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Electronically Filed
Oct 31 2018 08:46 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 V

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INDEX

FREDYS MARTINEZ 75760

Document	Page
Indictment.....	001-003
Judgment of Conviction.....	004-005
Order of Affirmance.....	006-012
Proper Person Motion to Make Additional Funds Available for NDOC inmates Legal Account and envelope.....	013-016
Order Denying Defendant's Motion to Make Funds Available.....	017-018
Motion for Appointment of Counsel.....	019-021
State's Opposition to Defendant's Motion for Appointment of Counsel.....	022-025
Order Denying Defendant's Motion for Appointment of Counsel.....	026-027
Register of Actions.....	028-037
Register of Actions.....	038-039
Notice of Appeal and envelope.....	040-043
Petition for Writ of Habeas Corpus and Envelope.....	044-050
State's Opposition to Motion for Evidentiary Hearing.....	051-054
Register of Actions.....	055
Notice of Entry of Order and Finding of Fact, Conclusions of Law And Order.....	056-061
Nevada Supreme Court Order of Affirmance and Remittitur.....	062-067
Amendment to Petition for Writ of Habeas Corpus.....	068-090
Register of Actions.....	091
Notice to Vacate JOC and envelope.....	092-095
USDC Appeal.....	096-103
Certificate of Service.....	104

INDEX

FREDYS MARTINEZ 75760

Document	Page
Appellee's Answering Brief.....	105-134
Memorandum from the 9 th Circuit.....	135-137
Order.....	138
Order Denying Defendant's Multiple Motions.....	139-141
Order Dismissing Appeal and Remittitur.....	142-145
Order Denying Defendant's Multiple Motions.....	146-148
Register of Actions.....	149-150
Motion for Production of Transcripts at State Expense and Envelope.....	151-163
Motion for Appointment of Counsel.....	164-166
District Court Minutes.....	167
Jury Trial, Day 1.....	168-338
Letter to District Court from Defendant.....	339
Letter to K. Hamers.....	340-357
Greivance filed by Defendant against NDOC.....	358
Letters to K. Bassett.....	359-363
Grievances filed by Defendant against NDOC.....	364-371
Letters to District Court and envelope.....	372-374
Letter from Public Defender to Client.....	375
Letters from Defendant re: attorney.....	376-383
Declaration of Appellant (English and Spanish).....	384-389
Proper Person Writ of Habeas Corpus.....	390-399
Order.....	400-403
PWHC.....	404-420
1 st Amended PWHC.....	421-430

1
2
3
4
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8
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28

INDEX
FREDYS MARTINEZ 75760

Document	Page
Index of Exhibits.....	431-436
Motion to Dismiss PWHC.....	437-444
Notice of Appeal (USDC).....	445-446
Appellants Opening Brief (USDC).....	447-475

1 28 U.S.C. § 2244(d)(1). A judgment, if appealed, becomes final when the Supreme Court of the
 2 United States denies a petition for a writ of certiorari or when the time to petition for a writ of
 3 certiorari expires. Bowen v. Roe, 188 F.3d 1157, 1158-60 (9th Cir. 1999). See also Sup. Ct. R.
 4 13(1). Any time spent pursuing a properly-filed application for state post-conviction review or other
 5 collateral review does not count toward this one-year limitation period. 28 U.S.C. § 2244(d)(2).
 6 The period of limitation resumes when the post-conviction judgment becomes final upon issuance
 7 of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). An untimely state
 8 post-conviction petition is not “properly filed” and does not toll the period of limitation. Pace v.
 9 DiGuglielmo, 544 U.S. 408, 417 (2005). Section 2244(d) is subject to equitable tolling. Holland v.
 10 Florida, 130 S. Ct. 2549, 2560 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he
 11 shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
 12 circumstance stood in his way’ and prevented timely filing.” Id. at 2562 (quoting Pace, 544 U.S. at
 13 418). The petitioner effectively files a federal petition when he mails it to the court. Stillman v.
 14 Lamarque, 319 F.3d 1199, 1201 (9th Cir. 2003). The court can raise the issue of timeliness on its
 15 own motion. Day v. McDonough, 547 U.S. 198, 209 (2006); Herbst v. Cook, 260 F.3d 1039, 1043
 16 (9th Cir. 2001).

17 In the Eighth Judicial District Court of the State of Nevada, petitioner was convicted
 18 of burglary and first-degree kidnapping. The sentence for at least one of these crimes was enhanced
 19 for the use of a deadly weapon.¹ The court entered its judgment of conviction on May 31, 2007.
 20 Petitioner appealed, and the Nevada Supreme Court affirmed on May 7, 2008. Martinez v. State,
 21 238 P.3d 835 (Nev. 2008) (table).² The time to petition the Supreme Court of the United States for
 22 a writ of certiorari expired on August 5, 2008. Six hundred thirty-three (633) days later, on April
 23 30, 2010, petitioner filed in state court a post-conviction petition for a writ of habeas corpus.

24
 25 ¹In the space for describing the offenses, petitioner only cited sections of the Nevada Revised
 26 Statutes, without specifying which crime received the deadly-weapon enhancement.

27 ²In the petition itself, petitioner alleges that the Nevada Supreme Court affirmed the
 28 judgment of conviction on August 12, 2006, more than nine months before the judgment of
 conviction was entered. Obviously, this is impossible.

1 Petitioner alleges that he appealed the denial of that petition, and that the Nevada Supreme Court
2 decided the appeal on December 7, 2010. Remittitur would have issued on or around January 3,
3 2011, taking into account both New Year's Day and a weekend. Nev. R. App. P. 41(a). Before
4 then, on December 11, 2010, petitioner effectively commenced this action by mailing his federal
5 habeas corpus petition to this court.

6 On its face, the petition is untimely. Six hundred thirty-three (633) days passed
7 between the finality of petitioner's judgment of conviction and the filing of his state habeas corpus
8 petition. The court assumes for the purpose of this order that the time spent on the state habeas
9 corpus petition is eligible for tolling pursuant to 28 U.S.C. § 2244(d)(2).³ However, the one-year
10 period expired long before petitioner filed his state habeas corpus petition, and nothing was left to
11 be tolled. Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001). Petitioner needs to show cause why
12 the court should not dismiss this action as untimely.

13 IT IS THEREFORE ORDERED that the application to proceed in forma pauperis
14 (#1) is **GRANTED**. Petitioner need not pay the filing fee of five dollars (\$5.00).

15 IT IS FURTHER ORDERED that the clerk of the court shall file the petition for a
16 writ of habeas corpus pursuant to 28 U.S.C. § 2254.

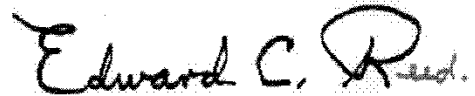
17 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date
18 of entry of this order to show cause why this action should not be dismissed as untimely. Failure to
19 comply with this order will result in the dismissal of this action.

20 IT IS FURTHER ORDERED that the clerk shall add Catherine Cortez Masto,
21 Attorney General for the State of Nevada, as counsel for respondents.

22
23
24 ³Nevada has a one-year period of limitation for filing a post-conviction habeas corpus
25 petition. In petitioner's case, the period started running from the issuance of the remittitur after his
26 direct appeal, which would have been on or about June 2, 2008. See Nev. Rev. Stat. § 34.726.
27 Petitioner filed his state habeas corpus petition long after the expiration of this period of limitation.
28 If the state courts decided that the petition was untimely, then it is not eligible for tolling pursuant to
28 U.S.C. § 2244(d)(2). Pace, 544 U.S. at 417. Consequently, the federal habeas corpus petition
would be even more untimely than it already is.

1 IT IS FURTHER ORDERED that the clerk shall electronically serve upon
2 respondents a copy of the petition and a copy of this order. No response by respondents is
3 necessary.

4 DATED: January 20, 2011

5 
6 EDWARD C. REED
7 United States District Judge
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FREDYS A. MARTINEZ
INMATE ID: 1003276
LOVELOCK CORRECTIONAL CENT
1200 PRISON ROAD
LOVELOCK NV 89419-5110

Place of Confinement

FILED ENTERED	<input checked="" type="checkbox"/> RECEIVED SERVED ON COUNSEL/PARTIES OF RECORD
DEC 14 2010	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Fredys Martinez, Petitioner,)
(Full Name))

3:10-cv-00777

vs. "

CASE NO. _____
(To be filled by the Clerk)

State of Nevada et al, Respondent,)
(Name of Warden, Superintendent, jailor or)
authorized person having custody of petitioner))

Jack Palmer

and
C. C. Meoto

The Attorney General of the State of Nevada)

PETITION FOR A
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY
(NOT SENTENCED TO DEATH)

- Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: In Clark County (D. Nev)
- Full date judgment of conviction was entered: 5/31/07. (month/day/year)
- Did you appeal the conviction? ☒ Yes ___ No. Date appeal decided: 8/12/06
- Did you file a petition for post-conviction relief or petition for habeas corpus in the state court?
☒ Yes ___ No. If yes, name the court and date the petition was filed: Clark County 4/30/10. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? ☒ Yes ___ No. Date the appeal was decided: 12/7/10. Have all of the grounds stated in this petition been presented to the state supreme court? ___ Yes ☒ No. If no, which grounds have not? Ineffective appellant counsel, meritless.
- Date you are mailing (or handing to correctional officer) this petition to this court: 12/11/10.
Attach to this petition a copy of all state court written decisions regarding this conviction.

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? ☒ Yes
 ___ No. If no, what was the prior case number? _____. And in what court was
 the prior action filed? _____.
- Was the prior action ___ denied on the merits or ___ dismissed for procedural reasons (check
 one). Date of decision: ____/____/____. Are any of the issues in this petition raised in the
 prior petition? ___ Yes ___ No. If the prior case was denied on the merits, has the Ninth
 Circuit Court of Appeals given you permission to file this successive petition? ___ Yes ___ No.
7. Do you have any petition, application, motion or appeal (or by any other means) now pending in
 any court regarding the conviction that you are challenging in this action? ☒ Yes ___ No.
 If yes, state the name of the court and the nature of the proceedings: In the
Supreme Court of Nev. No. 56153
8. Case number of the judgment of conviction being challenged: 06C226586
9. Length and terms of sentence(s): life / with
10. Start date and projected release date: N/A
11. What was (were) the offense(s) for which you were convicted: NRS 205.060,
NRS 193.165, 200.310, 200.320.
12. What was your plea? ___ Guilty ☒ Not Guilty ___ Nolo Contendere. If you pleaded guilty
 or nolo contendere pursuant to a plea bargain, state the terms and conditions of the agreement:

13. Who was the attorney that represented you in the proceedings in state court? Identify whether
 the attorney was appointed, retained, or whether you represented yourself *pro se* (without counsel).

	Name of Attorney	Appointed	Retained	<i>Pro se</i>
arraignment and plea	"P.D.O.", Nev.	<input checked="" type="checkbox"/>	___	___
trial/guilty plea	Kathleen Hamer's	<input checked="" type="checkbox"/>	___	___
sentencing	" "	<input checked="" type="checkbox"/>	___	___
direct appeal	Kedric Basset	<input checked="" type="checkbox"/>	___	___
1st post-conviction petition	_____	___	___	<input checked="" type="checkbox"/>
appeal from post conviction	_____	___	___	<input checked="" type="checkbox"/>
2nd post-conviction petition	_____	___	___	<input checked="" type="checkbox"/>
appeal from 2nd post-conviction	_____	___	___	<input checked="" type="checkbox"/>

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 14th Amendment right to due process of law based on these facts:

The petitioner sought H/C. P.C.R. and was denied due process. Nev. Rev. Stat. 34.770 (1), it was further abuse of discretion. (3), an evidentiary hearing was required, to then determine the legality of his custody and restraint, he could not advance his or support his grounds for requested relief without discovery. Counsel should have been appointed because of the language barrier. Citing, Geber's v. State 118 Nev. 500, 50 P.3d 1092, (2002). It was further abuse of discretion for the Supreme Court Nev. not to reverse and remand for further proceeding consistent with the opinion en banc, (167 P.3d 416).

