition until December 10, 2010. In his opening brief,

and in the district court, he makes no attempt to argue for “statutory tolling” and only asserts he is entitled to equitable tolling.

The Supreme Court of the United States has recently joined all eleven Courts of Appeals holding that AEDPA’s statutory limitations period in § 2244(d) may be tolled for equitable reasons. *Holland v. Florida*, 130 S.Ct. 2549, 2560-62 (2010). The Supreme Court of the United States further clarified that equitable tolling has two elements: (1) that a petitioner has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Id.* at 2562 (citing *Pace v. DiGuglielmo*, 125 S.Ct. 1807 (2005)). The diligence required for equitable tolling purposes is “reasonable diligence, not maximum feasible diligence.” *Id.* at 2565 (citations omitted).

In the Ninth Circuit, it has been determined that the petitioner bears the burden of proof of entitlement to equitable tolling. *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006). The Ninth Circuit has also described “extraordinary circumstances” to be circumstances beyond a prisoner’s control making it impossible to file his petition on time. *Lott v. Mueller*, 304 F.3d 918, 924 (9th Cir. 2002). Equitable tolling is the exception rather than the norm. *See, Waldron—Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009) (characterizing the Ninth Circuit’s “application of the doctrine” as “sparing” and a “rarity”). Equitable tolling is “unavailable in most cases,” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th

Cir. 1999), and “the threshold necessary to trigger equitable tolling is very high, lest the exception swallow the rule,” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)(quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)).

Additionally, the Ninth Circuit requires that the alleged extraordinary circumstances must be the cause of the inability to timely file the federal petition. *See Waldron-Ramsey v. Pacholke*, 556 F.3d at 1011; *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009); *Randle v. Crawford*, 578 F.3d 1177, 1186 (9th Cir. 2009) *amended*, 604 F.3d 1147, 1157 (9th Cir. 2010). The Petitioner “must show that some ‘external force’ caused his untimeliness, rather than mere ‘oversight, miscalculation or negligence.’” *Velasquez v. Kirkland*, 639 F.3d 964, 969 (9th Cir. 2011). A *pro se* petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling. *Rasberry v. Garcia*, 448 F.3d at 1154.

1. Martinez’s English proficiency not a basis for equitable tolling:

Martinez claims an inability to speak, read, or write English for his entitlement to equitable tolling. The Ninth Circuit has rejected a *per se* rule that a petitioner’s language limitations can justify equitable tolling, but has recognized that equitable tolling may be justified if language barriers actually prevent timely filing. *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006). Citing authority

from the Sixth Circuit, the Ninth Circuit recognizes a petitioner who demonstrates proficiency in English or who has the assistance of a translator would be barred from equitable relief. *Id.* (citing *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002)).

A non-English-speaking petitioner seeking equitable tolling must, at a minimum, demonstrate that during the running of the [Antiterrorism and Effective Death Penalty Act] time limitation, he was unable, despite diligent efforts, to procure either legal materials in his own language or translation assistance from an inmate, library personnel, or other source.

Id. at 1070.

Martinez's claim of equitable tolling should be denied as demonstrated by the record presented to the district court by Martinez, including the offer of proof he submitted in support of his opposition to Respondents motion to dismiss. Before the district court, Martinez proffered a number of exhibits in support of his claim for equitable tolling. Petitioner's Index of Exhibits in Support of Opposition to Motion to Dismiss, EOR 50-59, 466, 498-542 (Exhs. 1-9, 11, 14-19, 21-22 ,27; SEOR 1, 3-4, 17, 18-23 (Exhs. 10, 12-13, 20, 23-26). Of the proffered exhibits, a number of the exhibits are written in English prior to the time of the expiration of the AEDPA time limitation on, or about, August 4, 2009. Through such exhibits, Martinez demonstrates an ability to communicate in English, whether because of

his own proficiency in the language, or through the assistance of people available to him in prison.

As early as September 12, 2007, Martinez demonstrates his understanding of the use of an “inmate request form” and uses English to request assistance. EOR 466.

During the running of the AEDPA statute of limitations, from August 2008 through August 2009, Martinez further demonstrates an ability to communicate in English. On November 5, 2008, Martinez corresponded with the state district court, in English, to request state court records. EOR 498.

On March 14, 2009, he submitted an informal grievance in English to the Nevada Department of Corrections (NDOC). EOR 517. Interestingly, the grievance related to a dispute with the “legal lady” because Martinez wanted to make “legal copies” of materials he had obtained in both Spanish and English; demonstrating Martinez’s access to Spanish language materials. From his March 27, 2009, correspondence to his appellate counsel, Kedric Bassett, Martinez related that the copies were needed to send to the Honduran consulate and/or embassy; for what reason it is unclear. Nevertheless, Martinez apparently wrote the correspondence, dated March 27, 2009, to his appellate counsel in Spanish, EOR 520-521, and had someone translate it into English to send it to his appellate counsel on the same day. EOR 518-519.

On May 18, 2009, Martinez sent a letter, in English, to the Nevada Supreme Court arguing the merits of his appeal and contesting his innocence. EOR 522.

On June 30, 2009, Martinez sent another correspondence to his appellate counsel, Kedric Bassett, again demonstrating his ready access to a Spanish-to-English translator. SEOR 1-2. From the exhibit, it is apparent that Martinez wrote his letter in Spanish and dated the letter “6-25-09.” Martinez then obtained the services of a translator and within 5 days sent his letter, in English, to his counsel; complete with his notarized signature. The substance of the letter expressed no concern about the pendency of his appeal, but instead sought counsel’s assistance in obtaining a “restricting order” against people that testified against him at his trial.

On July 21, 2009, Martinez again submits grievances, in English, to the Nevada Department of Corrections complaining of the lack of professionalism by law library personnel. EOR 523-530.

The above records most likely are not exhaustive of Martinez’s ability to access the courts and communicate in English during the period of time he should have been focusing on submitting a petition for state post-conviction relief. Nevertheless, the above documents sufficiently demonstrate Martinez’s ability to grieve issues regarding Nevada Department of Corrections personnel; to request information from the Nevada state courts; and to communicate with his attorneys.

Additionally, a review of the Index of Exhibits submitted in support of Martinez's first amended petition demonstrates his ability to litigate post-conviction proceedings; filing *pro per* motions and pleadings; a post-conviction petition; and notices of appeal. See Index of Exhibits in Support of Amended Petition for Writ of Habeas Corpus, Exhs. 31, 34, 36, 38, 41, 45, 51-54, SEOR 8, 31-87.

Most tellingly, the record demonstrates, in spite of Martinez's proffered language limitations, that Martinez was aware of the availability of a federal remedy to challenge his state conviction and the time sensitive nature of the remedy. In a correspondence with his trial counsel, dated January 29, 2009, Martinez threatens seeking an appeal to the U.S. District Court if he has not received information regarding the status of his appeal. Petitioner's Index in Support of Opposition, Exh. 4, EOR 513-514. On October 23, 2009, in his *pro per* "Motion to Make Additional Funds Available for NDOC Inmate's Legal Account," Martinez demonstrates his actual knowledge of the concerns with delay resulting in his claims becoming "time barred" or "procedurally barred." See Petitioner's Index in Support of Opposition, Exh. 13, SEOR 5 ("A delay of this nature, could have serious remmifications [sic] in the outcome of the defendants case. Such outcomes may include, but are not limited to the defendant becoming "time barred," "proceedurally [sic] barred" due to the inability to properly utilize court

procedure and law....”). In spite of his knowledge of the possibility of the “time bar” issue on October 23, 2009, he delayed more than a year, until December of 2010, to file his initial federal petition with this court.

From the current record, Martinez’s language ability cannot be viewed as an extraordinary circumstance preventing him from filing a timely federal petition. An evidentiary hearing on the issue would most likely result in the production of evidence of additional examples of Martinez’s ability to grieve issues in the Nevada Department of Corrections, file *pro per* appeals with the Nevada Supreme Court, and communicate with his attorney. Additionally, he had sufficient knowledge of the concept of a “time bar” as early as October 23, 2009, and still delayed more than a year to file his federal petition. Martinez’s proficiency in English was not the cause of the untimely filing of his federal petition.

2. Martinez’s access to the courts:

As evidenced by his October 23, 2009, motion to the state district court, Martinez at that time had so much access to the prison law library that he had exceeded the funds made available to individual indigent inmates for copying and postage. See Petitioner’s Index in Support of Amended Petition, Exhs. 31-33, SEOR 8-15. His claim of a lack of meaningful access to the courts is belied by the record.

In support of his claim of inadequate access, Martinez only identified in the district court below two incidents he had with access to the prison law library and legal assistance. The first being the March 14, 2009, grievance, discussed above, asserting that the law library attendant failed to make legal copies for him and acted in an “unprofessional” manner and that she is “racist.” See Informal Grievance, EOR 517. It appears the issue was resolved within 10 days with prison officials promising to take care of Martinez’s “copy work.” The conflict caused no hindrance of Martinez’s ability to timely file his federal petition as the legal assistance requested related to a matter with the Honduras embassy – Los Angeles branch. See Letters, EOR 518-521. Martinez also points to an additional problem on July 21, 2009, again claiming the law library attendant was “unprofessional” and “racist.” Martinez does not specify how his conflict with the law library attendant prevented him any access to the courts. An inmate’s expressed inability to get along with prison personnel is not an “extraordinary circumstance” and Martinez has failed to specify how his asserted unpleasant experience with the prison law library attendant, and any short delay in the translation of his legal work, caused his failure to comply with the 1 year AEDPA statute of limitations.

Martinez further claims he was in administrative segregation but fails to inform this Court of the duration of that stay. In his opposition to the motion to dismiss in the court below, Martinez represented that he was only in segregation

from September 21, 2008 through February 19, 2009. EOR 42. While acknowledging the prison had a paging system to allow inmates access to the law library, he generally describes “further restrictions” to legal assistance while in administrative segregation. He does not specifically allege that he ever attempted to access legal materials and/or assistance while in administrative segregation. He does not provide any prison grievances complaining of a lack of access to the courts during this time period. His failure to utilize the resources available while in administrative segregation evidences a lack of diligence on his part and further does not equate to an extraordinary circumstance to entitle him to equitable tolling. Additionally, after his discharge from administrative segregation on February 19, 2009, he still had plenty of time, through August of 2009, to seek post-conviction relief both in state court and then subsequently in federal court. Instead, it appears during the AEDPA time period, from his own proffered exhibits, he was more concerned with a restitution order resulting from a prison disciplinary proceeding, petty grievances with NDOC law library personnel, and resolving a legal issue with the Honduras embassy.

Martinez has had plenty of access to legal materials and the courts. His segregation for five months and claims of “unprofessional” treatment by a law library attendant do not explain his inability to timely file a federal habeas petition. He is not entitled to equitable tolling on this basis.

3. Martinez has failed to identify any “egregious misconduct” by his appellate counsel:

Martinez correctly identifies *Holland v. Florida* for the concept that an attorney’s egregious misconduct may entitle a petitioner to equitable tolling.

Martinez only generally asserts in the instant appeal that he “...was unable to communicate with his appellate counsel, obtain a copy of his case file and was never advised as to the status of his appeal.” He further conclusorily asserts that he “...worked diligently to obtain, not only his case file, but also information regarding the outcome of his direct appeal.” Martinez’s claims are belied by the record before the Court.

First, it is interesting to note that Martinez claimed, in his opposition to respondents’ motion to dismiss in the court below, that his appellate counsel did not communicate with him starting on June 3, 2008. See Opposition, EOR 43. Martinez’s direct appeal was denied and his judgment affirmed by the Nevada Supreme Court on May 7, 2008. Order of Affirmance, EOR 25. In two of his letters to his appellate counsel, he acknowledges that he received a letter from his appellate counsel on May 23, 2008. See Letters, EOR 537 and SEOR 18. Yet, Martinez does not provide this Court, nor did he to the court below, a copy of the May 23, 2008, correspondence from his appellate counsel. The timing of said correspondence certainly would be consistent with appellate counsel informing Martinez of the negative result of his appeal. Such a failure to provide such a

critical document is inconsistent with Martinez's burden to establish his appellate counsel's alleged egregious misconduct.