Exhaustion of state court remedies regarding Ground 1:

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

☒ Yes ☐ No. If no, explain why not: _____

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If no, explain why not: _____

If yes, name of court: Clark County Nev. date petition filed 4 / 30 / 10.

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue? ☒ Yes ☐ No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

☐ Yes ☐ No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed / / .

Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not: N/A

If yes, did you raise this issue? ☐ Yes ☐ No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or

sentence overturned based on this issue (such as administrative remedies)? ☒ Yes ☐ No. If yes, explain: Remittitur issued 12-07-10, (D. Nev).

Supreme Court No. 56153.

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. Carson Street, Suite 201
Carson City, Nevada 89701

State concisely every ground for which you claim that the state court conviction and/or sentence is

unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my

14th, Amendment right to Brady Violation,
based on these facts:

Arrest report, video depo" from P.O.
(Mesquite Nevada), incident report,
P.S.I., Miranda,

The State D.A., P.D.O., Court did
not disclose statements, documents
in "Spanish" which he could understand,
(167 P.3d 416), he was prejudiced in all
proceeding as the court violated his
statutory rights, pursuant to, See
Brady v. Maryland, 373 U.S. 83, 10 LEd
215, 83 S.Ct 1194 (1963).

Exhaustion of state court remedies regarding Ground 2:

- ▶ Direct Appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

☒ Yes ☐ No. If no, explain why not: _____

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If no, explain why not: _____

If yes, name of court: Clark County date petition filed 4 / 30 / 10

Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue? ☐ Yes ☐ No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

☐ Yes ☐ No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed ____ / ____ / ____

Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not: N/A

If yes, did you raise this issue? ☐ Yes ☐ No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or

sentence overturned based on this issue (such as administrative remedies)? ☒ Yes ☐ No. If yes,

explain: Remitter issued 12-07-10 from Supreme Court of Nev. No. 56153.

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two

extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my

14th, 5th, Amendment right to Counsel,
based on these facts:

Employers relivent to the case
where not subpoenaed, there was no or
very little investigation, as counsel
failed to instruct the jury on a theory of
innocent's, which draw into question
counsel's strategic choices, if a
different approach, the outcome of
proceeding would have been diff-
erent, U.S. v. Deering, 179 F.3d 592 (
8th Cir. 1999)

Citing, Strickland V. Washington
104 S.Ct. 2052, 466 U.S. 668
(U.S. Fla. 1984).

The major concern her is the in-
terpretation of the law, (167 P.3d 416).

Exhaustion of state court remedies regarding Ground 3:

• Direct Appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

☒ Yes ___ No. If no, explain why not: _____

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes ___ No. If no, explain why not: _____

If yes, name of court: Clark County date petition filed 4/30/10

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme

Court? ☒ Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? ☒ Yes ___ No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed ____/____/____

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme

Court? ___ Yes ___ No. If no, explain why not: N/A

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or

sentence overturned based on this issue (such as administrative remedies)? ☒ Yes ___ No. If yes,

explain: Remitter issued 12-07-10

Doc. 50153. Supreme Court, Nev.

WHEREFORE, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

ACKNOWLEDGMENT

I, the undersigned, acknowledge that I have read the foregoing and that the information contained therein is true and correct to my own knowledge and belief.

Further, I state that I have not directly or indirectly paid or caused to be paid to any inmate, agent of an inmate, or family member of any inmate a sum of money, favors or anything else for assistance in the preparation of this document or any other document in connection with this action.

Further, I acknowledge that if any of the information included in this motion for leave to proceed *in forma pauperis* is false or misleading, I understand that sanctions may be imposed against me. Those sanctions may include, but are not limited to, the following:

- (1) dismissal of my case with prejudice;
- (2) imposition of monetary sanctions;
- (3) the Nevada Department of Prisons may bring disciplinary proceedings for a violation of MJ-48 of the Code of Penal Discipline, which can include all sanctions authorized under the Code including the loss of good time credits and punitive confinement; and
- (4) perjury charges.

Further, I hereby authorize the United States District Court, District of Nevada, or its representative, to investigate my financial status, and authorize any individual, corporation, or governmental entity to release any such information to the said Court or its representative.

Further, I acknowledge and consent that a portion of any recovery, as directed by the court, shall be paid to the clerk for reimbursement of all fees and costs incurred by me as a result of being granted leave to proceed *in forma pauperis*.

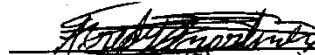
Dated this 10 day of Dec, 2010.



(Signature of Applicant)

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.** See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

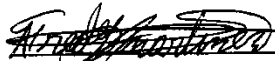
Signed at L.C.C. N.D.O.C.
(Location)


(Signature)


12-10-10
(Date)

1003276
(Inmate Prison Number)

Gene Allen
(Name of person who wrote this
complaint if not Plaintiff)


(Signature of Plaintiff)

12-10-10
(Date)



(Signature of attorney, if any)

(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.**
See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at L.C.C., of N.D.O.C. on 12-12-10
(Location) (Date)

 1003276
(Signature) (Inmate prison number)

**United States District Court
District of Nevada (Reno)
CIVIL DOCKET FOR CASE #: 3:10-cv-00777-LRH-VPC**

Martinez v. Palmer et al
Assigned to: Judge Larry R. Hicks
Referred to: Magistrate Judge Valerie P. Cooke
Case in other court: USCA, 13-15537
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 12/14/2010
Date Terminated: 02/25/2013
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

Petitioner

Fredys A. Martinez
1003276
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

represented by **Debra Bookout**
Federal Public Defender
411 E Bonneville
Suite 250
Las Vegas, NV 89101-
Email: ECF_Vegas@fd.org
TERMINATED: 06/06/2013
LEAD ATTORNEY

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Federal Public Defenders
411 E. Bonneville Avenue
Las Vegas, NV 89101
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Email: ECF_NVNCH@fd.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rene Valladares
Federal Public Defender
411 E Bonneville
Suite 250
Las Vegas, NV 89101-
702-388-6577
Fax: 702-388-6261
Email: Rene_Valladares@fd.org
TERMINATED: 09/16/2011

V.

Respondent

Jack Palmer

represented by **Thom Gover**
Nevada Attorney General's Office
555 E. Washington Ave
Suite 3900
Las Vegas, NV 89101-
702-486-3120

Fax: 702-486-3768
 Email: TGover@ag.nv.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

Nevada Attorney General

represented by **Thom Gover**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Catherine Cortez-Masto
 Nevada Attorney General's Office
 100 N Carson St., Ste 3900
 Carson City, NV 89701-4717
 775-684-1100
 Fax: 775-684-1108
 Email: usdcfilings@ag.nv.gov
TERMINATED: 09/15/2011

Date Filed	#	Docket Text
12/14/2010	<u>1</u>	APPLICATION for Leave to Proceed in forma pauperis by Petitioner Fredys A. Martinez. Motion ripe 12/14/2010. (Attachments: # <u>1</u> Petition for a Writ of Habeas Corpus)(KO) (Entered: 12/14/2010)
12/14/2010	<u>2</u>	NOTICE to Plaintiff from USDC advising case against defendant Palmer, et al. has been received and assigned case number 3:10-cv-00777 . (Inmate #*1003276*) (KO) (Entered: 12/14/2010)
12/15/2010		Case assigned to District Judge Edward C. Reed, Jr and Magistrate Judge Valerie P. Cooke. (WJ) (Entered: 12/15/2010)
12/22/2010	<u>3</u>	MOTION for Appointment of Counsel <i>for Discovery Proceeding</i> by Petitioner Fredys A. Martinez. Motion ripe 12/22/2010. (MLC) (Entered: 12/23/2010)
12/22/2010	<u>4</u>	MOTION for an Evidentiary Hearing by Petitioner Fredys A. Martinez. Motion ripe 12/22/2010. (MLC) (Entered: 12/23/2010)
12/27/2010	<u>5</u>	MOTION for Appointment of Counsel by Petitioner Fredys A. Martinez. Motion ripe 12/27/2010. (PM) (Entered: 12/28/2010)
12/29/2010	<u>6</u>	MOTION <i>to Make Additional Funds Available for NDOC Inmate Legal Account</i> by Petitioner Fredys A. Martinez. Responses due by 1/15/2011. (PM) (Entered: 12/29/2010)
01/20/2011	<u>7</u>	ORDER granting <u>1</u> Motion/Application for Leave to Proceed in forma pauperis.; Attorney Catherine Cortez-Masto for Nevada Attorney General added. ; P shall show cause why action should not be dismissed as untimely; (Deadline set in Habeas Corpus case for 2/20/2011.) Signed by Judge Edward C. Reed, Jr on 1/20/11. (Copies have been distributed pursuant to the NEF - LG) (Entered: 01/21/2011)
01/20/2011	<u>8</u>	PETITION for Writ of Habeas Corpus, filed by Fredys A. Martinez. (copy sent to Petitioner) (LG) (Entered: 01/21/2011)

02/01/2011	<u>9</u>	RESPONSE TO <u>7</u> ORDER TO SHOW CAUSE by Petitioner Fredys A. Martinez. (DRM) Modified on 2/2/2011 to correct file date (DRM). Modified on 2/2/2011 to add hyper link(DRM). (Entered: 02/02/2011)
02/01/2011	<u>10</u>	MOTION for Investigation, by Petitioner Fredys A. Martinez. Responses due by 2/18/2011. (DRM) (Entered: 02/02/2011)
02/02/2011	<u>11</u>	MOTION for Appointment of Counsel, by Petitioner Fredys A. Martinez. Motion ripe 2/2/2011. (KO) (Entered: 02/02/2011)
02/09/2011	<u>12</u>	MOTION for Appointment of Counsel, by Petitioner Fredys A. Martinez. Motion ripe 2/9/2011. (KO) (Entered: 02/10/2011)
02/09/2011	<u>13</u>	MOTION to <i>Extend Prison Copywork Limit</i> , by Petitioner Fredys A. Martinez. Responses due by 2/26/2011. (KO) (Entered: 02/10/2011)
02/09/2011	<u>14</u>	MOTION to <i>Investigation and, to for Pursuing My Rights. Petition for Investigation my Case</i> , by Petitioner Fredys A. Martinez. Responses due by 2/26/2011. (KO) (Entered: 02/10/2011)
02/09/2011	<u>15</u>	MOTION to Amend Petition. <i>Motion for Leave to Amend Petition for Writ of Habeas Corpus...</i> , by Petitioner Fredys A. Martinez. Responses due by 2/26/2011. (KO) (Entered: 02/10/2011)
02/09/2011	<u>16</u>	MOTION to Extend Time to Respond to <u>7</u> Order. ... <i>Motion for Enlargement of Time to Respond to Order From This Court</i> , by Petitioner Fredys A. Martinez. Motion ripe 2/9/2011. (Clerk notes that this motion is a duplicate image of <u>14</u> Motion.)(KO) (Entered: 02/10/2011)
02/25/2011	<u>17</u>	NOTICE of Change of Address by Petitioner Fredys A. Martinez. Old Address: LCC, 1200 Prison Road, Lovelock, NV 89419; New Address: NNCC, PO Box 7000, Carson City, NV 89702. (KO) (Entered: 02/25/2011)
03/10/2011	<u>18</u>	LETTER regarding appointment of counsel, from Fredy A. Martinez. (Envelope was addressed to the USDC, Reno, but the letter appears to be for attorney, Matthew Digesti.) (KO) (Entered: 03/10/2011)
06/15/2011	<u>19</u>	LETTER from Fredys Arcangel Martinez re case. (DRM) (Entered: 06/15/2011)
07/14/2011	<u>20</u>	NOTICE - Copy of letter to NDOC Offender Management Division, by Petitioner Fredys A. Martinez (DRM) (Entered: 07/14/2011)
08/11/2011	<u>21</u>	Copy of LETTER from Petitioner to Governor Sandoval. (JC) (Entered: 08/12/2011)
08/19/2011	<u>22</u>	ORDER. IT IS ORDERED that petitioner's <u>3</u> , <u>5</u> , <u>11</u> , and <u>12</u> motions for appointment of counsel are GRANTED . The Federal Public Defender is provisionally appointed to represent petitioner. FURTHER ORDERED, the FPD shall have thirty (30) days from the date that this order is entered to undertake direct representation of petitioner or to indicate to the court his inability to represent petitioner in these proceedings. If the FPD does undertake representation of petitioner, he shall then have sixty (60) days to file an amended petition for a writ of habeas corpus. If the FPD is unable to represent petitioner, then the court shall appoint alternate counsel. FURTHER ORDERED, the clerk shall electronically serve both the AG and FPD a copy of the <u>8</u> petition and a copy of this order. (<i>Served: 8/22/2011, see this entry's NEF and the regenerated NEF for document #8.</i>) FURTHER ORDERED, petitioner's <u>4</u> motion for an evidentiary hearing, <u>6</u> motion to make additional funds available, <u>10</u> motion for investigation, <u>13</u> motion to extend prison copywork limit, <u>14</u> motion for investigation, <u>15</u> motion to

		amend petition, and <u>16</u> motion to extend time are DENIED as moot. Signed by Judge Edward C. Reed, Jr on 8/18/2011. (Copies have been distributed pursuant to the NEF - KO) (Entered: 08/22/2011)
09/15/2011	<u>23</u>	NOTICE of Appearance by attorney Thom Gover on behalf of Respondents Nevada Attorney General, Jack Palmer. (Gover, Thom) (Entered: 09/15/2011)
09/16/2011	<u>24</u>	NOTICE of Appearance by attorney Debra Bookout on behalf of Petitioner Fredys A. Martinez. <i>Notice Of Representation Of Petitioner</i> (Bookout, Debra) (Entered: 09/16/2011)
11/15/2011	<u>25</u>	First MOTION to Extend Time regarding dispositive matter (First Request) <i>Motion For An Enlargement Of Time In Which To File An Amended Petition For Writ Of Habeas Corpus (First Request)</i> by Petitioner Fredys A. Martinez. Motion ripe 11/15/2011. (Bookout, Debra) (Entered: 11/15/2011)
11/15/2011	<u>26</u>	ORDER. IT IS ORDERED that P's <u>25</u> motion for extension of time is GRANTED. P shall have through January 13, 2012 , to file an amended petition. Signed by Judge Edward C. Reed, Jr on 11/15/2011. (Copies have been distributed pursuant to the NEF - PM) (Entered: 11/16/2011)
01/12/2012	<u>27</u>	Second MOTION to Extend Time regarding dispositive matter (Second Request) <i>Unopposed Motion For An Enlargement Of Time In Which To File An Amended Petition For Writ Of Habeas Corpus (Second Request)</i> by Petitioner Fredys A. Martinez. Motion ripe 1/12/2012. (Bookout, Debra) (Entered: 01/12/2012)
01/17/2012	<u>28</u>	ORDER. IT IS HEREBY ORDERED that petitioners' <u>27</u> motion for an enlargement of time is GRANTED . Petitioner shall have through March 13, 2012, to file an amended petition. Signed by Judge Edward C. Reed, Jr on 1/17/2012. (Copies have been distributed pursuant to the NEF - KO) (Entered: 01/18/2012)
03/13/2012	<u>29</u>	First AMENDED PETITION for Writ of Habeas Corpus <i>FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254</i> , filed by Fredys A. Martinez. No changes to parties. (Bookout, Debra) (Entered: 03/13/2012)
03/13/2012	<u>30</u>	EXHIBIT(s) <i>INDEX OF EXHIBITS IN SUPPORT OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS (Exs. 1-30)</i> to <u>29</u> Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Fredys A. Martinez. (Attachments: # <u>1</u> Exhibit 01, # <u>2</u> Exhibit 02, # <u>3</u> Exhibit 03, # <u>4</u> Exhibit 04, # <u>5</u> Exhibit 05, # <u>6</u> Exhibit 06, # <u>7</u> Exhibit 07, # <u>8</u> Exhibit 08, # <u>9</u> Exhibit 09, # <u>10</u> Exhibit 10, # <u>11</u> Exhibit 11, # <u>12</u> Exhibit 12, # <u>13</u> Exhibit 13, # <u>14</u> Exhibit 14, # <u>15</u> Exhibit 15, # <u>16</u> Exhibit 16, # <u>17</u> Exhibit 17, # <u>18</u> Exhibit 18, # <u>19</u> Exhibit 19, # <u>20</u> Exhibit 20, # <u>21</u> Exhibit 21, # <u>22</u> Exhibit 22, # <u>23</u> Exhibit 23, # <u>24</u> Exhibit 24, # <u>25</u> Exhibit 25, # <u>26</u> Exhibit 26, # <u>27</u> Exhibit 27, # <u>28</u> Exhibit 28, # <u>29</u> Exhibit 29, # <u>30</u> Exhibit 30)(Bookout, Debra) (Entered: 03/13/2012)
03/13/2012	<u>31</u>	EXHIBIT(s) <i>31-61</i> to <u>29</u> Amended Petition for Writ of Habeas Corpus ; filed by Petitioner Fredys A. Martinez. (Attachments: # <u>1</u> Exhibit 32, # <u>2</u> Exhibit 33, # <u>3</u> Exhibit 34, # <u>4</u> Exhibit 35, # <u>5</u> Exhibit 36, # <u>6</u> Exhibit 37, # <u>7</u> Exhibit 38, # <u>8</u> Exhibit 39, # <u>9</u> Exhibit 40, # <u>10</u> Exhibit 41, # <u>11</u> Exhibit 42, # <u>12</u> Exhibit 43, # <u>13</u> Exhibit 44, # <u>14</u> Exhibit 45, # <u>15</u> Exhibit 46, # <u>16</u> Exhibit 47, # <u>17</u> Exhibit 48, # <u>18</u> Exhibit 49, # <u>19</u> Exhibit 50, # <u>20</u> Exhibit 51, # <u>21</u> Exhibit 52, # <u>22</u> Exhibit 53, # <u>23</u> Exhibit 54, # <u>24</u> Exhibit 55, # <u>25</u> Exhibit 56, # <u>26</u> Exhibit 57, # <u>27</u> Exhibit 58, # <u>28</u> Exhibit 59, # <u>29</u> Exhibit 60, # <u>30</u> Exhibit 61)(Bookout, Debra) (Entered: 03/13/2012)
03/26/2012	<u>32</u>	CLIENT VERIFICATION <i>Of First Amended Petition For Writ Of Habeas Corpus</i> by

		attorney Debra Bookout on behalf of Petitioner Fredys A. Martinez. (Bookout, Debra) (Entered: 03/26/2012)
05/21/2012	<u>33</u>	ORDER - Rs' answer to <u>29</u> Amended Petition due by 7/5/2012. Reply due 45 days after service of answer. Signed by Judge Edward C. Reed, Jr on 5/21/2012. (Copies have been distributed pursuant to the NEF - DRM) (Entered: 05/21/2012)
07/05/2012	<u>34</u>	First MOTION to Extend Time regarding discovery/nondispositive matter (First Request) <i>Motion for Enlargement of Time</i> by Respondents Nevada Attorney General, Jack Palmer. Motion ripe 7/5/2012. (Gover, Thom) (Entered: 07/05/2012)
07/06/2012	<u>35</u>	ORDER granting <u>34</u> Motion to Extend Time re <u>29</u> Amended Petition for Writ of Habeas Corpus. Answer due 8/6/2012. Signed by Judge Edward C. Reed, Jr on 7/6/12. (Copies have been distributed pursuant to the NEF - JC) (Entered: 07/06/2012)
08/06/2012	<u>36</u>	MOTION to Dismiss <i>Petition for Writ of Habeas Corpus</i> by Respondents Nevada Attorney General, Jack Palmer. Responses due by 8/23/2012. (Gover, Thom) (Entered: 08/06/2012)
08/23/2012	<u>37</u>	First MOTION to Extend Time regarding dispositive matter (First Request) <i>Unopposed Motion For An Enlargement Of Time In Which To File An Opposition To Motion To Dismiss</i> by Petitioner Fredys A. Martinez. Motion ripe 8/23/2012. (Bookout, Debra) (Entered: 08/23/2012)
08/24/2012	<u>38</u>	ORDER GRANTING <u>37</u> Motion to Extend Time : P's Response to # <u>36</u> MOTION to Dismiss due by 10/22/2012. Signed by Judge Edward C. Reed, Jr on 8/23/2012. (Copies have been distributed pursuant to the NEF - DRM) (Entered: 08/24/2012)
10/01/2012	<u>39</u>	MINUTE ORDER IN CHAMBERS of the Honorable Chief Judge Robert C. Jones, on 10/1/2012. IT IS ORDERED that this case is reassigned to Judge Larry R. Hicks for all further proceedings. Judge Edward C. Reed, Jr no longer assigned to case. All further documents must bear the correct case number 3:10-cv-00777-LRH-VPC. (no image attached) (Copies have been distributed pursuant to the NEF - AF) (Entered: 10/01/2012)
10/22/2012	<u>40</u>	Second MOTION to Extend Time regarding dispositive matter (Second Request) <i>Unopposed Motion For An Enlargement Of Time In Which To File An Opposition To Motion To Dismiss (Second Request)</i> by Petitioner Fredys A. Martinez. Motion ripe 10/22/2012. (Bookout, Debra) (Entered: 10/22/2012)
10/23/2012	<u>41</u>	ORDER granting <u>40</u> Motion for Enlargement of Time. Petitioner shall have through November 26, 2012 , to file a response to the motion to dismiss <u>36</u> . Signed by Judge Larry R. Hicks on 10/23/2012. (Copies have been distributed pursuant to the NEF - HJ) (Entered: 10/23/2012)
11/26/2012	<u>42</u>	REPLY <i>Opposition To Respondents' 36 Motion To Dismiss</i> filed by Petitioner Fredys A. Martinez. (Bookout, Debra) Modified on 11/27/2012 link added. (BLG). (Entered: 11/26/2012)
11/26/2012	<u>43</u>	EXHIBIT(s) <i>Index of Exhibits and Exhibits 1-27 to 42</i> Reply - Other ; filed by Petitioner Fredys A. Martinez. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5, # <u>6</u> Exhibit 6, # <u>7</u> Exhibit 7, # <u>8</u> Exhibit 8, # <u>9</u> Exhibit 9, # <u>10</u> Exhibit 10, # <u>11</u> Exhibit 11, # <u>12</u> Exhibit 12, # <u>13</u> Exhibit 13, # <u>14</u> Exhibit 14, # <u>15</u> Exhibit 15, # <u>16</u> Exhibit 16, # <u>17</u> Exhibit 17, # <u>18</u> Exhibit 18, # <u>19</u> Exhibit 19, # <u>20</u> Exhibit 20, # <u>21</u> Exhibit 21, # <u>22</u> Exhibit 22, # <u>23</u> Exhibit 23, # <u>24</u> Exhibit 24, # <u>25</u> Exhibit 25, # <u>26</u> Exhibit 26, # <u>27</u> Exhibit 27)(Bookout, Debra) <i>Modified on</i>