Second, Martinez provided a number of letters he sent to his previous trial counsel to establish his inability to communicate with his appellate counsel. It is certainly not egregious misconduct for appellate counsel to not respond to letters written to trial counsel. The December 18, 2008, correspondence to trial counsel does not request any legal assistance and seems merely to be a missive to trial counsel second guessing trial tactics. EOR 499-512. The January 28, 2009 correspondence interestingly requests trial counsel to contact appellate counsel on Martinez's behalf. EOR 513-514. It certainly begs the question; why not just communicate with appellate counsel directly, especially in light of a lack of any proffered evidence of any effort to contact appellate counsel prior to that time. Curiously, on February 5, 2009, Martinez, in his correspondence to his previous trial counsel, claims he was able to contact his appellate counsel, and was provided information about his appeal.¹ EOR 515-516.

¹ This February 5, 2009, correspondence raises a number of questions, none favorable to the credibility of Martinez's claim for equitable tolling. First, it is directly contradictory to the assertion in his opposition in the court below that he had no communication with his appellate counsel regarding the status of his appeal between June 3, 2008, and sometime in February 2010. Second, Martinez in his opposition in the court below merely claimed an inability to communicate with his appellate counsel, but it certainly would be a much stronger claim of "egregious misconduct" if his appellate counsel had actually misinformed Martinez of the status of his direct appeal. Martinez's failure to provide evidence of such a

Martinez does not provide any copies of correspondence sent to his appellate counsel requesting any status of his direct appeal during the running of the AEDPA statute of limitations. In fact the only correspondence to appellate counsel proffered in support of his claim of egregious misconduct are the March 27, 2009, letter complaining about the ability to make legal copies for submission to the Honduras Embassy and a June 30, 2009 letter requesting a “restriction order” of some sort. See Letters, EOR 518-519 and SEOR 1. Later in 2010, Martinez chastises his counsel for not communicating with him about his appeal, but there is no direct evidence proffered that he ever inquired about his appeal prior to 2010. Letters, EOR 537-538 and SEOR 18.

In light of the evidence proffered in support of his claim for equitable tolling, Martinez does not establish any egregious misconduct on the part of his appellate counsel. The proffered evidence belies his claim and renders an evidentiary hearing on the point unnecessary.

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communication with his appellate counsel to this Court, in light of the representation made to his trial counsel in the relevant correspondence, belies the credibility of his claim. Did Martinez lie to his trial counsel regarding the communication with appellate counsel? Did Martinez forget the factual predicate of such an egregious misrepresentation and fail to include it in his opposition? Either way, Martinez’s proffered evidence is not credible and does not support his claim of egregious misconduct by his appellate counsel.

4. A comment on Martinez's exercise of diligence:

Martinez is apparently litigious. Such litigiousness should not be equated with diligence. During the running of the AEDPA statute of limitations, Martinez was concerned with issues related to a prison disciplinary proceeding and a resultant restitution order; personnel issues with an NDOC law library attendant; legal issues with the Honduras embassy; and in seeking "restriction orders" against people that testified against him at trial. His letters to the Nevada State Bar mostly complain about the conduct of his trial counsel in her efforts to advise him to accept a plea bargain prior to trial. Martinez did not have his priorities in order. There is no evidence that Martinez ever directly inquired of his appellate counsel regarding the status of his direct appeal. Similarly he did not inquire of the Nevada Supreme Court regarding the status of his direct appeal. While he suggests he "made efforts to obtain his files" from his appellate counsel, citing letters written to his previous trial counsel to support his claim, a review of such correspondence reveals no request for his "files." See Letter, EOR 513-516. Martinez eventually readjusted his priorities and filed a state petition for post-conviction relief in April of 2011. Why he didn't file a simultaneous federal petition with the United States District Court, as suggested by *Pace v. DeGugliemo*,² is unclear. Instead, Martinez

² 544 U.S. 408, 416 (2005)(recognizing the filing of a "protective petition" when a petitioner is uncertain whether the state court will ultimately find a state petition untimely and therefore inadequate to toll the AEDPA statute of

waited an additional seven months to file his federal petition further supporting a finding of his lack of diligence.

VI.

CONCLUSION

The AEDPA statute of limitations for Martinez to challenge his Nevada state conviction expired in August of 2009. Martinez filed his federal petition more than 16 months late in December of 2010.

Simply from the portions of the record submitted by Martinez in support of his amended petition and in support of his opposition to Respondents' motion to dismiss in the court below this Court can determine that Martinez was not hampered by any "extraordinary circumstances," due to his lack of English proficiency, which prevented him from filing a timely federal habeas petition. As the record demonstrates Martinez's ability to communicate, whether on his own, or with the aid of an inmate translator, there is no reason for an evidentiary hearing on

limitations). Of course, Respondents recognize that by April 2011, the time when Martinez filed his state petition, the AEDPA statute of limitations had already long expired and Martinez had no claim to any statutory tolling. Nevertheless, the principle, as it applies to the diligence of the untimely petitioner still applies. There is no real difference in the claims asserted by Martinez in his state post-conviction petition and the claims asserted in his federal petition. There was no reason to delay an additional seven months in the filing of the federal petition. By the time he filed his federal petition in December 2011, it was already more than 2 years late.

the issue. Martinez has failed to establish any entitlement to the equitable tolling of the AEDPA statute of limitations.

Similarly, from the record before the Court, Martinez's claims of lack of access to the courts and egregious misconduct on the part of his appellate counsel have no merit. Instead the record reveals Martinez had other priorities during the running of the AEDPA statute of limitations and failed to properly prioritize the filing of his state court post-conviction petition and/or his federal petition challenging his May 31, 2007 conviction for Burglary While in Possession of a Deadly Weapon, Battery With Use of a Deadly Weapon, and First Degree Kidnapping With Use of a Deadly Weapon.

Martinez is not entitled to equitable tolling and the order of the district court dismissing his first amended petition as untimely filed should be affirmed.

DATED this 3rd day of October, 2013.

CATHERINE CORTEZ MASTO
Attorney General

By: s/ Thom Gover
THOM GOVER
Chief Deputy Attorney General

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32 (a)(7)(B) because:

☒ this brief contains 4,971 words, excluding the parts of the brief exempted by FED. R. APP. P. 32 (a)(7)(B)(iii), or

☐ this brief uses a monospaced typeface and contains [*state number of lines*] of text, excluding the parts of the brief exempted by FED. R. APP. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32 (a)(5) and the type style requirements of FED. R. APP. P. 32 (a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 pt font and Times New Roman, or

☐ this brief has been prepared in a monospaced typeface using [state name and version of work processing program] with [state number of characters per inch and name of type style].

DATED this 3rd day of October, 2013.

CATHERINE CORTEZ MASTO
Attorney General

By: s/ Thom Gover
THOM GOVER
Chief Deputy Attorney General

STATEMENT OF RELATED CASES

Attorney General of the State of Nevada, CATHERINE CORTEZ MASTO, by and through THOM GOVER, Chief Deputy Attorney General, hereby certifies and states that there are no known cases before this Court related to the foregoing case.

DATED this 3rd day of October, 2013.

CATHERINE CORTEZ MASTO
· Attorney General

By: s/ Thom Gover
THOM GOVER
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 13-15537

I hereby certify that I electronically filed the foregoing *Appellees' Answering Brief* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, on October 3, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Ryan Norwood
Assistant Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101

s/ C. A. Sholing
An Employee of the
Office of the Attorney General

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 10 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FREDYS A. MARTINEZ,

Petitioner - Appellant,

v.

JACK PALMER; NEVADA ATTORNEY
GENERAL,

Respondents - Appellees.

No. 13-15537

D.C. No. 3:10-cv-00777-LRH-
VPC

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted December 9, 2014
San Francisco, California

Before: KOZINSKI, RAWLINSON, and MURGUIA, Circuit Judges.

Petitioner Fredys A. Martinez (Martinez) challenges the district court's dismissal of his untimely federal habeas petition pursuant to the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA). Martinez contends that he was entitled to equitable tolling because the

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

prison failed to provide him with Spanish-language resources and he was unable to timely obtain his files from his appellate counsel.

The district court permissibly held that equitable tolling based on Martinez's lack of English proficiency was unwarranted because Martinez was able to obtain English translations during the AEDPA statute of limitations period. *See Yeh v. Martel*, 751 F.3d 1075, 1078 (9th Cir. 2014) (denying equitable tolling because the petitioner received translation assistance during the limitations period).

Martinez did not satisfy his burden of demonstrating that it was impossible for him to timely file his federal habeas petition due to the library paging system or his administrative segregation.

Even assuming that Martinez did not receive his files from his appellate counsel until January, 2010, Martinez did not act with reasonable diligence by delaying the filing of his federal habeas petition until seven months after he filed his state habeas petition. *See id.* at 1079 (holding that the petitioner's pattern of delay reflected a lack of reasonable diligence).¹

¹ Martinez alleges that his appellate counsel denied Martinez access to his legal file for the entire limitations period. We do not condone this alleged conduct, which is likely a violation of the Nevada professional rules of conduct. *See Gibbs v. LeGrand*, 767 F.3d 879, 889 (9th Cir. 2014). However, to qualify for equitable tolling, Martinez must establish both an extraordinary circumstance and reasonable diligence. *See id.* at 889-90.

The district court did not abuse its discretion in denying an evidentiary hearing because the record was sufficiently developed to resolve Martinez's equitable tolling claim. *See Roberts v. Marshall*, 627 F.3d 768, 773 (9th Cir. 2010).

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 08 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FREDYS A. MARTINEZ,

Petitioner - Appellant,

v.

JACK PALMER; NEVADA ATTORNEY
GENERAL,

Respondents - Appellees.

No. 13-15537

D.C. No. 3:10-cv-00777-LRH-VPC
District of Nevada,
Reno

ORDER

Before: KOZINSKI, RAWLINSON, and MURGUIA, Circuit Judges.

Petitioner's "Notice of Motion for Rehearing" is construed as a Motion to Recall the Mandate and a Petition for Rehearing.

Petitioner's Motion to Recall the Mandate, received by the Court on May 15, 2015, shall be filed by the Clerk of the Court and is GRANTED.

Petitioner's Petition for Rehearing, received by the Court on May 15, 2015, shall be filed by the Clerk of the Court and is DENIED.


CLERK OF THE COURT

1 **ORDR**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **PATRICK BURNS**
6 **Deputy District Attorney**
7 **Nevada Bar #011779**
8 **200 Lewis Avenue**
9 **Las Vegas, NV 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

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

10 **THE STATE OF NEVADA,**

11 **Plaintiff,**

12 **-vs-**

13 **FREDDY MARTINEZ, aka,**
14 **Fredy A. Martinez #1361243**

15 **Defendant.**

CASE NO: 06C226586

DEPT NO: XXV

16 **ORDER DENYING DEFENDANT'S MULTIPLE MOTIONS**

17 **DATE OF HEARING: DECEMBER 28, 2015**

18 **TIME OF HEARING: 9:00 A.M.**

19 **THIS MATTER** having come on for hearing before the above entitled Court on the
20 **28th day of December, 2015,** the Defendant being present, in proper person, the Plaintiff
21 **being represented by STEVEN B. WOLFSON,** District Attorney, through PATRICK
22 **BURNS,** Deputy District Attorney, without argument, based on the pleadings and good cause
23 **appearing therefor,**

24 **///**

25 **///**

26 **///**

27 **///**

28 **///**

1 IT IS HEREBY ORDERED: As to Defendant's Pro Per Motion for Enlargement of
2 Time (First Request): COURT ORDERED, motion DENIED; as this motion appears to be
3 related to Defendant's Federal Court proceedings. As to Defendant's Pro Per Motion to the
4 Court Asking Where Are the Records of My Criminal Case: COURT ORDERED, motion
5 DENIED WITHOUT PREJUDICE; as Defendant must be more specific as to what records
6 he is seeking, if he plans to pursue some post-conviction proceedings; and why he would not
7 be time-barred from doing so. As to Defendant's Pro Per Motion for Production of Transcripts
8 at State Expense: COURT ORDERED, motion DENIED; as this motion appears to be related
9 to Defendant's Federal Court proceedings. As to Defendant's Pro Per Motion to Extend Prison
10 Copy-work Limit: COURT ORDERED, motion DENIED; as this motion appears to be
11 related to Defendant's Federal Court proceedings. As to Defendant's Pro Per Motion for
12 Appointment of Counsel: COURT ORDERED, motion DENIED; as this motion appears to
13 be related to Defendant's Federal Court proceedings. As to Defendant's Pro Per Motion for
14 Order of Delivery of Records: COURT ORDERED, motion DENIED; as this motion appears
15 to be related to Defendant's Federal Court proceedings. As to Defendant's Pro Per Motion for
16 Order to Produce Prisoner Transcripts and Record: COURT ORDERED, motion DENIED;
17 as this motion appears to be related to Defendant's Federal Court proceedings.