		11/27/2012 link to <u>36</u> Motion to dismiss added. (BLG). (Entered: 11/26/2012)
12/05/2012	<u>44</u>	REPLY to Response to <u>36</u> MOTION to Dismiss <i>Petition for Writ of Habeas Corpus</i> filed by Respondents Nevada Attorney General, Jack Palmer. <i>Reply to Opposition</i> (Gover, Thom) (Entered: 12/05/2012)
02/25/2013	<u>45</u>	ORDERED that Rs' # <u>36</u> Motion to dismiss is GRANTED. This action is DISMISSED with prejudice as untimely. The clerk of the court shall enter judgment accordingly. FURTHER ORDERED that a certificate of appealability is GRANTED on the issue of whether the court is correct in its determination that equitable tolling is not warranted. Signed by Judge Larry R. Hicks on 2/25/2013. (Copies have been distributed pursuant to the NEF - DRM) (Entered: 02/25/2013)
02/25/2013	<u>46</u>	JUDGMENT - Respondents' motion to dismiss (# <u>36</u>) is GRANTED. This action is DISMISSED with prejudice as untimely. IT IS FURTHER ORDERED that a certificate of appealability is GRANTED on the issue of whether the court is correct in its determination that equitable tolling is not warranted. (Copies have been distributed pursuant to the NEF - DRM) (Entered: 02/25/2013)
03/25/2013	<u>47</u>	NOTICE OF APPEAL by Petitioner Fredys A. Martinez. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Bookout, Debra) (Entered: 03/25/2013)
03/25/2013	<u>48</u>	ORDER for Time Schedule as to <u>47</u> Notice of Appeal. USCA Case Number 13-15537 . (JC) (Entered: 03/25/2013)
03/25/2013	<u>49</u>	<p>CERTIFICATE OF RECORD on <u>47</u> Notice of Appeal (USCA Case Number 13-15537). Certificate of Appealability GRANTED on the issue of whether the court is correct in its determination that equitable tolling is not warranted per <u>45</u> Order.</p> <p>The record on appeal, consisting of the reporter's transcripts and the United States District Court clerk's record is ready for the purpose of the appeal.</p> <p>This file exists in electronic format and is accessible via CM/ECF - PACER. The documents comprising the United States District Court clerk's record have been numbered in conformance with Rule 11(b) of the Federal Rules of Appellate Procedure. These document numbers are reflected on the United States District Court's docket sheet and should be used for reference purposes in the briefs.</p> <p>Appeals in Habeas Corpus and 28 USC 2255 Motion to Vacate Sentence cases are treated as civil appeals in the Court of Appeals. Criminal appeals briefing schedules will be issued upon the filing of this document.</p> <p>E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (no image attached) (JC) (Entered: 03/25/2013)</p>
03/26/2013	<u>50</u>	TRANSCRIPT DESIGNATION by Petitioner Fredys A. Martinez re <u>47</u> Notice of Appeal. Transcripts are NOT required for this appeal. (Bookout, Debra) (Entered: 03/26/2013)
06/06/2013	<u>51</u>	NOTICE of Appearance by attorney Ryan Norwood on behalf of Petitioner Fredys A. Martinez. NOTICE OF APPEARANCE (Norwood, Ryan) (Entered: 06/06/2013)

Transaction Receipt			
07/22/2013 10:48:05			
PACER Login:	fp0083	Client Code:	
Description:	Docket Report	Search Criteria:	3:10-cv-00777-LRH-VPC
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7 Attorneys for Petitioner

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 FREDYS MARTINEZ,
11 Petitioner,

12 vs.

13 JACK PALMER, et al.,

14 Respondents.

3:10-cv-00777-ECR-VPC

**FIRST AMENDED PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY
PURSUANT TO 28 U.S.C. § 2254**

15
16 Petitioner, Fredys Martinez ("Martinez"), by and through his attorney of record, Debra A.
17 Bookout, Assistant Federal Public Defender, files this First Amended Petition for Writ of Habeas Corpus
18 by a Person in State Custody Pursuant to U.S.C. § 2254.¹

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¹ The Exhibits referenced in this First Amended Petition are identified as "Ex." Petitioner reserves the right to file supplemental exhibits as needed and relevant.

I.

PROCEDURAL BACKGROUND

1. Following a jury trial, Mr. Martinez was found guilty of the following crimes: Burglary While in Possession of a Deadly Weapon (Count I), Battery With Use of a Deadly Weapon (Count II), and First Degree Kidnapping With Use of a Deadly Weapon (Count III).² Mr. Martinez was sentenced to a maximum of one hundred eighty (180) months with minimum parole eligibility of sixty (60) months on Count I; a maximum of one hundred twenty (120) months with minimum parole eligibility of forty-eight (48) months on Count II; and to Life with minimum parole eligibility of sixty (60) months, plus an equal and consecutive term of Life with minimum parole eligibility of sixty (60) months for the Use of a Deadly Weapon on Count III. Counts I, II and III were imposed to run concurrently. Mr. Martinez was given credit for two hundred eighty-one (281) days of time served. (Ex. 21.) Mr. Martinez is currently serving out his sentence at the Lovelock Correctional Center in Lovelock, Nevada.

2. On May 31, 2007, the clerk of the Eighth Judicial District Court, Clark County, Nevada entered a Judgment of Conviction under the case entitled The State of Nevada vs. Freddy Martinez, Case No. C226586. (Id.)

3. On September 29, 2006, an Indictment was filed charging Mr. Martinez as follows: Burglary While in Possession of a Deadly Weapon, a felony violation of NRS 205.060 (Count I); Battery With Use of a Deadly Weapon, a felony violation of NRS 200.481 (Count II); First Degree Kidnapping With Use of a Deadly Weapon, a felony violation of NRS 200.310, 200.320, 193.165 (Count III); and Sexual Assault With Use of a Deadly Weapon, a felony violation of NRS 200.364, 200.366, 193.165 (Count IV.) (Ex. 3.)

4. The initial arraignment took place on October 5, 2006, before the Honorable Michael A. Cherry. (Ex. 5.) Mr. Martinez was present with Deputy Public Defender, Kathleen M. Hamers, and a court interpreter. Mr. Martinez pled not guilty to the charges as listed in the Indictment and invoked his right to a trial within sixty (60) days. (Id.)

5. The trial commenced on April 11, 2007, before the Honorable Stewart L. Bell, and

² Mr. Martinez was acquitted of Count 4- Sexual Assault With Use of a Deadly Weapon.

1 concluded on April 12, 2007. (Exs. 14, 19.) Mr. Martinez was present throughout and represented by
2 Deputy Public Defenders Kathleen M. Hamers and Ronald S. Paulson.

3 6. The sentencing hearing took place on May 24, 2007. (Ex. 20.) Mr. Martinez's sentence
4 is set forth above in the first paragraph.

5 7. The Judgment of Conviction was filed on May 31, 2007. (Ex. 21.)

6 **DIRECT APPEAL**

7 8. A timely Notice of Appeal was filed on June 19, 2007. (Ex. 22.) The Nevada Supreme
8 Court docketed this appeal as Case No. 49608.

9 9. The Clark County Public Defender's Office was appointed to represent Mr. Martinez on
10 appeal. (Ex. 24.)

11 10. Appellant's Opening Brief was filed in the Nevada Supreme Court on December 12,
12 2007. (Ex. 26.) Appellate counsel raised the following issues:

- 13 I. MR. MARTINEZ CANNOT BE CONVICTED OF TWO CRIMES FOR A SINGLE
14 TRANSACTION.
15 II. DURING CLOSING ARGUMENTS, THE PROSECUTION COMMITTED
16 MISCONDUCT BY IMPROPERLY DENIGRATING A DEFENSE THEORY, WHICH
17 DEPRIVED APPELLANT OF HIS RIGHTS UNDER STATE AND FEDERAL LAW AS
18 WELL AS THE NEVADA UNITED STATES CONSTITUTIONS.
19 III. THERE WAS INSUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUSTAIN THE
20 KIDNAPING CONVICTION AGAINST FREDDY MARTINEZ.

21 11. The Nevada Supreme Court filed its Order of Affirmance on May 7, 2008. (Ex. 29.)
22 Remittitur issued on June 3, 2008. (Ex. 30.)

23 **POST-CONVICTION LITIGATION**

24 12. On April 21, 2010, Mr. Martinez, in proper person, file a Motion to Vacate his Judgment
25 of Conviction (ex. 34), arguing that he did not get a fair trial because his statements to the jury were not
26 interpreted which was a denial of his rights to due process.

27 13. On April 30, 2010, Mr. Martinez, in proper person, filed a Petition for Writ of Habeas
28 Corpus (Post-Conviction) (ex. 36), arguing 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.

1 III. FUNDAMENTAL MISCARRIAGE OF JUSTICE, CAUSE AND PREJUDICE.

2 IV. A CATCH ALL CLAIM, INEFFECTIVE APPEAL COUNSEL OMITTED TRIAL
3 COUNSEL CLAIM.

4 14. On May 21, 2010, the trial court entered an Order Denying Defendant's Pro Per Motion
5 to Vacate a J.O.C. (Ex. 40.)

6 15. On June 3, 2010, Mr. Martinez timely filed a Notice of Appeal regarding the denial of
7 his motion to vacate. (Ex. 42.) The Nevada Supreme Court docketed this appeal under Case No. 56153.

8 16. On November 12, 2010, the Nevada Supreme Court issued its Order of Affirmance,
9 affirming the lower court's denial of the motion to vacate. (Ex. 44.) Remittitur issued on December 7,
10 2010. (Ex. 46.)

11 17. The Findings of Fact, Conclusions of Law and Order denying the state habeas petition
12 were filed on January 21, 2011. (Ex. 47.) The Notice of Entry of Order was filed on March 8, 2011.
13 (Ex. 49.)

14 18. A Notice of Appeal was filed on November 12, 2010 (following the denial of the state
15 habeas petition at the hearing). (Ex. 45.) The Nevada Supreme Court docketed this appeal as Case No.
16 57197.

17 19. Absent any briefing on the appeal, the Nevada Supreme Court filed its Order of
18 Affirmance in Case No. 57197 on May 9, 2011. (Ex. 56.)³ Remittitur issued on June 3, 2011. (Ex. 57.)

19 20. Mr. Martinez mailed the Petition for a Writ of Habeas Corpus Pursuant to U.S.C. § 2254
20 by a Person in State Custody in the instant action on December 11, 2010.

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26 ³ Mr. Martinez appealed the denial of his state habeas petition twice. As stated above, he
27 first appealed on November 16, 2010 after the hearing denying his petition (the Nevada Supreme Court
28 docketed this case as Case No. 57197), and then again on March 21, 2011 (ex. 51) after the written
Notice of Entry of Order was filed. The Nevada Supreme Court entertained both appeals. The appeal
on Case No 58023 was decided on July 13, 2011. (Ex. 58.) Remittitur issued in that case on August
10, 2011. (Ex. 59.)

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II.

STATEMENT OF EXHAUSTION

Grounds One, Two and Three were presented to the Nevada Supreme Court in the direct appeal. (Ex. 29.) Grounds Four and Five were raised in Martinez' state post- conviction proceedings and to the Nevada Supreme Court on appeal from the denial of the petition. (Ex. 36, 41.) Accordingly, all grounds raised in the instant petition have been exhausted.