18 DATED this 7th day of ~~December~~ ^{January}, 2016.

19 
20 DISTRICT JUDGE

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

23
24 BY 

25 PATRICK BURNS
26 Deputy District Attorney
Nevada Bar #011779

27 ///

28 ///

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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 11th day of January, 2016 by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

FREDDY MARTINEZ #1003276
LOVELOCK CORRECTIONAL CENTER
1200 PRISON RD
LOVELOCK, NV 89419

BY M. Crawford
M. CRAWFORD
Secretary for the District Attorney's Office

06F15924X/mc/L4

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDDY A. MARTINEZ, A/K/A FREDY A.
MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 69596
District Court Case No. C226586

FILED

APR 13 2016

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER this appeal DISMISSED."

Judgment, as quoted above, entered this 11th day of March, 2016.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
April 05, 2016.

Tracie Lindeman, Supreme Court Clerk

By: Joan Hendricks
Deputy Clerk

06C226586
CCJD
NV Supreme Court Clerks Certificate/Judg
4538791



IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDDY A. MARTINEZ, A/K/A FREDY
A. MARTINEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 69596

FILED

MAR 11 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER DISMISSING APPEAL

This appeal was initiated by the filing of a pro se appeal.
Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Appellant filed notices of appeal on January 12, 2016, and
February 1, 2016. No appealable orders were designated in the notices of
appeal. Because appellant failed to designate an appealable order, we

ORDER this appeal DISMISSED.

Douglas, J.
Douglas

Cherry, J.
Cherry

Gibbons, J.
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge
Freddy A. Martinez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: April 5th, 2016

Supreme Court Clerk, State of Nevada

By [Signature] Deputy

PA144

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDDY A. MARTINEZ, A/K/A FREDY A.
MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 69596
District Court Case No. C226586

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk /

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 05, 2016

Tracie Lindeman, Clerk of Court

By: Joan Hendricks
Deputy Clerk

cc (without enclosures):
Hon. Kathleen E. Delaney, District Judge
Freddy A. Martinez
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on APR 13 2016.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED

APR 09 2016

CLERK OF THE COURT
PA145


CLERK OF THE COURT

ORDR
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
SARAH E. OVERLY
Deputy District Attorney
Nevada Bar #012842
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

FREDDY MARTINEZ, aka,
Fredys A. Martinez #1361243

Defendant.

CASE NO: 06C226586
DEPT NO: XXV

ORDER DENYING DEFENDANT'S MULTIPLE MOTIONS

DATE OF HEARING: MAY 2, 2016
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 2nd day of May, 2016, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through SARAH E. OVERLY, Deputy District Attorney, without argument, based on the pleadings and good cause appearing therefor,

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1 IT IS HEREBY ORDERED that Defendant's Pro Per Motion for Production of
2 Transcripts at State Expense: Brady Declaration Transcripts of the Mesquite Police Who
3 Arrest Me this day, August 16-2006; and the Brady of the Knife, 8-16-2006, also Defendant's
4 Pro Per Motion for Production of Transcripts at State Expense: Brady Verbal Declaration of
5 Bianca-Marina, h. with Ms. Nyikos, Noreen, State of Nevada Attorney, this day September
6 14, 2006, and Barr, I. Mesquite Police, August 16, 2006, also Defendant's Pro Per Motion for
7 Appointment of Counsel, and Defendant's Pro Per Motion for Production of Transcripts at
8 State Expense: Brady Declaration and Verbal Declaration of the Police Who Arrested Me in
9 Mesquite, NV this day of August 16, 2006, and Defendant's Motion for Production of
10 Transcripts at State Expense: Brady Transcripts of the Investigation of this Car, Ford Focus
11 Nevada Plate 308TRL, this day of My Arrest August 16, 2006 and Defendant's Motion for
12 Production of Transcripts at State Expense: Brady Verbal Declaration of Bianca Maxima
13 Hernandez with Detective Chavez, Arturo LVMPD P#4048 and Goddard Blake LVMPD
14 P#59, August 16, 2006, shall be, and are DENIED WITHOUT PREJUDICE, as they are time-
15 barred and successive; FURTHER, Defendant has not shown any basis why he is entitled to
16 counsel.

17 DATED this 12th day of May, 2016.

18 
19 DISTRICT JUDGE

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

23 BY


24 SARAH E. OVERLY
25 Deputy District Attorney
26 Nevada Bar #012842

27 ///

28 ///

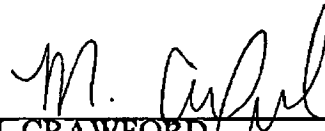
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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 11th day of May, 2016, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

FREDDY MARTINEZ #1003276
LOVELOCK CORRECTIONAL CENTER
1200 PRISON RD
LOVELOCK, NV 89419

BY


M. CRAWFORD
Secretary for the District Attorney's Office

06F15924X/mc/L4

of the Court of District Court Clark County, Nevada: COURT ORDERED, motion DENIED WITHOUT PREJUDICE, as it is vague and impossible for the Court to consider it. State to prepare the orders. NDC CLERK'S NOTE: A copy of this minute order has been mailed to Defendant. /db 6.2.2016

Parties Present

Return to Register of Actions

"original"

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06/02/2016 09:06:30 AM

Allen D. Shuman
CLERK OF THE COURT

Case No. 06C226586
Dept. No. XXV

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Clark

* * * * *

Fredys A. Martinez)
Petitioner.)

-vs-

State of Nevada)
Respondent, et al.)

MOTION FOR PRODUCTION
OF TRANSCRIPTS
AT STATE EXPENSE

06-27-2016
9:00 AM

COMES NOW Petitioner Fredys A. Martinez in pro se,
and moves the Court for an order directing the Clerk of the
Court to prepare or cause to be prepared, transcripts of the
(list the hearing(s)/date(s) for which you request transcripts):
I need the "Brady transcripts, and verbal declaration," of
Jose Castillo, with Detective Chavez, Arturo, LVMPDP #4
048, and Goddard, Blake, LVMPDP #5975,
and to serve same upon him at his place of confinement.

This motion is made and based upon the requirements of NRS
34.370(4); NRS 34.760(2); all papers, pleadings and documents on
file herein; the instant (check applicable pending action to
which this motion relates) X petition for writ of habeas
corpus X motion to/for a new trial, transcripts, peti-
tioner is actually innocent of the crime.

///

MC
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DA

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MAY 31 2016 CCCLL FORM 26.054

CLERK OF THE COURT

PA151

4

1 and the following points and authorities.

2 POINTS AND AUTHORITIES

3 Petitioner/Defendant has filed a X petition for writ of
4 habeas corpus X motion to/for a new trial transcripts, pe-
5 itioner is actually innocent of the crime,
6 _____, presenting ground(s)/claim(s) for relief. NRS

7 34.730(4) and NRS 34.760(2) require that the presentation of
8 habeas petitions be supported by affidavits, records,
9 transcripts or other relevant evidence. Id. Petitions and
10 motions which are not supported by such evidence render the
11 claims therein to be bare and naked allegations, unsupported by
12 the record and meriting dismissal. Hargrove v. State, 100 Nev.
13 498, 686 P.2d 222 (1984). See also Griffin v. State, 122 Nev.
14 737, 137 P.3d 1165, 1170 (2006) (defendant must support his
15 claims with "specific facts" demonstrating entitlement to relief
16 sought); Berjarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996)
17 (defendant bears burden of establishing factual allegations in
18 support of his claims).

19 In order to obtain this Court's order to produce the
20 requested transcripts, Petitioner/Defendant need show that they
21 would serve a useful purpose and that he would be prejudiced
22 without them. Peterson v. Warden, 87 Nev. 134, 483 P.2d 204,
23 205 (1971). Petitioner/Defendant requires the transcripts at
24 bar in order to support his ground(s)/claim(s), which have
25 merit, as shown on the separate page(s) annexed hereto as page
26 (s) S-2 (you must describe your grounds/claims and
27 demonstrate how the requested transcripts are necessary to avoid
28 a dismissal/denial of same), and as are incorporated as if set
forth herein. Prejudice is demonstrated inasmuch as due to the

1 petitioner is requesting the documents to en-
2 able him to better prepare a petition for
3 writ of habeas corpus (post-conviction)
4 pursuant to NRS 34.726 which allows for
5 filing more than 1 year after entry of
6 judgment of conviction, or after appeal
7 is taken if "Good Cause" for the delay
8 exists, and prejudice, to excuse untimely
9 filing, petitioner is alleging a "Good
10 Cause and Prejudice" that he will suffer
11 a "Fundamental miscarriage of Justice,"
12 to excuse the untimely filing because
13 he is actually innocent of the crime.
14 See, Klein v. Warden, 43 P.3d 1029, 1033 (200
15 2) (per curiam). However, he needs the doc-
16 uments requested to comply with the re-
17 quirement that he make factual alle-
18 ation in his petition. See, Grandin v. State,
19 634 P.2d 456, 458 (1981) (per curiam); Hargr
20 ove v. State, 686 P.2d 222, 225 (1984) (per
21 curiam); If possible, argue that the de-
22 fault in question is not "adequate," remind
23 the court that the state bears the bur-
24 den of proof on the issue of "adequacy,"
25 Bennett v. Mueller, 322 F.3d 573 (9th Cir. 2
26 003); Johnson v. Mitchell, 585 F.3d 923, 945
27 (6th Cir. 2009) (counsel's failure to do any
28 presentence investigation was prejudicial

-S-1

1 because no potential mitigating eviden-
2 se presented even though such evidence
3 existed); See, e.g., Steele v. U.S., 51
4 8 F.3d 986, 988 (8th Cir. 2008); U.S. v. Cur-
5 ley, 639 F.3d 50, 59-63 (2d Cir. 2011) (new
6 trial granted because district court
7 abused discretion by improperly admit-
8 ting "other acts" evidence which pre-
9 judiced jury); U.S. v. Johnson, 592 F.
10 3d 164, 171 (D.C. Cir. 2010) (new trial grant-
11 ed because prosecutor did not disclo-
12 se evidence that heroin defendant
13 was charged with, possessing actually
14 belonged to cousin); Klein v. Leis, 5
15 48 F.3d 425, 433-34 (6th Cir. 2008) (no a-
16 buse of discretion to declare mistrial
17 or new trial where defense's inappra-
18 priate opening statements accusing
19 prosecution of withholding evidence
20 in previous trial created strong pos-
21 sibility of prejudicing jury); And for
22 example, the double jeopardy clause does
23 not prohibit a retrial following a "Brady
24 violation by the government. See, e.g.,
25 U.S. v. Coleman, 862 F.2d 455, 457-58 (3d
26 Cir. 1988); U.S. v. Lewis, 368 F.3d 1102, 1107 (4th
27 Cir. 2004); U.S. v. Davis, 578 F.2d 277, 280 (10th Cir.
28 1978).

Donald J. Mortenson #1003276 Date: 5-23-2016.

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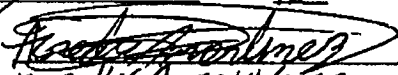
merit of Petitioner/Defendant's claims, same would be dismissed/denied without the transcripts at issue.

Petitioner/Defendant is a pauper, as evidenced by his having proceeded as a pauper in these proceedings. Therefore, the transcripts must be provided at State expense so as to satisfy the concerns of due process and fairness herein. See e.g. Gardner v. California, 393 U.S. 367, 89 S.Ct. 580, 582 (1969) (transcripts in habeas proceedings may not be supplied those who can afford them and denied to those who cannot).

CONCLUSION

For the reasons set forth above, the Court should grant the instant motion via ordering the Clerk of the Court to produce the above-described transcripts and serve same upon Petitioner/Defendant at his place of confinement.

Dated this 23 day of may, 2016.


Fredy A. Martinez #1003276
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

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CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing MOTION FOR PRODUCTION OF TRANSCRIPTS to the below address on this 23 day of may, 2016, by placing same in the U.S. Mail via prison law library staff:

Steven B. Wolfson, District Attorney
Office of the District Attorney
200 Lewis Avenue, P.O. Box 552212
Las Vegas, NV 8955-2212.

Attorney For Respondent

~~Fredy A. Martinez~~
Fredy A. Martinez #1003276
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION FOR PRODUCTION OF TRANSCRIPTS AT STATE EXPENSE does not contain the social security number of any person.

Dated this 23 day of may, 2016.

~~Fredy A. Martinez~~
Fredy A. Martinez #1003276

Petitioner In Pro Se

"original"

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MC
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Case No. 06C226586
Dept. No. XXV

Ann D. Quinn
CLERK OF THE COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Clark

* * * * *

Fredys A. Martinez,)
Petitioner,)
-vs-)
State of Nevada,)
Respondent, et al.)

6-22-16

9:00A

MOTION FOR PRODUCTION
OF TRANSCRIPTS
AT STATE EXPENSE

COMES NOW Petitioner, Fredys A. Martinez, in pro se,
and moves the Court for an order directing the Clerk of the
Court to prepare or cause to be prepared, transcripts of the
(list the hearing(s)/date(s) for which you request transcripts):
I need the "Brady" transcripts, of, Fuller, Clayton, M.
D., Physician for Bianca-Marina-Hernandez, in this
Case. August 16, 2006.
and to serve same upon him at his place of confinement.

This motion is made and based upon the requirements of NRS
34.370(4); NRS 34.760(2); all papers, pleadings and documents on
file herein; the instant (check applicable pending action to
which this motion relates) X petition for writ of habeas
corpus X motion to/for a new trial, transcripts, petiti-
on, is actually innocent of the crime.

///

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LCCLL FORM 26.054
MAY 31 2016

CLERK OF THE COURT

PA157

7

1 and the following points and authorities.

2 POINTS AND AUTHORITIES

3 Petitioner/Defendant has filed a X petition for writ of
4 habeas corpus X motion to/for a new trial, transcripts, Petitioner is actually innocent of the crime.
5 _____, presenting ground(s)/claim(s) for relief. NRS

6 34.730(4) and NRS 34.760(2) require that the presentation of
7 habeas petitions be supported by affidavits, records,
8 transcripts or other relevant evidence. Id. Petitions and
9 motions which are not supported by such evidence render the
10 claims therein to be bare and naked allegations, unsupported by
11 the record and meriting dismissal. Hargrove v. State, 100 Nev.
12 498, 686 P.2d 222 (1984). See also Griffin v. State, 122 Nev.
13 737, 137 P.3d 1165, 1170 (2006) (defendant must support his
14 claims with "specific facts" demonstrating entitlement to relief
15 sought); Berjarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996)
16 (defendant bears burden of establishing factual allegations in
17 support of his claims).

18 In order to obtain this Court's order to produce the
19 requested transcripts, Petitioner/Defendant need show that they
20 would serve a useful purpose and that he would be prejudiced
21 without them. Peterson v. Warden, 87 Nev. 134, 483 P.2d 204,
22 205 (1971). Petitioner/Defendant requires the transcripts at
23 bar in order to support his ground(s)/claim(s), which have
24 merit, as shown on the separate page(s) annexed hereto as page
25 (s) 5-2 (you must describe your grounds/claims and
26 demonstrate how the requested transcripts are necessary to avoid
27 a dismissal/denial of same), and as are incorporated as if set
28 forth herein. Prejudice is demonstrated inasmuch as due to the

1 Petitioner is requesting the documents
2 to enable him to better-better prepare
3 a Petition for writ of Habeas Corpus
4 (Post Conviction) Pursuant to NRS 34.
5 726 which allows for filing more than
6 1 year after entry of Judgment of
7 conviction or after Appeal is taken,
8 if "Good Cause" for the delay exists, and
9 prejudice, to excuse untimely filing.
10 Petitioner is alleging as "Good Cause
11 and Prejudice" That he will suffer a
12 "Fundamental miscarriage of Justice".
13 To excuse the untimely filing because
14 he is "Actually innocent," of the crime.
15 See Klein V. Warden, 43 P.3d 1029, 1033 (2002)
16 (Per curiam).

17 However, he needs the documents reque-
18 sted to comply with the requirement
19 that he make factual allegation in his
20 petition. See, Grondin V. State, 634 P.2d
21 456, 458 (1981) (Per curiam); Hargrove V.
22 State, 686 P.2d 222, 225 (1984).
23 If possible, argue that the default in
24 question is not "adequate", Remind the
25 Court that the State bears the burden
26 of proof on the issue of "adequacy." Ben-
27 nett V. Muedler, 322 F.3d 573 (9th Cir. 2003);
28 Johnson V. Mitchell, 585 F.3d 923, 945 (6th Cir. 2009).

1 (Counsel's Failure to do any presentence
2 investigation was prejudicial because
3 no potential mitigating evidence pre-
4 sented even though such evidence ex-
5 isted); See, e.g., Steele v. U.S., 518
6 F.3d 986, 988 (8th Cir. 2008); U.S. v.
7 Curley, 639 F.3d 50, 59-63 (2d Cir. 2011) (ne-
8 w trial granted because district court
9 abused discretion by improperly admi-
10 tting "other acts" evidence which pre-
11 judiced jury); U.S. v. Johnson, 592 F.
12 3d 164, 171-73 (D.C. Cir. 2010) (new trial
13 granted because prosecutor did not
14 disclose evidence that heroin defen-
15 dant was charged with possessing
16 actually belonged to cousin);
17 Klein v. Leis, 548 F.3d 425, 433-34 (6th
18 Cir. 2008) (no abuse of discretion to
19 declare mistrial or new trial where
20 defense's inappropriate opening stat-
21 ements accusing prosecution of with-
22 holding evidence in previous trial cre-
23 ated strong possibility of prejudicing
24 jury); See, e.g., U.S. v. Coleman, 862 F.2d
25 455, 457-58 (3d Cir. 1988); U.S. v. Lewis, 268
26 F.3d 1102, 1107 (9th Cir. 2004); U.S. v. Davis, 578 F.
27 2d 277, 280 (10th Cir. 1978).
28 Fredy S. Martinez # 1003276 ~~Rio Martinez~~
Date: 5-23-2016.

-S-2

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merit of Petitioner/Defendant's claims, same would be dismissed/denied without the transcripts at issue.

Petitioner/Defendant is a pauper, as evidenced by his having proceeded as a pauper in these proceedings. Therefore, the transcripts must be provided at State expense so as to satisfy the concerns of due process and fairness herein. See e.g. Gardner v. California, 393 U.S. 367, 89 S.Ct. 580, 582 (1969) (transcripts in habeas proceedings may not be supplied those who can afford them and denied to those who cannot).

CONCLUSION

For the reasons set forth above, the Court should grant the instant motion via ordering the Clerk of the Court to produce the above-described transcripts and serve same upon Petitioner/Defendant at his place of confinement.

Dated this 23 day of May, 2016.

~~Frederick A. Martinez~~
Frederick A. Martinez #1003276
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

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CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing MOTION FOR PRODUCTION OF TRANSCRIPTS to the below address on this 23 day of may, 2016, by placing same in the U.S. Mail via prison law library staff:

Steven B. Wolfson, District Attorney
Office of the District Attorney
200 Lewis Avenue, P.O. Box 552212
Las Vegas, NV 8955-2212.

Attorney For Respondent

~~Fredys A. Martinez~~
Fredys A. Martinez #1003276
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION FOR PRODUCTION OF TRANSCRIPTS AT STATE EXPENSE does not contain the social security number of any person.

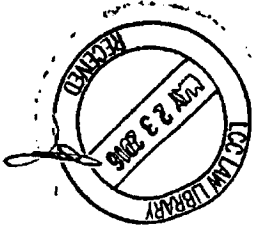
Dated this 23 day of may, 2016.

~~Fredys A. Martinez~~
Fredys A. Martinez #1003276

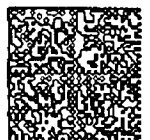
Petitioner In Pro Se

1003276

Fredys A. Martinez #1003276
Love Lock Correctional Center
1200 Prison Road
Love Lock, NV 89419

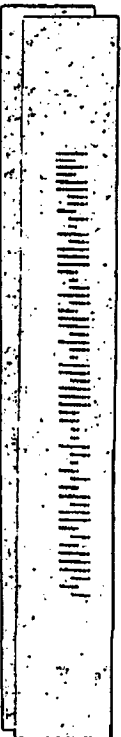


Steven R. Grierson, Clerk of the Court
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155-1160



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INMATE LEGAL
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Case No. 06C226586
Dept. No. XXV

Ann L. Blum
CLERK OF THE COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Clark

* * * * *

Fredys A. Martinez,)

Petitioner,)

-vs-

State of Nevada,)

Respondent, et)
al.

MOTION FOR APPOINTMENT
OF COUNSEL

COMES NOW Petitioner, Fredys A. Martinez, in pro se,
and moves the Court for an order appointing counsel in the
instant petition for writ of habeas corpus (post-conviction).

This motion is made and based upon NRS 34.750; all papers,
pleadings and documents on file herein; and the points and
authorities below.

POINTS AND AUTHORITIES

Petitioner is unable to afford counsel. See Application to
Proceed In Forma Pauperis on file herein.

The substantive issues and procedural requirements of this
case are difficult and incomprehensible to Petitioner.

Petitioner, due to his incarceration, cannot investigate,
take depositions or otherwise proceed with discovery herein.

Petitioner's sentence is: 5, to life, and, 5, to life.
Actually innocent.

RECEIVED

3 MAY 31 2016 CL FORM 26.042

CLERK OF THE COURT

PA164

1 There — are ~~X~~ are not additional facts in support of
2 this motion attached hereto on separate page(s).

3 Counsel would assist Petitioner with a clearer presentation
4 of his issues before this Court and would likewise facilitate
5 and ease this Court's task of discerning the issues and
6 adjudicating same upon their merits.

7 Discretion lies with the Court to appoint counsel under NRS
8 34.750. Crump v. Warden, 113 Nev. 293, 934 P.2d 247, 254
9 (1997). The Court is to consider: (1) the complexity of the
10 issues; (2) whether Petitioner comprehends the issues; (3)
11 whether counsel is necessary to conduct discovery; and (4) the
12 severity of Petitioner's sentence. NRS 34.750(1)-(1)(c).

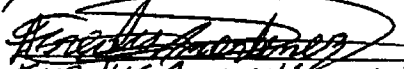
13 Under similar discretionary standards, Federal courts are
14 encouraged to appoint counsel when the interests of justice so
15 require - a showing which increases proportionately with the
16 increased complexities of the case and the penalties involved in
17 the conviction. Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir.
18 1986). Attorneys should be appointed for indigent petitioners
19 who cannot "adequately present their own cases." Jeffers v.
20 Lewis, 68 F.3d 295, 297-98 (9th Cir. 1995).

21 Although Petitioner need meet but one (1) of the enumerated
22 criteria of NRS 34.750 in order to merit appointment of counsel,
23 he meets all of them. He also presents a classic example of one
24 meriting counsel under the interest of justice test bespoken by
25 the Ninth Circuit. Indeed, Petitioner's sentence, coupled with
26 the other factors set forth above, demonstrate that appointment
27 of counsel to him would not only satisfy justice, but
28 fundamental fairness, as well.

1 CONCLUSION

2 For the reasons set forth above, the Court should appoint
3 counsel to represent Petitioner in and for all further
4 proceedings in this habeas corpus action.

5 Dated this 23 day of May, 2016.

6 
7 Fredy A. Martinez #1003276
8 Lovelock Correctional Center
9 1200 Prison Road
10 Lovelock, Nevada 89419

11 Petitioner In Pro Se

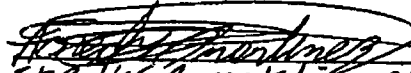
12 CERTIFICATE OF SERVICE

13 I do certify that I mailed a true and correct copy of the
14 foregoing MOTION FOR APPOINTMENT OF COUNSEL to the below address
15 on this 23 day of May, 2016, by placing same

16 in the U.S. Mail via prison law library staff:

17 Steven B. Wolfson, District Attorney
18 Office of the District Attorney
19 200 Lewis Avenue, P.O. Box 552212
20 Las Vegas, NV 8955-2212.