III.

GROUND FOR RELIEF

GROUND ONE

MARTINEZ' CONVICTIONS FOR FIRST DEGREE KIDNAPING AND BATTERY WITH USE OF A DEADLY WEAPON VIOLATE THE FIFTH AMENDMENT'S PROHIBITION AGAINST DOUBLE JEOPARDY.

The State charged Martinez by indictment, in relevant part, as follows:

Count II - battery with use of a deadly weapon

[Martinez] did then and there wilfully, unlawfully, and feloniously use force or violence upon the person of another, to-wit: Bianca Hernandez, with use of a deadly weapon, to-wit: a knife, by cutting the said Bianca Hernandez in the thigh with said knife.

Count III - first degree kidnaping with use of a deadly weapon

[Martinez] did wilfully, unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away Bianca Hernandez, a human being, with the intent to hold or detain the said Bianca Hernandez against her will, and without her consent, for the purpose of committing sexual assault, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

(Ex 3.)

The double jeopardy clause contained within the Fifth Amendment provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. am. V. The double jeopardy clause provides protection against three types of violations: 1) a second prosecution after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. Martinez contends it is the third violation which occurred in his case.

When a defendant is convicted of two offenses that punish the exact same act, the convictions are redundant. Martinez contends that the gravamen of both the battery with use of a deadly weapon and

1 first degree kidnaping are the same. Therefore, he is being punished for the same criminal act.
2 Accordingly, the writ should be granted and Martinez' convictions should be vacated.

3 **GROUND TWO**

4 **THE STATE COMMITTED PROSECUTORIAL MISCONDUCT DURING**
5 **CLOSING ARGUMENT IN VIOLATION OF MARTINEZ' RIGHT TO DUE**
6 **PROCESS AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND**
7 **FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

8 A person's Fifth Amendment right to Due Process made applicable to the States through the
9 Fourteenth Amendment is violated when misconduct by a prosecutor during closing argument is so
10 repugnant and prejudicial that it calls into question the fundamental fairness of the trial and verdict of
11 the jury. Martinez contends the prosecution committed misconduct during closing argument which
12 rendered his trial fundamentally unfair.

13 During closing argument, the prosecutor engaged in misconduct when he denigrated Martinez
14 and his defense. The prosecutor argued to the jury that Martinez' claim that the sexual conduct that
15 occurred between him and Ms. Hernandez was consensual was "offensive" and made "absolutely no
16 sense." (Ex. 19, p. 74.) Martinez contends these comments were improper and violated his right to a fair
17 trial under the Fifth and Fourteenth Amendments.

18 **GROUND THREE**

19 **MARTINEZ IS IN CUSTODY IN VIOLATION OF HIS RIGHT TO DUE**
20 **PROCESS PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS**
21 **TO THE UNITED STATES CONSTITUTION BECAUSE THE EVIDENCE**
22 **ADDUCED AT TRIAL WAS INSUFFICIENT TO PROVE KIDNAPING IN THE**
23 **FIRST DEGREE BEYOND A REASONABLE DOUBT**

24 Martinez was charged with first degree kidnaping in Count III of the indictment and sexual
25 assault in Count IV of the indictment. (Ex 3.) The State charged kidnaping in the first degree due to the
26 allegation that the kidnaping was done with the intent to commit the crime of sexual assault. (Id.)

27 Count III - first degree kidnaping with use of a deadly weapon

28 [Martinez] did wilfully, unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away Bianca Hernandez, a human being, with the intent to hold or detain the said Bianca Hernandez against her will, and without her consent, **for the purpose of committing sexual assault**, said Defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

1 (Ex. 3)(emphasis added). However, the jury found that the State had not proven, beyond a reasonable
2 doubt, that Martinez committed sexual assault and he was acquitted of that offense. (Ex. 18)

3 Martinez contends that because the jury found that he did not intend to commit the crime of
4 sexual assault the State could not sustain a conviction on the charge of first degree kidnaping. Instead,
5 the conviction could only have been for second degree kidnaping. Nev. Rev. Stat. 200.310 provide, in
6 relevant part, as follows:

- 7 1. A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals,
8 kidnaps or carries away a person by any means whatsoever with the intent to hold or
9 detain, or who holds or detains the person for ransom or reward, or for the purpose of
10 committing sexual assault, ... is guilty of kidnaping in the first degree ...
- 11 2. A person who willfully and without authority of law seizes, inveigles, takes, carries away
12 or kidnaps another person with the intent to keep the person secretly imprisoned within
13 the State, or for the purpose of conveying the person out of State without authority of
14 law, or in any manner held to service or detained against the person's will, is guilty of
15 kidnaping in the second degree ...

16 The Fourteenth Amendment to the United States Constitution guarantees every person the right
17 to due process of law. Specifically, no person can be convicted of any criminal offense unless the State
18 first proves, with sufficient and competent evidence, each and every element of the crime charged
19 beyond a reasonable doubt. In other words, the conviction and sentence cannot survive constitutional
20 scrutiny if, after viewing the proof in the light most favorable to the State, the jury could not have found
21 sufficient proof beyond a reasonable doubt to return a verdict of guilt.

22 The evidence presented by the State at trial failed to establish beyond a reasonable doubt that
23 Martinez was guilty of sexual assault which was an element of the crime of first degree kidnaping as
24 charged by the State. Accordingly, the evidence was insufficient to sustain the verdict for first degree
25 kidnaping.

26 GROUND FOUR

27 MARTINEZ WAS DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL 28 GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS DUE TO THE LACK OF A COURT INTERPRETER.

29 Martinez contends that a court interpreter was not present during his trial and, therefore, he could
30 not communicate with the jury. (See Ex. 36.) The failure to have an interpreter present rendered his trial
31 proceedings fundamentally unfair.

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GROUND FIVE

**MARTINEZ IS IN CUSTODY IN VIOLATION OF HIS SIXTH AMENDMENT
RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE
COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE AVAILABILITY
OF RELEVANT WITNESS AND TO PRESENT A THEORY OF DEFENSE TO
THE JURY.**

Martinez was represented by Kathleen Hamers through his pre-trial, trial and sentencing proceedings, by Ronald Paulson during his trial, and by Kedric Bassett on direct appeal. (See Ex. 1 (Minutes)). Martinez has a constitutional right to be represented by competent counsel. Counsel's lack of effective representation substantially and injuriously affected the process to such an extent as to render Martinez' conviction and sentence fundamentally unfair and unconstitutional. No strategic or tactical reason existed for counsel's failure to address or investigate these significant and obvious issues during Martinez' proceedings. Counsel's failure to address these significant issues fell below objective standards of reasonableness and thereby deprived Martinez of effective representation guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution.

Martinez contends that counsel failed to investigate witnesses relevant to his case. He further contends that counsel failed to present a theory of defense to the jury. Martinez contends that had counsel properly investigated his case and presented a theory of defense, the outcome of the proceedings would have been different.

IV.

PRAYER FOR RELIEF

Accordingly, Petitioner respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Mr. Martinez brought before the Court so that he may be discharged from his unconstitutional confinement;

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1 2. Conduct a hearing at which proof may be offered concerning the allegations in this
2 Amended Petition and any defenses that may be raised by Respondents and,

3 3. Grant such other and further relief as, in the interests of justice, may be appropriate.

4 DATED this 13th day of March, 2012.

5
6 LAW OFFICES OF THE
7 FEDERAL PUBLIC DEFENDER

8
9 By: /s/ Debra A. Bookout
10 DEBRA A. BOOKOUT
11 Assistant Federal Public Defender
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 13, 2012 she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Thom Gover
Chief Deputy Attorney General
Special Prosecutions Division
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101

/s/ Leianna Montoya
Leianna Montoya, an employee of the
Federal Public Defender's Office

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Federal Public Defender
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7 Attorneys for Petitioner

8 UNITED STATES DISTRICT COURT

9 DISTRICT OF NEVADA

10 FREDYS MARTINEZ,

11 Petitioner,

12 vs.

13 JACK PALMER, et al.,

14 Respondents.

3:10-cv-00777-ECR-VPC

**INDEX OF EXHIBITS IN SUPPORT OF
AMENDED PETITION FOR WRIT OF
HABEAS CORPUS**

15
16 Petitioner, by and through his counsel, Debra A. Bookout, Assistant Federal Public Defender,
17 submits the following Index of Exhibits in support of the Amended Petition for Writ of Habeas Corpus.

No.	DATE	DOCUMENT	COURT	CASE #
1.	09/21/2006	Reporter's Transcript of Proceedings-Vol 1 - Grand Jury Hearing	District Court	05BGJ145
2.	09/28/2006	Reporter's Transcript of Proceedings-Vol 2 - Grand Jury Hearing	District Court	05BGJ145
3.	09/29/2006	Indictment	District Court	06-C226586
4.	09/29/2006	Court Minutes	District Court	06-C226586
5.	10/05/2006	Recorder's Transcript-Hearing Regarding Arraignment	District Court	05BGJ145
6.	11/17/2006	Motion to Compel Disclosure of Exculpatory Evidence	District Court	05BGJ145

No.	DATE	DOCUMENT	COURT	CASE #
7.	11/28/2006	State's Opposition to Defendant's Motion to Compel	District Court	06-C226586
8.	11/28/2006	Order Releasing Medical Records	District Court	06-C226586
9.	11/28/2006	Ex Parte Motion for Release of Medical Records	District Court	06-C226586
10.	11/30/2006	Recorder's Transcript of Defendant's Motion to Compel Disclosure And Calendar Call	District Court	06-C226586
11.	01/25/2007	Reporter's Transcript of Proceedings	District Court	06-C226586
12.	01/30/2007	Reporter's Transcript of Proceedings - Guilty Plea Agreement	District Court	06-C226586
13.	02/08/2007	Reporter's Transcript of Proceedings	District Court	06-C226586
14.	04/11/2007	Recorder's Partial Transcript of Jury Trial-Day 1-Vol 1	District Court	06-C226586
15.	04/12/2007	Amended Jury	District Court	06-C226586
16.	04/12/2007	Jury Instructions	District Court	06-C226586
17.	04/12/2007	Proposed Jury Instructions Not Used At Trial	District Court	06-C226586
18.	04/12/2007	Verdict	District Court	06-C226586
19.	04/12/2007	Recorder's Partial Transcript Of Jury Trial and Verdict-Day 2-Vol II	District Court	06-C226586
20.	05/24/2007	Recorder's Transcript Of Sentencing	District Court	06-C226586
21.	05/31/2007	Judgment Of Conviction (Jury Trial)	District Court	06-C226586
22.	06/19/2007	Notice Of Appeal	District Court	06-C226586
23.	06/25/2007	Order Of Limited Remand For Appointment Of Counsel	Nevada Supreme Court	49608