21 Attorney For Respondent

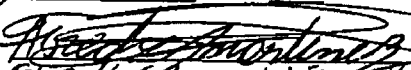
22 
23 Fredy A. Martinez #1003276

24 Petitioner In Pro Se

25 AFFIRMATION PURSUANT TO NRS 239B.030

26 The undersigned does hereby affirm that the preceding
27 MOTION FOR APPOINTMENT OF COUNSEL DOES not contain the social
28 security number of any person.

29 Dated this 23 day of May, 2016.

30 
31 Fredy A. Martinez #1003276

32 Petitioner In Pro Se

**DISTRICT COURT
CLARK COUNTY, NEVADA
COURT MINUTES**

Felony/Gross Misdemeanor

June 27, 2016

06C226586

The State of Nevada vs Freddy Martinez

June 27, 2016

9:00 AM

All Pending Motions

HEARD BY: Delaney, Kathleen E.

COURTROOM: RJC Courtroom 15A

COURT CLERK: Dania Batiste

REPORTER: JoAnn Melendez

PARTIES**PRESENT:** Overly, Sarah

Deputy District Attorney

JOURNAL ENTRIES

- DEFENDANT'S PRO PER MOTION FOR PRODUCTION OF TRANSCRIPTS AT STATE'S EXPENSE (DECLARATION OF JOSE CASTILLO).....DEFENDANT'S PRO PER MOTION FOR PRODUCTION OF TRANSCRIPTS AT STATE EXPENSE.....DEFENDANT'S PRO PER MOTION FOR PRODUCTION OF TRANSCRIPTS AT STATE EXPENSE

COURT NOTED it has signed and will be sending Defendant the approval of his order to proceed in forma pauperis.

COURT ORDERED, Defendant's Pro Per Motion to Appoint Counsel calendared for July 11th will be ADVANCED to today, and GRANTED; matter SET for Confirmation of Counsel for Drew Christensen, Esq.'s office to determine how the new attorney wishes to proceed. COURT FURTHER ORDERED, today's motions CONTINUED.

NDC

7/20/2016 9:00 am Confirmation of Counsel (D. Christensen, Esq.)...Deft's Pro Per Motions for Production of Transcripts

CLERK'S NOTE: A copy of this Minute Order has been electronically mailed to Drew Christensen, Esq.; and mailed to Defendant at the Nevada Department of Corrections (NDC) /db 6.29.2016

PRINT DATE: 06/29/2016

Page 1 of 1

Minutes Date: June 27, 2016

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DISTRICT COURT
CLARK COUNTY, NEVADA
CLERK OF THE COURT

1 TRAN
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6 STATE OF NEVADA,

7 Plaintiff,

8 vs.

9 FREDDY A. MARTINEZ,

10 Defendant.
11
12

CASE NO. C226586

DEPT. VII

13 BEFORE THE HONORABLE STEWART L. BELL, DISTRICT COURT JUDGE
14 Wednesday, April 11, 2007

15 RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL
16 DAY 1 - VOLUME I

17 APPEARANCES:

18 For the State:

NOREEN C. NYICOS, ESQ.
Deputy District Attorney
SAMUEL G. BATEMAN, ESQ.
Deputy District Attorney

21 For the Defendant:

KATHLEEN M. HAMERS, ESQ.
Deputy Public Defender
RONALD S. PAULSON, ESQ.
Deputy Public Defender

25 RECORDED BY: RENEE VINCENT, COURT RECORDER

-1-

Day 1 - Volume I

PA168

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AUG 10 2007
CLERK OF THE COURT

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I N D E X

	PAGE
WITNESS: FRANKLIN MARTINEZ	
DIRECT EXAMINATION BY MR. BATEMAN	34
CROSS-EXAMINATION BY MS. HAMERS	42
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1 Tuesday, April 11, 2007 - 9:11 a.m.

2 [Out of the presence of the jury]

3
4 THE COURT: This is Case Number C226586, State of Nevada versus
5 Freddy Martinez. Let the record reflect the presence of Mr. Martinez, his
6 counsel, Mr. Paulson, Ms. Hamers; Mr. Bateman, and I guess Ms. Nyicos is
7 coming for the State. Absence of the jury. Any matters to come before the
8 Court before we bring the jury in?

9 MS. HAMERS: Not from us, Judge.

10 MR. BATEMAN: I don't believe so. The only thing, Your Honor, was,
11 we did have some witness availability issues, one of the detectives and then
12 our nurse. The nurse is coming in from out of state.

13 MS. NYICOS: Absolutely cannot be here until tomorrow.

14 MR. BATEMAN: Right.

15 MS. NYICOS: But I think we've got enough today to fill today.

16 MR. BATEMAN: Most of today.

17 MS. NYICOS: Yeah.

18 THE COURT: Okay. We do the best we can. I thought we'd probably
19 get all of our witnesses today and argument tomorrow, but obviously we
20 won't, so we'll be done tomorrow night.

21 MR. BATEMAN: At the very latest. I mean --

22 MS. NYICOS: Yeah. I mean, we'll be done tomorrow morning.

23 MR. BATEMAN: Yeah.

24 THE COURT: This Defendant doesn't have prior felonies. If I had to
25 guess, I guess he's probably going to get on the stand. And so by the time we

1 get through argument and get them the case at 4:00, it's probably what we're
2 dealing with. Okay.

3 [Court at ease.]

4 THE COURT: Okay. We'll do one alternate, so that's 13. So you'll
5 have nine each. Certainly, you wouldn't need to use nine, but if you need to,
6 do what you gotta do. I take it the Defendant doesn't speak English since we
7 have the interpreter?

8 MS. NYICOS: Yes.

9 THE COURT: Do we have witnesses who don't speak English?

10 MS. NYICOS: Yes.

11 THE COURT: And we have interpreters -- separate interpreters coming
12 up for them?

13 MS. NYICOS: Yeah.

14 [Court at ease; waiting for prospective jury panel.]

15 [Prospective jury panel enters the courtroom at 9:28 a.m.]

16 THE COURT: Okay. Good morning, ladies and gentlemen. This is the
17 time set for trial in Case Number C226586, State of Nevada versus Freddy
18 Martinez. This is Mr. Martinez here in the white shirt and the tie with his
19 attorneys, Mr. Ron Paulson and Ms. Kathleen Hamers. These are prosecuting
20 attorneys, Ms. Noreen Nyicos and Mr. Sam Bateman, who represent the State
21 of Nevada. This is a criminal case, and Mr. Martinez is charged with sexual
22 assault and a couple of related other charges.

23 My name is Stew Bell. I'm the judge assigned to try this case.
24 You're in Department VII. You've been summoned here to act as potential
25 jurors to decide this case.

1 Let me introduce the staff to you. This is Renee Vincent. She's
2 our court reporter/recorder. It is her job to see that everything is said and by
3 whom is taken down accurately. The reason for that is that after the trial, if
4 one side or the other thinks I didn't do my job right and they want to appeal to
5 the Nevada Supreme Court, a transcript of exactly what happened is prepared
6 and sent to the Court, and that's what they review to determine whether or not
7 both sides had a fair trial.

8 This is Tina Hurd. She's our records clerk. She's responsible for
9 keeping track of all the records, all the evidence, swearing the witnesses, and
10 she keeps Minutes, which is the official record of this Court.

11 Finally, you've met Lisa Cologna. She's a deputy sheriff assigned
12 to this court as a bailiff. Her job is courtroom security. That is the security of
13 all the persons and property in the courtroom, including yourselves. She is also
14 the only participate in the trial that is allowed to talk to jurors during the trial
15 for obvious reasons.

16 So if there's something you need to ask, if there's something you
17 need to bring to my attention or the lawyers' attention or you just want to
18 know where the restroom is or whatever, you talk to Lisa, and she'll give you
19 the answer. And if it's something that needs to be brought to somebody else's
20 attention, she knows exactly how to do it within the context of the rules.

21 Ms. Nyicos, will you introduce yourself and your co-counsel and
22 tell the ladies and gentlemen of the jury the witnesses you intend to call.

23 MS. NYICOS: Thank you. Ladies and gentlemen, my name is Noreen
24 Nyicos. I'm a deputy district attorney here in Clark County, Nevada. With me
25 is Sam Bateman, another deputy district attorney to assist me. We're here to

1 prosecute the case of State of Nevada versus Freddy Martinez. We have
2 alleged on or about the 16th day of August 2006 that the Defendant kidnapped
3 Bianca Hernandez at knifepoint, took her in her vehicle, drove her up to
4 Mesquite, Nevada. On the way up to Mesquite, he pulled off to the side of the
5 road and sexually assaulted her at knifepoint.

6 Witnesses the State intends to call in this case -- we may not call
7 all these witnesses, but these are all the people related to this case. You need
8 to listen carefully to these names. Arturo Chavez, Las Vegas Metropolitan
9 Police Department; Scott Kavon, Las Vegas Metropolitan Police Department;
10 Christopher Tomaino, Metro Police; Bradley Grover, Metro Police; Troy Givens,
11 Metro Police; Blake Goddard, Metro Police; Michelle Briggs, Metro Police;
12 Bianca Hernandez, Las Vegas, Nevada; Jose' Quiroz-Castillo, Las Vegas,
13 Nevada; William McPherson [sic], Moapa, Nevada; Debbie Young. She's a
14 nurse, operates out of St. George, Utah.

15 THE COURT: Okay.

16 MS. NYICOS: Do you want me to start over?

17 THE COURT: Start over.

18 MS. NYICOS: Okay.

19 THE COURT: We just had a prospective juror come in, and obviously
20 everybody has to hear what Ms. Nyicos has to say. So, Ms. Nyicos, please
21 start over.

22 MS. NYICOS: All right. My name is Noreen Nyicos, Deputy District
23 Attorney. With me is Sam Bateman, also a deputy district attorney. We're
24 here to prosecute State of Nevada versus Freddy Martinez, the Defendant. We
25 have alleged that on or about August 16th of 2006 that Mr. Martinez kidnapped

1 Bianca Hernandez at knifepoint here in Las Vegas, Nevada; that he took her in
2 her vehicle up to Mesquite, Nevada, along the I-15. At some point during that
3 drive, he pulled off to the side of the road near Logandale where he sexually
4 assaulted her at knifepoint.

5 Witnesses involved in this case, although we are not going to call
6 every single witness, you need to pay attention to these names, and I didn't
7 get through the list very far, so here we go. Arturo Chavez, Metro Police;
8 Scott Kavon, K-a-v-o-n, Metro Police; Christopher Tomaino, T-o-m-a-i-n-o,
9 Metro Police; Bradley Grover, Metro Police; Troy Givens, Metro Police; Blake
10 Goddard, Metro Police; Michelle Briggs, Metro Police; Bianca Hernandez, Las
11 Vegas, Nevada; Jose' Quiroz-Castillo, Las Vegas, Nevada; William McPherson
12 [sic], Moapa, Nevada; Debbie Young. She's a nurse. She operates out of St.
13 George, Utah.

14 Franklin Martinez, Las Vegas, Nevada; Lance Barr, Mesquite
15 Police Department; Shane Charles, Mesquite Police Department; Ron Richmond,
16 Mesquite Police Department; C.J. Larsen, Mesquite Police Department; Millie
17 Tara, Mesquite, Nevada. We also have Kristina Paulette, Las Vegas
18 Metropolitan Police Department, the DNA lab; and Clayton Fuller, M.D., Las
19 Vegas, Nevada.

20 THE COURT: Thanks. Ms. Hamers, will you introduce yourself, your
21 co-counsel and your client, please.

22 MS. HAMERS: Thank you, Judge. Good morning. My name is
23 Kathleen Hamers, and along with my co-counsel, Ron Paulson, we will be
24 representing Freddy Martinez in this case. In addition to the witnesses that the
25 State has just listed off, the Defense may call Gregorio David Martinez, Maria

1 Diaz and Naomi Conaway.

2 THE COURT: Okay. Thanks. Okay. Let me -- let me tell you the
3 good news first, and we'll get going. The good news is that they read all these
4 witnesses because that's the rules. One of the rules we operate by is there no
5 trial by ambush, so you have to tell the other side who your witnesses are, so
6 we get to the truth and not that somebody wins because they're unprepared or
7 surprised.