No.	DATE	DOCUMENT	COURT	CASE #
24.	06/28/2007	Order Appointing Appellant Counsel	District Court	06-C226586
25.	07/12/2007	Appellant's Request For Transcript Of Proceedings	Nevada Supreme Court	49608
26.	12/12/2007	Appellant's Opening Brief	Nevada Supreme Court	49608
27.	01/15/2008	Respondent's Answering Brief	Nevada Supreme Court	49608
28.	03/21/2008	Order Submitting For Decision Without Oral Argument	Nevada Supreme Court	49608
29.	05/07/2008	Order Of Affirmance	Nevada Supreme Court	49608
30.	06/03/2008	Remittitur	Nevada Supreme Court	49608
31.	10/23/2009	Motion To Make Additional Funds Available for NDOC Inmate's Legal Account	District Court	06-C226586
32.	11/03/2009	Opposition To Defendant's Motion To Make Additional Funds Available For NDOC Inmate's Legal Account	District Court	06-C226586
33.	01/06/2010	Order Denying Defendant's Motion To Make Additional Funds Available for NDOC Inmates Legal Account	District Court	06-C226586
34.	04/21/2010	Motion To Vacate Judgment Of Conviction	District Court	06-C226586
35.	04/24/2010	Order Denying Defendant's Pro Per Motion For Appointment Of Counsel	District Court	06-C226586
36.	04/30/2010	Petition For Writ Of Habeas Corpus (Post-Conviction)	District Court	06-C226586
37.	05/11/2010	Order For Petition For Writ Of Habeas Corpus	District Court	06-C226586
38.	05/13/2010	Motion For Evidentiary Hearing	District Court	06-C226586

No.	DATE	DOCUMENT	COURT	CASE #
39.	05/21/2010	State's Opposition To Defendant's Motion For Evidentiary Hearing	District Court	06-C226586
40.	05/21/2010	Order Denying Defendant's Pro Per Motion To Vacate Judgment Of Conviction	District Court	06-C226586
41.	05/24/2010	Answer And Response	District Court	06-C226586
42.	06/03/2010	Notice Of Appeal	District Court	06-C226586
43.	07/09/2010	State's Response And Motion To Dismiss Defendant's Petition (Post-Conviction)	District Court	06-C226586
44.	11/12/2010	Order Of Affirmance	Nevada Supreme Court	56153
45.	11/16/2010	Notice Of Appeal	District Court	06-C226586
46.	12/07/2010	Remittitur	Nevada Supreme Court	56153
47.	01/21/2011	Findings Of Fact, Conclusions Of Law And Order	District Court	06-C226586
48.	01/25/2011	Order Denying Defendant's Motion For Petition For Writ Of Habeas Corpus	District Court	06-C226586
49.	03/08/2011	Notice Of Entry Of Decision And Order-Findings Of Facts and Conclusions Of Law And Order	District Court	06-C226586
50.	03/08/2011	Notice Of Entry Of Decision And Order Denying Petitioner's Motion For Writ Of Habeas Corpus	District Court	06-C226586
51.	03/21/2011	Notice Of Appeal	District Court	06-C226586
52.	03/25/2011	Motion For Appointment Of Counsel	District Court	06-C226586
53.	03/25/2011	Motion To Extend Prison Copywork Limit For	District Court	06-C226586
54.	03/25/2011	Notice Of Appeal	District Court	06-C226586
55.	04/01/2011	State's Opposition To Defendant's Motion For Appointment Of Counsel	District Court	06-C226586

No.	DATE	DOCUMENT	COURT	CASE #
56.	05/09/2011	Order Of Affirmance	Nevada Supreme Court	57197
57.	06/03/2011	Remittitur	Nevada Supreme Court	57197
58.	07/13/2011	Order Of Affirmance	Nevada Supreme Court	58023
59.	08/10/2011	Remittitur	Nevada Supreme Court	58023
60.	08/30/2011	Order Dismissing Appeal	Nevada Supreme Court	58050
61.	09/26/2011	Remittitur	Nevada Supreme Court	58050

Respectfully submitted this 13th day of March, 2012.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: /s/ Debra A. Bookout
DEBRA A. BOOKOUT
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 13, 2012, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Thom Gover
Chief Deputy Attorney General
Special Prosecutions Division
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101

/s/ Leianna Montoya
Leianna Montoya, an Employee of the
Federal Public Defender's Office

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UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

FREDYS MARTINEZ,

Petitioner,

v.

JACK PALMER, *et al.*,

Respondents.

Case No.: 3:10-cv-00777-ECR-VPC

**MOTION TO DISMISS PETITION FOR WRIT
 OF HABEAS CORPUS PURSUANT TO
 28 U.S.C. § 2254 BY A PERSON IN
 STATE CUSTODY**

(NOT SENTENCED TO DEATH)

Respondents, through legal counsel CATHERINE CORTEZ MASTO, Attorney General, by THOM GOVER, Chief Deputy Attorney General, hereby request an order dismissing the First Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody, Court Document ("CD") 29, filed by Petitioner FREDYS MARTINEZ ("Martinez"). This Motion is based upon the pleadings and papers on file herein, the following Memorandum of Points and Authorities, and the previously filed Index of Exhibits, CD 30-31.

DATED this 6th day of August, 2012.

CATHERINE CORTEZ MASTO
 Attorney General

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

Attorney General's Office
 555 E. Washington, Suite 3900
 Las Vegas, NV 89101

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PROCEDURAL BACKGROUND

A. Entry of Judgment of Conviction:

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, CD 30, Exh. 21.

B. Direct Appeal:

Martinez filed a notice of appeal on June 19, 2007 resulting in the docketing of Nevada Supreme Court, Case Number 49608. CD 30, Exh. 22.

The following issues were raised on direct appeal:

- I. Mr. Martinez cannot be convicted of two crimes for a single transaction.
- II. During closing arguments, the prosecution committed misconduct by improperly denigrating a defense theory, which deprived appellant of his rights under state and federal law as well as the Nevada and United States constitutions.
- III. There was insufficient evidence produced at trial to sustain the kidnapping conviction against Freddy Martinez.

Appellant's Opening Brief, CD 30, Exh. 26.

On May 7, 2008, the Nevada Supreme Court entered its Order of Affirmance. CD 30, Exh. 29.

Remittitur issued on June 3, 2008. CD 30, Exh. 30.

C. Post-Conviction Petition for Writ of Habeas Corpus:

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.

1 II. Miranda Rights, U.S.C.A. Const. Amend 5th.

2 III. Fundamental Miscarriage of Justice, Cause and Prejudice.

3 IV. A Catch All Claim, Ineffective Appeal Counsel Omitted Trial Counsel Claim.

4 CD 31, Exh. 36.

5 On January 21, 2011, the state district court filed its Findings of Fact, Conclusions of
6 Law and Order denying Martinez' post-conviction petition as time barred pursuant to NRS
7 34.726. CD 31, Exh. 47, pp. 3-5.

8 **D. Nevada Supreme Court, Case Numbers 57197 and 58023:**

9 Martinez filed a timely Notice of Appeal challenging the order dismissing his post-
10 conviction petition. Martinez filed two separate notices of appeal, resulting in the Nevada
11 Supreme Court docketing, Case Numbers 57197 and 58023. CD 31, Exhs. 45 and 51.

12 On May 9, 2011, Order of Affirmance was entered in the 57197 case upholding the
13 lower court's application of the time bar pursuant to NRS 34.726(1). CD 31, Exh. 56.

14 In an interesting example of the Nevada Supreme Court's regular and consistent
15 application of the procedural bar against untimely petitions, on July 13, 2011, Order of
16 Affirmance was entered in the 58023 case again upholding the lower court's application of
17 NRS 34.726(1). CD 31, Exh. 58.

18 **E. United States District Court, District of Nevada 3:10-CV-00777-ECR-VPC:**

19 On December 11, 2010, Martinez caused to filed his *pro per* Petition for Writ of Habeas
20 Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 resulting in the docketing
21 of the instant action. CD 8.

22 Counsel was appointed resulting in the filing of a first amended petition which is
23 currently pending before this Court. CD 29.

24 An answer or otherwise responsive pleading is currently pending from Respondents.
25 CD 35.

26 / / /

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28 / / /

II.

LEGAL DISCUSSION**A. MARTINEZ'S FEDERAL PETITION IS UNTIMELY:**

Martinez's federal petition was untimely filed on December 11, 2010. A one year period of limitation applies to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d)(1). The limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Of course, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Nevertheless, an untimely filed state court petition is not "properly filed" and does not toll the statute of limitations. *Pace v. DiGuglielmo*, 544 U.S. 408, 413-14 (2005). If a petition reveals on its face that the statute of limitations has run, the petitioner has the burden of alleging facts which would give rise to any tolling of the statute. *Hinton v. Pacific Enterprises*, 5 F.3d 391, 395 (9th Cir. 1993).

The one year federal statute expired one year from the date of the time allotted for Martinez to file a petition for writ of certiorari with the United States Supreme Court after the Nevada Supreme Court affirmed his judgment on direct appeal. See *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The Nevada Supreme Court entered its Order of Affirmance on direct appeal on May 7, 2008. Pursuant to Supreme Court Rules, Rule 13(1), the time for petitioning for review on certiorari is "...within 90 days after entry of judgment." Martinez did not file for certiorari review with the United State Supreme Court. As a result, the one-year period of limitations under 28 U.S.C. § 2244(d)(1) began to run on August 5, 2008. The time on the statute ran untolled for a one year period of time and currently continues to run as Martinez's untimely, and thus improperly, filed state petition, was not filed until April 30, 2010; a delay of more than 20 months. Of course, the instant federal habeas matter cannot act to toll the statute.

1 Martinez makes no effort to explain why he could not have filed his instant federal
2 petition in a timely manner. He has failed to allege facts which would give rise to any
3 equitable tolling of the AEDPA limitations period statute in spite of the facial deficiency of his
4 petition. As such, his petition must be dismissed.

5 **B. MARTINEZ'S INSTANT FEDERAL PETITION IS PROCEDURALLY DEFAULTED:**

6 Ground Four of Martinez's instant federal petition was found to be time barred by both
7 the state district court and the Nevada Supreme Court pursuant to NRS 34.726(1). The claim
8 was first raised in Martinez's untimely state court post-conviction petition.

9 A federal court will not review a question of federal law decided by a state court if the
10 decision of the state court rests on a state law ground that is independent of the federal
11 question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 727,
12 731 (1991). This rule applies whether the state law ground is substantive or procedural and
13 whether the default was caused by a failure to raise a claim at trial, a failure to raise a
14 particular claim on appeal, or a failure to appeal at all. *Id.* at 750. "In order to constitute
15 adequate and independent grounds sufficient to support a finding of procedural default, a
16 state rule must be clear, consistently applied, and well-established at the time of petitioner's
17 purported default." *Bargas v. Burns*, 179 F.3d 1207, 1211 (9th Cir. 1999). Nevada's
18 procedural bar against untimely petitions articulated in NRS 34.726(1) is an adequate and
19 independent ground sufficient to support a finding of procedural default. The Ninth Circuit has
20 found, at least as far back as of 1993, that the Nevada Supreme Court has consistently
21 applied the state rule barring review of the merits of untimely post-conviction petitions.
22 *Loveland v. Hatcher*, 231 F.3d 640, 642 (9th Cir. 2000). Unless the prisoner can demonstrate
23 cause for the default and actual prejudice as a result of the alleged violation of federal law, or
24 demonstrate that failure to consider the claims will result in a fundamental miscarriage of
25 justice the federal courts are barred from hearing his claims. *Coleman* at 750.

26 As referenced above, the Nevada Supreme Court considered Martinez's post-
27 conviction petition in two separate appeals.

28 In Case No. 57197, the Nevada Supreme Court found as follows:

Appellant filed his petition on April 30, 2010, almost two years after issuance of the remittitur on direct appeal on June 3, 2008. [citation omitted]. Thus, appellant's petition was untimely filed. NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.

Order of Affirmance, CD 31, Exh. 56. The Nevada Supreme Court further considered an asserted "language barrier" and "actual innocence" as cause for the untimely filing and found such claims to lack merit. Id.

In Case No. 58023, the Nevada Supreme Court again found that Martinez's petition was time barred having been filed "...almost 2 years after issuance of the remittitur on direct appeal on June 3, 2008." The Nevada Supreme Court also found to be without merit Martinez's efforts to show cause for the untimely filing holding "Appellant failed to demonstrate that an impediment external to the defense excused his delay." Order of Affirmance, CD 31, Exh. 58.

C. MARTINEZ PRESENTS A PETITION WITH UNEXHAUSTED CLAIMS:

Ground Five of Martinez's federal petition was never presented in the Nevada state courts. While Martinez did present a "catch-all claim" related to his appellate counsel, no assertion of ineffectiveness was ever raised alleging trial counsel was ineffective for failing to "...adequately investigate the availability of relevant witnesses and to present a theory of defense."

As a result, Martinez presents this Court a mixed petition containing both exhausted and unexhausted claims which must be dismissed, or otherwise resolved, pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), and its progeny. Exhaustion of state remedies is a prerequisite to a federal court's consideration of claims presented in a petition for writ of habeas corpus. 28 U.S.C. § 2254(b). Moreover, a "mixed petition," containing both exhausted and unexhausted claims, must be resolved by a federal district court, leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court. *Rose*, 455 at 510. Alternatively, upon the presentation of a mixed petition, a federal habeas petitioner may seek to stay federal proceedings to return to state court to

1 exhaust state remedies upon the showing of (1) "good cause" for failure to exhaust, (2) that
2 the unexhausted claims are "potentially meritorious" and (3) no indication of any intentionally
3 dilatory litigation tactics. *Rhines v. Weber*, 125 S.Ct. 1528, 1534-35 (2005).

4 **III.**

5 **CONCLUSION**

6 Martinez's federal petition must be dismissed as untimely filed. Alternatively, he has
7 filed a mixed petition that needs to be dismissed or otherwise cleansed of unexhausted
8 claims. Lastly, the Court should dismiss any claims that were found to be defaulted by the
9 Nevada Supreme Court, i.e. Claim Four. Respondents hereby request that this Court issue
10 an order dismissing with prejudice Martinez's First Amended Petition for a Writ of Habeas
11 Corpus pursuant to 28 U.S.C. § 2254 By a Person in State Custody.

12 DATED this 6th day of August, 2012.

13 CATHERINE CORTEZ MASTO
14 Attorney General

15 By: /s/ Thom Gover
16 THOM GOVER
17 Chief Deputy Attorney General
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Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***Motion to Dismiss Petition for Writ of Habeas Corpus*** with the Clerk of the Court by using the CM/ECF system on the 6th day of August, 2012.

The following participants in this case are registered CM/ECF users and will be served by the CM/ECF system:

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Assistant Federal Federal Public Defender
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/ s / C. A. Sholing, PLS
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7 Attorneys for Petitioner

8 UNITED STATES DISTRICT COURT

9 DISTRICT OF NEVADA

10
11 FREDYS MARTINEZ,
12 Petitioner,
13 vs.
14 JACK PALMER, et al.,
15 Respondents.

Case No. 3:10-cv-00777-LRH-VPC

NOTICE OF APPEAL

16 NOTICE is hereby given that FREDYS MARTINEZ, Petitioner herein, hereby appeals to the
17 United States Court of Appeals for the Ninth Circuit from the Order and Judgment In A Civil Case
18 entered on February 25, 2013.

19 LAW OFFICES OF THE
20 FEDERAL PUBLIC DEFENDER

21
22
23 By: /s/ Debra A. Bookout
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 25, 2013 she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

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/s/ Susan Kline
Susan Kline, an Employee of the
Federal Public Defender's Office

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

FREDYS A. MARTINEZ,

Petitioner-Appellant,

v.

JACK PALMER, et al.,

Respondent-Appellee.

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

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	Page
I. ISSUE PRESENTED FOR REVIEW.....	1
II. BAIL STATUS OF APPELLANT.....	1
III. STATEMENT OF JURISDICTION.....	1
IV. STATEMENT OF THE CASE.....	2
A. Procedural History.	2
V. SUMMARY OF ARGUMENT.	4
VI. LEGAL ARGUMENT.	5
A. MARTINEZ IS ENTITLED TO EQUITABLE TOLLING FROM AUGUST 5, 2008 TO DECEMBER 10, 2010.....	5
1. Standards of Review.....	5
2. AEDPA’S Statute of Limitations.....	6
3. Extraordinary Circumstances Stood in the Way of Martinez’ Timely Filing the Federal Petition.	9
a. Martinez does not speak, read or write in English. As a non-English speaking inmate, Martinez was denied meaningful access to the law library.	9
b. Martinez could not obtain a copy of his case file from appellate counsel.	17
4. Martinez exercised reasonable diligence in pursuing his rights	20

VI. CONCLUSION..... 22

VII. STATEMENT OF RELATED CASES. 23

VIII. CERTIFICATE OF COMPLIANCE. 23

CERTIFICATE OF SERVICE. 24

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
Allen v. Lewis, 255 F.3d 798 (9th Cir. 2002).....	22
Bounds v. Smith, 430 U.S. 817 (1977).....	13, 14
Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999).	7
Brown v. Roe, 279 F.3d 742 (9 th Cir. 2002).	9
Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998)	7, 8
Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002).	8
Harris v. Carter, 515 F.3d 1051 (9th Cir. 2008).	8
Hebbe v. Pliler, 627 F.3d 338 (9th Cir. 2010).	14
Holland v. Florida, 130 S. Ct. 2549 (2010).....	7, 8, 18, 20
Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990).....	18
Lewis v. Casey, 518 U.S. 343 (1996).	14
Lott v. Mueller, 304 F.3d 918 (9th Cir. 2002).	7, 8, 18, 21
Mendoza v. Carey, 449 F.3d 1065 (9th Cir. 2006).....	8, 10, 12, 16, 22
Miles v. Prunty, 187 F.3d 1104 (9th Cir. 1999).	6
Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998).....	10, 11
Ross v. Moffit, 417 U.S. 600 (1974).....	13

Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003).....	6, 8, 22
Starns v. Andrews, 524 F.3d 612 (5th Cir. 2008).....	21
Waldron-Ramsey, 556 F.3d (9 th Cir. 2002).....	21
Whalem/Hunt v. Early, 233 F.3d 1146 (9 th Cir. 2000).....	10
Woodford v. Carceau, 538 U.S. 202 (2003).....	7

FEDERAL STATUTES

28 U.S.C. § 2254.....	1
28 U.S.C. § 2244.....	6, 7, 8

OTHER

Nevada Rules of Prof'l Conduct, Rule 1.4 (a)(3).	19
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I.

ISSUE PRESENTED FOR REVIEW

1. Whether Martinez is entitled to equitable tolling from August 5, 2008 to December 10, 1010.

II.

BAIL STATUS OF APPELLANT

Fredys Martinez is a Nevada state prisoner currently housed at Lovelock Correctional Center in Lovelock, Nevada. Martinez was convicted of Burglary While in Possession of a Deadly Weapon, Battery With Use of a Deadly Weapon, and First Degree Kidnaping With Use of a Deadly Weapon. (EOR 460-61.) He is serving two life sentences with minimum parole eligibility of sixty (60) months on the first degree kidnaping charge. (Id.)¹

III.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court denying a Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2254 on February 25, 2013. (EOR 1-6.) The district court granted Martinez a Certificate of

¹ Citations to “EOR” refer to Martinez’s Excerpts of Record filed with this Opening Brief. Citations to “CR” refer to the Clerk’s Record in the district court and citations to “Ex.” refer to the Exhibits filed with Martinez’s federal petition and are found at CR 30-31 and 43.

Appealability (COA). (EOR 5-6.)

IV.

STATEMENT OF THE CASE

A. Procedural History

On September 29, 2006, the State filed an Indictment charging Martinez with Burglary While in Possession of a Deadly Weapon, Battery With Use of a Deadly Weapon, First Degree Kidnaping With Use of a Deadly Weapon, and Sexual Assault With Use of a Deadly Weapon. (EOR 111-13.)

Martinez was arraigned on October 5, 2006, represented by Deputy Public Defender, Kathleen M. Hamers. A court interpreter was present. (EOR 129-32.) Martinez pled not guilty to the charges as listed in the Indictment. (Id.) The trial commenced on April 11, 2007 and concluded on April 12, 2007. (EOR 158-416.)

The jury returned a verdict of guilty on all the charges except Count IV (Sexual Assault with Use of a Deadly Weapon. (EOR 545-55.) The trial court sentenced Martinez on May 24, 2007. (EOR 456-59.) The Judgment of Conviction was filed on May 31, 2007. (EOR 460-61.)

Martinez timely appealed from the Judgment of Conviction. (EOR 462-64.) Martinez filed the Opening Brief on December 12, 2007. (EOR 467-79.) The

Nevada Supreme Court filed its Order of Affirmance on May 7, 2008. (EOR 25-31.) Remittitur issued on June 3, 2008. (EOR 497.)

On April 21, 2010, Mr. Martinez, in proper person, filed a Motion to Vacate his Judgment of Conviction, arguing that he did not get a fair trial because his statements to the jury were not interpreted. (EOR 543-47.) On May 21, 2010, the trial court entered an Order Denying Defendant's Pro Per Motion to Vacate the judgment of conviction. (EOR 564-65.) Martinez timely appealed the trial court's decision denying the motion to vacate. (CR 31, Ex. 42.) On November 12, 2010, the Nevada Supreme Court issued its Order of Affirmance. (EOR 23-24.) Remittitur issued on December 7, 2010. (CR 31, Ex. 46.)

On April 30, 2010, Martinez filed a Petition for Writ of Habeas Corpus (Post-Conviction). (EOR 548-54.) The trial court issued the Findings of Fact, Conclusions of Law and Order denying the state habeas petition on September 13, 2010. (EOR 14-19.)² The Notice of Entry of Order was filed on March 8, 2011. (Id.) The court did not appoint counsel or conduct an evidentiary hearing.

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² The trial court denied the petition twice; once on September 13, 2010 (EOR 14-19) and again on January 25, 2011 (EOR 20-22).

Martinez timely appealed. (CR 31, Ex. 45.) The Nevada Supreme Court filed the Order of Affirmance on May 9, 2011 and July 13, 2011. (EOR 8-10; 11-13.)³ Remittitur issued on June 3, 2011. (CR , Ex. 57.)

V.

SUMMARY OF ARGUMENT

Martinez' statute of limitations period commenced running on August 5, 2008, the date on which his judgment of conviction became final by the conclusion of direct review. He had one year from that date in which to file his federal petition. Martinez did not file his federal petition until December 10, 2010. However, Martinez maintains that due to a number of circumstances beyond his control he is entitled to equitable tolling which renders his petition timely filed.

Martinez contends he can establish that he exercised reasonable diligence in pursuing his rights and that his attorney's neglect, his inability to speak, read, or write English, and the lack of Spanish language materials at the prison law library were extraordinary circumstances beyond his control which stood in the way of his timely filing the federal petition. Without the ability to speak, read or write in English,

³ Martinez appealed the denial of his state habeas petition twice. He first appealed on November 16, 2010 after the hearing denying his petition and then again on March 21, 2011 after the written Notice of Entry of Order was filed. (See CR 31, Ex. 45, 51.)

Martinez was denied meaningful access to the law library and was forced to rely on other inmates to translate materials for him.

Martinez eventually befriended an inmate who could assist him with his legal case, with translation help from Spanish speaking inmates. After Martinez obtained his file from appellate counsel, and with the help of the inmates, he wasted no time in filing pleadings in state court in an effort to exhaust his federal claims. Martinez filed a motion to vacate and a state habeas petition on April 10, 2010. While those pleadings were working their way through the state courts, Martinez filed the federal petition on December 10, 2010. Martinez contends that the delay in filing his federal petition was not unreasonable.