8 The truth is, the State will call maybe a quarter of those
9 witnesses, and the Defense may call anywhere from zero to three of the
10 witnesses they called. The sum and substance of it is, while our average trial
11 in District Court takes six days -- you know, some take two days; some take
12 two weeks; some take six weeks; six days the average -- this case is two days.
13 It's all day today, a good hard day, and all day tomorrow. We will be finished
14 tomorrow at 5:00, 5:30.

15 I've got another trial starting Friday. I just know how long these are
16 going to take. So I've never been wrong in several hundred trials. That's how
17 long it's going to take because I go over it with the lawyers in advance, and I
18 know what witnesses they're going to call, and I know how long it's going to
19 take. And it's only fair to give you an honest assessment of how long a trial is
20 going to take because you may have other things that would otherwise get in
21 the way of your serving.

22 One other thing that you may have noticed, this lady in the nice
23 green suit, she's an interpreter. She works for the court. Mr. Martinez does
24 not speak English. I assume he speaks -- well, I know he speaks Spanish only
25 or Spanish is his primary language. And when we have that happen -- we have

1 it all the time with languages all over the world -- the court has interpreters that
2 interpret as necessary for the benefit of defendants. We're going to have some
3 witnesses that only speak Spanish, and the interpreters will interpret for you.

4 These are very, very skilled people who have to go through
5 rigorous education and testing. They're all certified. They all work for the
6 court and not for any party, and you will see that we'll proceed through this in
7 a virtually seamless manner, notwithstanding the fact that several people do
8 not speak English.

9 You'll probably see interpreters come and go because it's very,
10 very taxing and very, very tiring, and they can only go for a certain amount of
11 time, and then they need to have a replacement because they are talking as
12 fast as I'm talking to make sure that the Defendant and the witnesses
13 understand what's going on.

14 Okay. The next thing that happens is we have a roll call of all
15 the jurors to make sure that we have an accurate record of who's here. Just
16 like school, when they call your name, say "present" or "here," please, and
17 we'll get going.

18 [The Clerk calls roll of the prospective jury panel; not transcribed]

19 THE COURT: Is there anyone who's name was not called? Okay. The
20 next thing that happens is what we call the *voir dire* process. It's a process
21 where mostly the Court, a little bit counsel asked very non-personal, non-
22 evasive questions of potential jurors to make sure that the ultimate jurors that
23 sit in judgment in this case can be fair to both the State and Mr. Martinez.

24 Ultimately, we will have 12 people sit in judgment -- they probably
25 told you that downstairs -- in a criminal case. We have 13 potential people in

1 the box. Why so? Well, because the rules say that we have to have 12 people
2 make the decision, and in a criminal case, they have to be unanimous. Things
3 do happen. Even good citizens that are here doing their duty, people get in car
4 wrecks; they have sick kids; they have relatives go in the hospital. Things
5 happen that can abort the process for a juror here or a juror there.

6 So we start off with enough people to make sure we get to the
7 finish line with 12. In a two-day trial, 13 is plenty. If this was a six-week trial,
8 we might start off with 20 or 22 because we know we're going to lose a few,
9 and if we lose down below the minimum amount, the law says it's a do-over,
10 and it's a very big waste of time and money, including your time.

11 So we'll start with 13, and we'll end up with 12 tomorrow. If, in
12 fact, we end up with 13 tomorrow, it's probably much better than 50/50 of the
13 case. Then at the end of the trial, the Clerk draws a number of a juror at
14 random out of a cup, and that person serves as an alternate.

15 In any event, the idea is to make sure that everybody can be fair
16 and impartial. I have no doubt that all of you could be fair and impartial in 98
17 percent of the cases you might be called upon to sit as a juror. We want to
18 make sure that this isn't one of those rare cases that you couldn't, and it has
19 to do with background experiences. It has nothing to do with your character or
20 your ability or your talent or your willingness to serve or citizenship or anything
21 like that. It is experiences you may have had that may make it difficult for you
22 to come to your task with a clean slate.

23 How could that be? Well, maybe Ms. Hamers is your personal
24 attorney. Maybe you live next door to Ms. Nyicos. Maybe you've had dealings
25 with one of the witnesses that would make it difficult for you to objectively

1 judge their veracity. Maybe you personally or somebody close to you has had
2 an experience so similar to the allegations in this case that it makes it difficult
3 for you to be objective. Those are the kinds of things we're looking for,
4 background experiences.

5 And so the way this goes is, I'm going to ask some questions of
6 everybody en masse, and then I'm going to ask a few individual questions of
7 the 13 starters here, so to speak, and then each of the lawyers has a chance to
8 ask a few questions. Again, they're not personal; just gives us a flavor of
9 what's going on.

10 And then the final thing is what we call preemptory challenges,
11 and that means each side gets to ask to have excused persons for any reason
12 or no reason, and it usually is no reason. I mean, usually it is just a feeling in
13 the gut of a lawyer that, Maybe this person isn't going to understand this
14 particular case from my point of view, and it's all subjective. It isn't objective.
15 That isn't because of the case. It's just sort of their feeling because when we
16 get there, we want to make sure that both sides, including the Defendant and
17 the lawyers, have a feeling that they're comfortable with the jurors and that
18 both sides get a fair shake.

19 So this whole process will take us maybe an hour and half, hour
20 and 45 minutes, and then we'll get started with the trial, and we will work two
21 good long days, and we'll be done.

22 It's very important that everybody tells the truth, and to that end,
23 the law says the rules we play by are that this is done under oath. So if you'll
24 stand and raise your right hand, the Clerk will administer the oath, and we'll get
25 cooking.

1 [The Clerk administers the oath en masse to the prospective jury panel]

2 THE CLERK: Thank you. You may be seated.

3 [Jury *voir dire*; not transcribed.]

4 THE COURT: Okay. Thanks. All right, folks. We have our jury.

5 Obviously, it takes more than 13 folks to get a jury in a case like this. The way
6 this work is, you that are sitting in the back of the room, you go back
7 downstairs, and they'll see if they can find a different -- another case for you to
8 work on.

9 Basically the way it works is this, or supposed to work is, they
10 take their turn, and theoretically, although occasionally you have one slip
11 through, we don't call them again until we go through the whole citizenry,
12 which is typically 15, 18 years, and people have a couple turns in their life. If
13 you go downstairs and they don't have another case, they'll just send you
14 home. If you go out three times today on three different cases and it just so
15 happens that you're, luck of the draw, in the back of the room and you don't
16 get picked, we don't make you come back day after day after day. You get to
17 go home. We'll have another couple hundred people come into tomorrow, and
18 we'll start again. So if you'll go back downstairs, they'll tell you what you
19 need to do. Thanks very much.

20 Ladies and gentlemen of our jury, your jury service is done under
21 oath. If you'll raise -- stand and raise your right hand, please, the Clerk will
22 administer the oath, and we'll get going.

23 [The Clerk administers the oath to the jury panel.]

24 THE CLERK: Thank you. You may be seated.

25 THE COURT: Okay. Let me give you a couple pointers, and we'll get

1 started. First of all, next to your seat you're going find a clipboard with a pad
2 of paper and a pencil or pen and a hard red badge. If you'll take that hard
3 badge and replace your soft badge, it will identify you as actually being a juror
4 here in Department VII as opposed to a potential juror somewhere. There's a
5 lot of reasons for that, but maybe most important is that if you're outside at
6 lunch or at a break or whatever and people see that you're a juror in
7 Department VII and they're witnesses or investigators in this case, they'll be
8 sensitive not to talk about the case in your presence.

9 We give you the pad and writing implement because you are
10 entitled to take notes. You can write down what you think is important or
11 maybe just a question you want to ask of your fellow jurors when you get in
12 the jury room, but you can take whatever notes you take into the jury room
13 with you.

14 Ultimately your decision has to be based on what you hear here
15 in court. While it is a noble virtue to want to get as much information and
16 evidence as you can before making any decision in life, it would be against the
17 rules to do independent investigation. To decide that you want to go to the
18 scene or look things up on the Internet, that would be against the rules; and if
19 somebody did it and the Court found out about it, it would void everything.
20 We'd have to do it over. It's difficult. It's expensive. It's not fair to your
21 fellow jurors, so please do not do that. Simply pay attention in court and
22 render your verdict.

23 As I said earlier, during the trial all the participants are not
24 allowed to talk to you for obvious reasons. The only person that's allowed to
25 talk to you is Lisa. If you have any questions or concerns or anything you

1 want, you just flag down Lisa, and she'll take care of it. She's done hundreds
2 and hundreds and hundreds of these. You won't present her with an issue
3 she's not familiar with.

4 This is a criminal trial. It is commenced by the filing of a
5 document called an Indictment. An Indictment is simply a charge. It is no
6 evidence whatsoever of the guilt of the Defendant. For the sole purpose of you
7 understanding the specific nature of the charge, the Clerk is going to read to
8 you the Indictment. You do not have to take notes. This is just so you'll kind
9 of understand what's coming. When I instruct you on the law at the end of the
10 case, I will actually give you an instruction that embodies all the language here,
11 so you won't have to take it down. Ms. Clerk.

12 [The Clerk reads the Indictment aloud; not transcribed.]

13 THE COURT: Okay. Thanks. The process goes like this: As soon as
14 I'm done talking in a couple minutes, we'll hear the opening statement from the
15 State. An opening statement is not evidence. It is a framework to help you
16 understand the evidence. I liken it to the picture on the outside of a jigsaw
17 box. You pick up any jigsaw puzzle piece and look at it, it's just gibberish.
18 You can't -- it doesn't make any sense.

19 But if you can look at this picture and you see that there's a lot
20 of red up here, you kind of know it goes up here. I mean, that's the idea.
21 Evidence comes in a bit here and a piece there, and instead of having you try to
22 have to put it all together after the fact with no idea of what it means, the
23 State is going to tell you what they think the evidence is going to show, so as
24 it comes in, it sort of makes sense to you.

25 Then the Defense has three options. They may get up and make

1 an opening statement and tell you what they believe the evidence will or will
2 not show, for that matter, or they can wait until the State's case is done and
3 make an opening statement or they don't have to make an opening statement
4 at all. That's just a strategic decision they'll make.

5 Then we'll hear the actual evidence. It will start with the State
6 calling their witnesses. The State under our procedure has the entire burden of
7 proof, and so they call first any and all witnesses they have. Sometimes you
8 have witnesses that both the Defense and State would like to call. They have
9 things that each would like to bring out to you, and so the State calls them --
10 well, if the State didn't call them, the Defense might call them, but because the
11 State has called them, we don't call them back. We bring them in, we take
12 one turn at them, and everybody gets -- so sometimes witnesses are really both
13 sides' witnesses.

14 When the State is done calling witnesses, again, the Defendant
15 may or may not call witnesses. They have absolutely no obligation to call any;
16 no obligation to put the Defendant on the stand. If they believe that the State
17 hasn't proved their case, they have a right to stand up and argue that or they
18 can call witnesses. That's their choice. If they wish to call witnesses, they
19 can.

20 The State can then, if they wish, call what we call rebuttal
21 witnesses, somebody that didn't -- they didn't put on in their case, but may
22 have something to rebut what the Defense said. It doesn't happen very often,
23 but they have that right.

24 Then I'll give you the law as it applies to this case. I start by
25 having it done in advance. I work on it all the time as the trial is going so that I

1 have it ready when the time comes, and I'll give it to you. It doesn't take very
2 long to impart it to you.

3 Then we hear closing argument. Closing argument is the mirror
4 image or the opposite of opening statement. It is what the lawyer thinks the
5 evidence did or did not show and why that supports their theory of the case,
6 why the State thinks that this is enough to convict the Defendant; why the
7 Defense thinks it is not enough for you to convict the Defendant.

8 Because the State has the burden of proof, in closing arguments
9 they go first and last. So we'll hear from the State, the Defense, then the
10 State. Then the case is submitted to you.

11 During the course of the trial, you are not allowed to talk about the
12 case with each other or anyone else, and every time we recess, I'll tell you
13 that. There are a number of important reasons, but mainly we want people to
14 keep an open mind until the end of the case. So if you're at a break or you
15 want to call home, you want to call home and say, I'm a juror. It's a sexual
16 assault case. It's two days. I can't talk about it now, but Thursday night I'll
17 be glad to talk to you, honey, that is fine. Please don't talk with each other or
18 anybody else about the specifics of what's been said in here.

19 Ultimately the weight and value to be given any evidence or
20 testimony is up to you. You decide who's telling the truth or what to believe or
21 what not to believe. During the course of the trial you may hear lawyers say
22 "object" or "I object, Your Honor" or "objection." What does that mean? You
23 may have seen it if you've been a juror before. You may have seen it on TV.
24 What it means is this: Trials are conducted under rules, and they are good
25 rules. They are not rules designed to keep things from jurors. They are rules

1 designed to make sure that the playing field stays level, that both sides have a
2 fair chance to have their position considered, and my job is, I'm the enforcer of
3 the rules. I'm like the home plate umpire. You know, I don't care what the
4 result is. I don't care if the Defendant is convicted or acquitted. All I care is
5 that both sides have a fair opportunity to present their circumstances and that I
6 get you out by tomorrow night. That's my sole job.

7 So when the lawyer says, Objection, Your Honor, what he's
8 saying is, Judge, under the rules you can't ask a question that way or that's
9 not a fair piece of evidence or whatever, and it's just up to me to make a
10 decision. That's all.

11 If you can't hear a witness or can't see something or you don't
12 quite understand, please raise your hand and say, I didn't understand or I didn't
13 hear it, and we'll rephrase it. We want everybody to see, hear and understand
14 everything.

15 Also, there's some water over there. Lisa will put some cups
16 out. If you want a drink of water, that's certainly fine. If you go to lunch or go
17 to a break and you want to bring back a bottle of water or a small Coke or
18 something just to keep your mouth from getting dry, as long as your subtle
19 about it, that's perfectly fine. You can't have a picnic in the jury box, but I
20 know sometimes it's a little more comfortable if you have something to sip on.

21 Under the rules you are entitled to ask questions. We didn't have
22 this process up till about two and a half years ago, but now jurors are entitled
23 to ask questions. And the way it works is this: If you think a question needs
24 to be asked that one of the lawyers didn't ask, while the witness is still here --
25 not after they went back to Newark -- while they are still here, get Lisa's

1 attention. Tear a sheet out of your pad, write your juror number and the
2 question. Forget those old numbers. You're now 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
3 11, 12, 13. Juror Number 13, What color's the cat? That's the question.

4 You give it to Lisa on a piece of paper; she'll give it to me. If it is
5 a proper question, under the rules I'll ask the question, and you deem the
6 answer the same as if one of the lawyers asked the question. If it is not
7 allowable under the rules, and we don't expect you, of course, to know all the
8 rules, I'll just set it aside. I won't ask it. It won't be any big deal.

9 After the trial is over, I'll pick it back up, and I'll go over it with
10 you, and I'll tell you what the rule is, and why we have that rule. Why does
11 that rule tend to keep the playing field level? Why does it make sense, and
12 then I think it'll make sense to you.

13 In my experience in doing this literally hundreds of times since
14 we invoked the jury's right to ask questions, it's been my experience about 75
15 percent of the time we don't have any jury questions. I attribute that to pretty
16 capable lawyers who bring out everything from their point of view that's
17 necessary. About 25 percent of the time we have a few questions. I haven't
18 found that it has changed the process much, but that's the way it goes.

19 Finally, our schedule is something like this: We'll go to about
20 noon. We'll take an hour break for lunch. We'll go for a couple hours. We'll
21 take a 10-, 12-minute break for restroom, cigarette, get a drink of water. In
22 the afternoon we'll go for a couple more hours. We'll break for the night. Sort
23 of the same schedule tomorrow. Two, two and a half hours in the morning, a
24 break, a couple hours, break, couple hours. We will be done by tomorrow
25 night. I promise you we're going to be right on schedule. We're not going to

1 be done by tomorrow noon, and we're not going to be here on Friday on this
2 case.

3 That said, having given you the schedule, you know, if right now
4 somebody needs to use the restroom and they don't want to wait until noon,
5 and that includes the lawyers, or if somebody needs to make a call or get a
6 drink of water or somebody says, Judge, can we have five minutes, we'll just
7 take five minutes. It ain't any big deal. We'll pick back up, and we'll get on
8 schedule. So if you need a break or you need something, just raise your hand
9 and say, Let's go, and we'll go. If I don't have somebody raise their hand, I'll
10 assume everybody is good to go till noon. We will take a five-minute break.

11 Now, listen, every time we break, I have to give you three
12 instructions. It is part of the rules. They are good rules to have to give you, in
13 my opinion, and my opinion doesn't count. It is a stupid rule that I have to give
14 it to you every time because once I give it to you once, you'll have it, but
15 you're going to hear it about four times during the trial.

16 One, don't talk about the case with each other or anyone else. I
17 already told you that. Talk about the weather, talk about Iraq, the ballgame,
18 politics, anything you want, but do not talk about the case.

19 Number two, don't read, watch or listen to any report on the
20 case by Internet, television, radio or newspaper. I don't think this will be
21 reported, but it might be. I'll look for a reporter. If there's somebody in here,
22 I'll kind of clue you in. If not, you probably don't have to sanitize your paper.

23 And number three, don't form or express an opinion on the case
24 until you deliberate. Keep an open mind. Just fundamental fairness. We'll
25 take a five-minute break, and we'll come in with the State's opening. Okay.

1 [Jury exits the courtroom.]

2 [A short break was taken at 11:15 a.m.]

3 [The jury returns to the courtroom.]

4 THE COURT: Okay. Back on the record in Case Number C226586,
5 State of Nevada versus Freddy Martinez. Let the record reflect the presence of
6 Mr. Martinez with his counsel; counsel for the State. All ladies and gentlemen
7 of the jury are back in the box. We're missing someone. No?

8 THE BAILIFF: No.

9 THE COURT: We've got them. Okay. State, your opening
10 statement.

11 ***STATE'S OPENING STATEMENT***

12 MS. NYICOS: Thank you, Judge. Counsel. Good morning, ladies and
13 gentlemen. We're here today to try State of Nevada versus Freddy Martinez.
14 You're going to hear from 11 witnesses from the State. I know I read about
15 30. You're going to hear from 11. Maybe ten.

16 What these witnesses are going to tell you is that on the morning
17 of August 16th, 2006, the Defendant, Freddy Martinez, showed up at the home
18 of Bianca Hernandez shared with her boyfriend, Jose' Quiroz-Castillo, and her
19 son, 16-year-old Franklin Martinez. You're going to hear that on that morning,
20 he had a knife, a small folding knife.

21 You're going to hear that that morning, it was around 5:30, 6:00
22 o'clock in the morning, Bianca was taking Jose' to work. She was outside in
23 the car waiting for him. That as Jose' steps outside the front door, he sees the
24 Defendant cross the street with something in his hand. Jose' is going to tell
25 you he didn't know what that something was, but whatever it was, it scared

1 him because Jose' [sic] went like this to him [indicating]. Jose' stopped as the
2 Defendant pointed this knife at him. Then Jose' watches the Defendant then
3 go to the car where Bianca is, put the knife up against her face and that Bianca
4 drove away.

5 You're going to hear from Bianca that the Defendant made her
6 drive up toward Nellis near Las Vegas Boulevard, that at some point Defendant
7 takes over the wheel because she's not shifting very well because she's
8 scared, because she doesn't want to be with him.

9 You're also going to hear at some point Bianca sees a police car
10 two cars ahead of her, that she grabs onto the steering wheel, and she's trying
11 to make the steering wheel jerk to get that police officer's attention, and at
12 that point Defendant hit her.

13 That throughout this car ride, Defendant is telling her, Forget about
14 Las Vegas. You're never going back there. Forget about your ex-husband
15 David. You're never going to see him again. Forget about your son. You're
16 never going to see him again.

17 You're also going to hear that the Defendant takes her on the 15,
18 that some point near Logandale, he pulls off to the side of the road. Bianca is
19 going to tell you that she didn't know exactly where she was, but she
20 remembered there was an abandoned truck. And they pulled off in that little
21 alcove, he forces her into the backseat and has sexual intercourse with her.
22 And she's going to tell you that he had a knife and that she was scared and
23 that she did what he wanted to do because she was afraid for her life, and she
24 needed to be here alive for her son.

25 She's also going to tell you that at numerous points during this

1 car drive she contemplated opening the door and jumping out of the car, but he
2 was just driving too fast. That he drives her all the way up to Mesquite. Once
3 he gets to Mesquite, he stops in an apartment complex because there's some
4 guy there that owes him money, and that's Bianca's chance to get away. She
5 flags down a woman walking by in the apartment complex, the woman calls
6 9-1-1, and Mesquite Police arrive at the apartment complex.

7 You're going to hear from Officer Lance -- Lance Barr and
8 Sergeant Shane Charles from Mesquite. They said they made contact with
9 Bianca, that she was scared, she was shook up, she was balling her eyes out.
10 And you're going to hear how they made contact with the Defendant. He had
11 gotten into a white pickup truck occupied by two other men and that this
12 pickup truck was attempting leave the apartment complex, and that's where
13 they found the Defendant.

14 Once they detain the Defendant, they transport Bianca to the
15 hospital. You're going to hear from the nurse, Debbie Young, that she
16 examined Bianca, that Bianca had some abrasions or puncture marks on her
17 right thigh. And Bianca is going to tell you that those came from the Defendant
18 poking her in the thigh with the knife, that she had a mark on her wrist. Bianca
19 is going to tell you that came from the Defendant grabbing her. That she had
20 swelling on her face. Bianca is going to tell you that came from the Defendant
21 hitting her.

22 And you're also going to hear from the nurse that there was an
23 abrasion on Bianca's vagina around 6:00 o'clock, down near the bottom
24 consistent with sexual intercourse. You're also going to hear from Kristina
25 Paulette, a forensic analyst from the police department, that she analyzed

1 samples taken from the sex assault kit with what's called a bucal swab taken
2 from Defendant's cheek and that Defendant's DNA was inside Bianca's vagina.

3 And you're also going to hear from Detective Art Chavez from
4 the Las Vegas Metropolitan Police Department. He's going to tell you he
5 interviewed the Defendant. He's going to tell you, Defendant admitted to him
6 that he showed up at the house that morning to take her and that he had a
7 knife with him.

8 Now, you're also going to hear the Defendant was under the
9 impression that they were having a relationship, but in his statement you're
10 going to hear that he tells Detective Chavez that Bianca moved away, that he
11 didn't know why because she didn't tell him where she was going, that she
12 knew he was -- she was -- that he knew she was with another man, and he
13 just had to find out.

14 And he told the police that the day before he took her at knifepoint
15 by his own admission, he had to be sure whether she was with another man or
16 not, so he followed her, and he confirmed that that was true. And that's when
17 he decided to do what he did. So he took a knife, and he showed up where
18 she lived, and he pointed the knife at Jose', and he took Bianca right in front of
19 Jose'.

20 Now, you're going to hear from Jose', and you're going to hear
21 from Franklin, who's Bianca's son, and you're also going to hear from Bianca
22 that there wasn't a relationship, that the Defendant is Bianca's ex-husband's
23 brother and that they allowed him to live with them for 16 years and that he
24 was nothing more than a brother, than a family member. And you're going to
25 hear that Bianca did not want to go to Mesquite with him. Did not want to

1 have sex with him.

2 And at the conclusion of that, we're going to ask that you return
3 the only verdict in this case, which is guilty, burglary with a weapon; first
4 degree kidnapping with a weapon; sex assault with a weapon; and battery with
5 a weapon.

6 THE COURT: Mr. Paulson.

7 MR. PAULSON: Thank you, Judge.

8 ***DEFENSE OPENING STATMENT***

9 MR. PAULSON: We've all heard the saying, The truth shall set you
10 free. Many of the things the Prosecutor just said are not disputed. There's no
11 dispute that on the morning of August 16th Freddy Martinez and Bianca
12 Hernandez had sexual intercourse. You're going to hear testimony to that
13 effect, and we're certainly not disputing that fact.

14 But this trial is about getting to the truth. It's about credibility,
15 accountability and the fact that a man should be held accountable for what he
16 has done. Freddy Martinez should be held accountable for what he did, but
17 we're going to ask you that you don't hold him accountable for everything he's
18 been charged with, for things that he did not do in this case.

19 It's true that there was a relationship between Bianca Hernandez
20 and Jose' Castillo, and Freddy Martinez wanted answers about that particular
21 relationship. Freddy Martinez suspected that the woman that he had been
22 living with for nearly three years was with another man. The truth was, in
23 Freddy's mind as he relayed it to the police, there was another rooster. He
24 referred to Jose' Castillo as a rooster, and he tells this to the police.

25 Now, Freddy couldn't handle the truth that there was another

1 man in Bianca's life, at least the truth that was untold. The fact was, Freddy
2 was trying to talk to Bianca Hernandez to hear directly from her that there was
3 another man in her life and that Freddy was no longer part of her life. Freddy
4 Martinez had absolutely no intent to harm Bianca on this day, and he told the
5 police that in his statement.

6 A lot of this case is going to go back -- you'll hear testimony
7 about the relationship between Bianca Hernandez and Freddy Martinez and
8 Freddy's brother David and their son Franklin. You'll hear that Freddy Martinez
9 came to Bianca Hernandez's life about 16 years ago. He moved in with Bianca
10 and Freddy's brother David. David and Bianca were partners, and they had a
11 son together, Franklin. Freddy came to the United States and lived with his
12 brother.

13 At some point Bianca's relationship with David ended. It's about
14 three years ago. At that point Bianca and her son continued to live with Freddy
15 Martinez. For the next three years they lived together as a family in a mobile
16 home on Lake Mead Boulevard. Freddy worked, provided for Bianca and her
17 son, and Freddy, yes, loved Bianca, and there was an ongoing sexual
18 relationship between them.

19 At some point Jose' Quiroz-Castillo comes into the picture.
20 You'll hear that Jose' met Bianca about three or four year ago. Jose' was
21 Bianca's boyfriend for at least the last two years, maybe three years, which she
22 continued to live with Freddy during that time in the mobile home.

23 At some point Bianca moved out of the mobile home about four
24 months prior to the August 16th incident, so we're talking about April of 2006.
25 She moves out and explains that she's moving into an apartment with a family.

1 She moves into an apartment on Lamont Street, and this is with Jose'. True,
2 at some point Freddy found out about Jose', about this other rooster as he
3 explains it to the police. You're also going to hear that Jose' suspected or may
4 have thought that Bianca was seeing somebody else.

5 Now, a couple days prior to the incident on August 16th, about
6 Monday the 14th of August, you'll hear that Bianca went by the mobile home
7 and spoke to Freddy that morning. In fact, you'll hear that Bianca went by the
8 mobile home frequently. On this particular day, she goes by to talk to Freddy,
9 and Jose' sees her in the car talking to Freddy. Later that night, Jose' asks
10 Bianca to give him a ride. He wants to go by Freddy's, where Freddy is living
11 in the mobile home on Lake Mead, and so he asks Bianca to take him there.

12 As they're passing the mobile home, Freddy actually sees Jose'
13 and Bianca together passing by, and he decides he's going to follow them in his
14 car. Freddy wants to find out about this relationship. Bianca has left. She
15 hasn't explained to him why; yet, she keeps coming back to see him. Freddy
16 wants to confront this other man. He wants to find out what is going on.

17 He stops them, but it just so happens that when he's trying to
18 talk to them, as he approaches the car, there's a police officer or a traffic cop
19 there writing a ticket to somebody else, and because he sees Freddy coming
20 toward them in what you may call an aggressive manner, the police officer
21 stops him, so he never gets a chance to speak to Jose' and Bianca on that day.
22 The police officer tells Freddy to leave, he leaves, and everybody goes away
23 that particular day. Freddy never has the opportunity to talk to either Jose' or
24 Bianca that night.

25 So now that leads us to the morning of August 16th. That

1 particular morning Bianca comes back from taking Jose' to work, and Freddy is
2 waiting and decides that he is going to confront Bianca to get the truth. He
3 wants to know what is going on. He gets in the passenger seat -- she's in the
4 driver's seat already -- and tells her to drive. She drives. He wanted to talk to
5 her about this other man, about this other rooster.

6 He told police he wasn't intending to harm Bianca. He told them
7 that in his statement, but he only wanted to scare her. He had been trying to
8 get her to tell him what was going on for a long period of time now and could
9 never get her to say anything. He intended to scare her. Freddy told police
10 this was all -- this whole thing was about making Jose' mad so that he would
11 be able to confront Jose', and Jose' would be gone from their lives.

12 Now, you heard about after Freddy gets in the car, they drive.
13 You'll hear that during the drive there are some -- there are some struggles.
14 Bianca is trying to get the attention of other people around, and there's a police
15 car a couple cars in front of them, and she's attempting to attract attention so
16 she can get some help. There's some struggles.

17 During those struggles, you'll that hear Freddy grabs her by the
18 arm and tries to pull her. Freddy does hit her in the face and causes an injury
19 to her cheek. And as he's holding this -- this knife and she's attempting to
20 shift gears and he's attempting to shift and she's struggling with the steering
21 wheel, that the knife does make contact with her leg.

22 At some point the drive takes them to I-15, and they head
23 northbound toward Mesquite. They drive for about 25 minutes. It's a long
24 drive. Around Logandale, in that area, they pull off the freeway, get off on an
25 exit, and they park on the side of the road, and they engage in sexual

1 intercourse. Freddy explains to the police that it's happened like it always
2 happened, like they had had sex before.

3 This lasts for a short period of time, five, ten minutes or so.
4 They get back on I-15, and they drive about five minutes and stop at a gas
5 station. You'll hear testimony that they stopped the car, Freddy went and got
6 gas in the gas can and then put gas in the car, and they continued on to
7 Mesquite.

8 In Mesquite they finally stop in an apartment complex, and
9 Freddy -- and you'll hear testimony from Bianca the fact that Freddy stopped at
10 this particular apartment complex because it's where he used to work. There's
11 a construction site there. Freddy used to work there. He was looking for some
12 friends of his.

13 Eventually the police are called by somebody that Bianca is able
14 to get the attention of, and Freddy is arrested when he's coming back to the
15 car. He's -- he didn't run away. He was coming back to the car, the police
16 arrest him, and that leads us here.

17 Now, ladies and gentlemen, when we talked earlier about
18 reasonable doubt, it's the highest legal standard, that the State has to prove
19 every element and every charge beyond a reasonable doubt. After hearing and
20 considering all of the evidence in this case, we're confident that you will find
21 that they have not met that burden.

22 As I said earlier, this is about getting to the truth. You're going to
23 hear testimony of many witnesses and have the opportunity to see what they
24 say and test what they say against the other evidence. It's also about
25 credibility, believability, and, yes, it is about holding Freddy Martinez

1 accountable for what he did. At the end of this trial, we will ask you to hold
2 him accountable only for what he did, but not for things that he did not do.

3 Thank you.

4 THE COURT: Thanks. Okay. Well, we are 15 minutes ahead of
5 schedule. According to the way I've scheduled the trial, I expected us to be
6 here at noon. It's a quarter to noon, so we're doing just great. But also what
7 that means is, they've got their witnesses coming an hour from now because
8 we expected to go till lunch.

9 So we're going to just break for lunch now, and then we'll pick up
10 an hour from now. We'll pick up at a quarter to 1:00, and that will give us an
11 extra 15 minutes this afternoon, and the State will be ready with their
12 witnesses.

13 So don't talk about the case with each other or anybody else.
14 Don't read, watch or listen to any report on the case by TV, Internet,
15 newspaper or radio, and don't form an opinion on the case until it's submitted
16 to you. Leave your stuff on your chairs. Wear your badge while you're in the
17 building. We'll be in recess until 12:45.

18 If you need to know where to eat or where to go potty or
19 anything you need, just ask Lisa. She'll take care of it. She is the deputy
20 sheriff and concierges. Okay. We'll see you all at quarter to. You either take
21 it with you or leave it there, sir. The Bailiff will guard the room, so whatever
22 your pleasure.

23 [Jury exits the courtroom for lunch at 11:43 a.m.]

24 THE COURT: Okay. The record will reflect that the jury has exited.
25 Counsel and Defendant are still here. Mr. Martinez, you understand that under

1 the Constitution of the United States and the Constitution of the State of
2 Nevada, you cannot be compelled or forced to get on the stand and tell your
3 side of the story? Do you understand that?

4 THE DEFENDANT: [Through the Interpreter] Yes.

5 THE COURT: If you wish, you can get on the stand and testify, but if
6 you do testify, then the State is going to be able to ask you questions, and
7 anything you say, whether on direct examination or cross-examination, it could
8 be commented on to the jury. Do you understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: If you decide not to testify, I will -- upon request of Ms.
11 Hamers, I will give an instruction that says, one, you can't be compelled to
12 testify; two, the jury can't draw any inference from the fact that you didn't
13 testify and, in fact, really can't even talk about it when they're in the jury
14 room. Do you understand that? And Ms. Hamers has submitted one, so I
15 assume that's your request that I give it; right?

16 MS. HAMERS: If that's the decision we make at that time, yes.

17 THE COURT: All right. I'll put it in the packet.

18 MS. HAMERS: Thank you, Judge.

19 THE COURT: Do you also understand that if you have a felony
20 conviction -- and I don't know that you do -- but if you do and less than ten
21 years has elapsed since you've been released from parole or probation or
22 prison, that if you testify, you could be asked if you've been convicted, when,
23 where and what was the conviction, but no details? Do you understand that?

24 THE DEFENDANT: I've never been convicted anywhere.

25 THE COURT: Okay. Then it won't come into play. It's just a right

1 that I have to tell you. So if you haven't been convicted of a felony, then if
2 you testify or if you don't testify, either way, any of your background stuff
3 won't be gone into. They couldn't ask you about arrests or misdemeanor
4 convictions. Do you understand that?

5 THE DEFENDANT: Yes.

6 THE COURT: Okay. With those rights in mind, I want you to talk to
7 Ms. Hamers and Mr. Paulson between now and the time that it becomes
8 material and make a collective, intelligent decision as to whether you wish to
9 testify. If they don't call you to the stand when their turn comes, I will assume
10 that the three of you have agreed that it's in your best interest not to testify.
11 Fair enough?

12 THE DEFENDANT: Yes.

13 THE COURT: Okay. Have a good lunch. We'll see you at quarter to
14 1:00.

15 [Jury exits courtroom.]

16 [A lunch break was taken at 11:43 p.m.]

17 [Out of the presence of the jury.]

18 THE COURT: Back on the record in Case C226586, State of Nevada
19 versus Freddy Martinez. Let the record reflect the presence of Mr. Martinez,
20 counsel for the State, counsel for the Defense. Absence of the jury. It's my
21 understanding that by stipulation we're going to open a sealed box of evidence
22 because the person who's actually going to introduce it is not going to testify
23 in order before somebody who's going to testify where you need to lay
24 foundation for the evidence. Is that right, Mr. Bateman?

25 MR. BATEMAN: That's correct, Judge.

1 THE COURT: Any objection, Ms. Hamers?

2 MS. HAMERS: No, no objection. I just know we're on the record, but
3 we don't have an interpreter.

4 THE COURT: Okay. But --

5 MS. HAMERS: Which is fine.

6 THE COURT: -- the point is, the box is sealed; you've seen it. There's
7 no issue of chain of custody, and the Interpreter can tell Mr. Martinez what we
8 did.

9 THE CLERK: And we actually did not break the seal where there's a
10 hinge there.

11 THE COURT: Where's the Interpreter?

12 [Court at ease.]

13 [Interpreter enters the courtroom.]

14 THE COURT: Okay. Let's dance. Bring them in.

15 [Jury enters the courtroom at 12:46 p.m.]

16 THE COURT: Okay. Back on the record in Case C226586, State of
17 Nevada versus Freddy Martinez. Let the record reflect the presence of Mr.
18 Martinez with his counsel; counsel for the State. All ladies and gentlemen of
19 the jury are back in the box. Ms. Nyicos, call your first witness.

20 MR. BATEMAN: The State calls Franklin Martinez.

21 THE COURT: Franklin Martinez. Does Franklin need an interpreter?

22 MS. NYICOS: No.

23 MR. BATEMAN: He does not.

24 THE COURT: Okay. We're going to get to a witness or two that needs
25 an interpreter, and the way it works is this: These interpreters, as I said, are all