Martinez has established that he diligently pursued his case but extraordinary circumstances stood in his way and prevented him from timely filing the federal petition.

VI.

LEGAL ARGUMENT

A. MARTINEZ IS ENTITLED TO EQUITABLE TOLLING FROM AUGUST 5, 2008 TO DECEMBER 10, 2010.

1. Standards of Review.

This Court reviews de novo the district court's decision to dismiss a petition

for writ of habeas corpus on statute of limitations grounds. Miles v. Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999). “If the facts underlying a claim for equitable tolling are undisputed, the question on whether the statute of limitations should be equitably tolled is also reviewed de novo. Otherwise, findings of fact made by the district court are to be reviewed for clear error.” Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003)(citations omitted).

2. AEDPA’S Statute of Limitations.

Martinez’ case is governed by the AEDPA (Antiterrorism and Effective Death Penalty Act). 28 U.S.C. § 2244. The AEDPA provides the following, regarding its statute of limitations and tolling provisions:

- (1) A 1- year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitations period shall run from the latest of -
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - ...
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1) and (2).

The time for filing a federal habeas petition is tolled following a direct appeal, during which time a petitioner could have sought certiorari review, even if the petitioner did not do so. Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999). A petitioner has 90 days from the conclusion of direct review to file a petition for writ of certiorari with the Supreme Court. Id.

In addition to this statutory tolling, this Court has long recognized that petitioners can establish equitable grounds for tolling. Under this doctrine, “the time bar of 28 U.S.C. § 2244(d)(1) can be tolled if extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time.” Calderon v. United States District Court (Kelly), 163 F.3d 530, 541 (9th Cir. 1998), abrogated on other grounds by Woodford v. Carceau, 538 U.S. 202 (2003); Lott v. Mueller, 304 F.3d 918, 924 (9th Cir. 2002) (“[t]he equitable tolling doctrine permits tolling” of the statute of limitations). The United States Supreme Court has recently confirmed that equitable tolling is available to a habeas petitioner who can show that “(1) he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Holland v. Florida, 130 S.Ct. 2549, 2562 (2010)(citing Pace v. Diguglieilmo, 544 U.S. 408 at 418 (2005)).

The “impossibility” requirement of equitable tolling described in Calderon, 163 F.3d 530, 541, does not appear in Holland, and in any event is a term of art that has

not been applied literally by this Court. Harris v. Carter, 515 F.3d 1051, 1055 n.5 (9th Cir. 2008)(“Despite the unequivocal ‘impossibility’ language in our standard, we have not insisted that it be literally impossible for a petitioner to file a federal habeas petition on time as a condition of granting equitable tolling.”). Equitable tolling is appropriate when a petitioner’s untimely filing is caused by any of a number of circumstances, including gross negligence by the petitioner’s attorney, Holland v. Florida, 130 S.Ct. at 2563-65 and Spitsyn v. Moore, 345 F.3d 796, 800-802 (9th Cir. 2003), errors by the district court, Corjasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002), the petitioner’s mental incompetency, Calderon (Kelly), 163 F.3d at 541, the petitioner’s inability to obtain his file, Lott v. Mueller, 304 F.3d 924-925, and the petitioner’s inability to communicate in English, Mendoza v. Carey, 449 F.3d 1065, 1069-1070 (9th Cir. 2006).

In the present case, the Nevada Supreme Court issued the Order of Affirmance on May 7, 2008 on Martinez’ direct appeal. (EOR 25-31.) Therefore, Martinez’ date of finality, as defined by § 2244 (d)(1)(A), was August 5, 2008 because that was the date on which his “judgment (of conviction) became final by the conclusion of direct review.” Martinez did not file his federal habeas petition until December 10, 2010. (EOR 98-110.) Thus, unless Martinez can establish that he is entitled to either statutory or equitable tolling during this time period, his federal petition is untimely.

Martinez contends that he can establish that he is entitled to equitable tolling.

3. Extraordinary Circumstances Stood in the Way of Martinez' Timely Filing the Federal Petition.

Martinez contends he can establish that he exercised reasonable diligence in pursuing his rights and that his attorney's neglect, his inability to speak, read, or write English, and the lack of Spanish language materials at the prison law library were extraordinary circumstances beyond his control which stood in the way of his timely filing the federal petition.

a. Martinez does not speak, read or write in English. As a non-English speaking inmate, Martinez was denied meaningful access to the law library.

Martinez was unable to speak, read or write in the English language at the time he was attempting to prepare and file his state and federal habeas petitions. He was also a pro se litigant (with a 6th grade education) during the times relevant to the filing of his petition.⁴ Without the ability to speak, read or write in English, Martinez was denied meaningful access to the law library and was forced to rely on other inmates to translate materials for him.

⁴ In Brown v. Roe, 279 F.3d 742 (9th Cir. 2002) this Court determined that equitable tolling consideration may be warranted where the petitioner had a 3rd grade education and was illiterate. Id. at 745-46. As was the case with Brown, Martinez has not had an opportunity to fully develop this aspect of his equitable tolling claim in the district court.

A prisoner's lack of English-language abilities may render him unable to file a timely petition. In Mendoza v. Carey, 449 F.3d 1065, this Court acknowledged that the "combination of (1) a prison law library's lack of Spanish-language legal materials, and (2) a petitioner's inability to obtain translation assistance before the one-year deadline" could constitute extraordinary circumstances sufficient to warrant equitable tolling. Id. at 1069. This Court relied on its earlier decision in Whalem/Hunt, in which the key issue was the fact that the prison had made unavailable a copy of the AEDPA. Id. at 1069 n.3 (citing Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000)). Here, the prison failed to provide Martinez translated copies of legal materials which he contends is the functional equivalent of the issue in Whalem/Hunt.

This Court has recognized that prisoners, even in the best of circumstances, face difficulties in litigating their cases. See Rand v. Rowland, 154 F.3d 952, 958 (9th Cir. 1998) (en banc) (describing the "unique handicaps prisoner face in prosecuting their own cases"). This was particularly true for Martinez, who speaks no English and was forced to rely on other prisoners to translate for him, and to actually prepare his pleadings. Adding to his difficulties is the fact that Martinez has only a sixth grade education and, during the relevant time period, Martinez was placed in segregation which made access to the law library and legal materials even

more difficult. (See EOR 54-59.) During the period of segregation, Martinez was not allowed to have any letters or grievances translated into English nor any legal documents translated into Spanish. (Id.) Under these circumstances, Martinez' delay in filing the federal petition was not unreasonable and should be excused on the basis of equitable tolling.

The district court disagreed that Martinez' language problem was a grounds for equitable tolling. The court found that because some of the letters Martinez wrote to counsel and/or the court seeking assistance were also contemporaneously translated into English, Martinez must have had assistance in translation and therefore, Martinez could not establish that his "limited proficiency in English was [] an extraordinary circumstances that prevented him from filing a petition." (EOR 3)

Martinez contends that the district court's focus on a handful of letters or prison Kites which were translated into English by other inmates should not defeat his claim that he was impeded by his lack of English language skills. The referenced translated requests show only that Martinez diligently sought assistance in litigating his case but was forced to rely on the beneficence of other inmates, often to his detriment. Additionally, the grievances translated by other inmates do not reflect that Martinez had access to Spanish speaking law clerks or Spanish language materials. Moreover, simply because Martinez may have had assistance from an inmate capable

of translating a prison grievance from Spanish to English does not mean that the inmate could provide meaningful legal assistance.

In Mendoza, the prisoner alleged that there were no Spanish-language legal materials in either of the California prisons he was transferred to following his conviction. Id. 449 F.3d at 1067. Eventually, he was able to locate, through “conversations with people in the prison yard,” a Spanish-speaking inmate who was able to assist him. Id. With this inmate’s assistance, he filed numerous state post-conviction pleadings. Almost a year after initiating his state court litigation, the prisoner filed an untimely petition in the federal court. Id. at 1067-68.

The Court concluded that “[b]ecause Mendoza alleged that he lacks English language ability, was denied access to Spanish-language materials, and could not procure the assistance of a translator during the running of the AEDPA limitations period, he had alleged facts that, if true, may entitle him to equitable tolling.” Mendoza, 449 F.3d at 1071. The Court remanded the case for an evidentiary hearing to determine the truth of Mendoza’s proffer. Id. at 1067

Martinez faced similar difficulties in litigating his case. After the conclusion of his direct appeal, Martinez “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.” Mendoza, 449 F.3d at 1070.

Martinez' inability to speak, read, or write English has been apparent throughout his legal proceedings. While attempting to pursue his legal rights, Martinez, on several occasions, grieved to prison officials the difficulties he was having with the law library regarding obtaining materials in Spanish. For example, on September 12, 2007, Martinez filed an inmate request form seeking help to send a letter to the Supreme Court for a copy of a document that had been thrown away when he was transferred to another prison. (EOR 466.) This is a task which an English speaking inmate could perform without assistance. Having to seek translation assistance from other inmates in every instance and for every task added to the delay in Martinez' case.

In March 2009, Martinez filed an Informal Grievance against the law library for failing to make legal copies or translate letters from Spanish to English. (EOR 517; see also EOR 54-59.) Martinez filed another grievance against the law library on July 21, 2009 complaining that the supervisor discriminated against him because he is Hispanic. (EOR 523-30.)

States must provide inmates with "meaningful access" to the courts. See Bounds v. Smith, 430 U.S. 817, 823 (1977) (citing Ross v. Moffit, 417 U.S. 600, 616 (1974)). This right of access requires that the state provide prisoners with "adequate law libraries or adequate assistance from persons trained in the law." Id. at 828.

When determining whether a program adopted by a state meets this standard a court must look at the plan as a whole. Id. at 831. The Supreme Court in Bounds affirmed inmates' right of access to the courts and held that "law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Id. at 821, 825. Later, the Court narrowed the scope of Bounds and held that an inmate must "establish relevant actual injury," which may be accomplished by "demonstrat[ing] that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Lewis v. Casey, 518 U.S. 343, 351 (1996). Lewis and Bounds continue to require that prisoners be provided sufficient "tools ... that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." Hebbe v. Pliler, 627 F.3d 338, 342-3 (9th Cir. 2010) (quoting Lewis, 518 U.S. at 355, and citing Bounds, 430 U.S. at 828).

Martinez contends that the Nevada Department of Corrections did not provide the tools necessary for him to litigate his case because the prisons lacked Spanish speaking inmates trained in the law or Spanish language legal materials. Further exacerbating matters for Martinez, Lovelock Correctional Center in 2007 instituted a paging system to access the law library. Inmates were no longer allowed direct

access to the law library or to the inmate law clerks who ran the law library. Requests had to be specific, meaning they must include case names and citations, and be written on the appropriate form. Additionally, due to Martinez' placement in administrative segregation and/or disciplinary segregation between September 21, 2008 and February 19, 2009, Martinez' ability to access the law library and obtain assistance was further restricted. (EOR 54-59.) While in administrative segregation, Martinez could only request, by Kite, that an inmate law clerk visit the segregation unit where he was housed. After visiting, the law clerk still had the ability to deny any requests. No general requests for help would be acknowledged and any materials provided by the law clerks were delivered under the supervision of a correctional officer, through the food hole in the door. The further restriction of his ability to access the law library or law clerks made it even more difficult for Martinez to obtain the documents and legal assistance necessary to proceed with his case. (See Id.)

While it is true, as the district court pointed out, that Martinez had assistance in translating some of his requests, that fact fails to establish that he had access to any legal documents or materials in Spanish. Nor does it reflect that Martinez had any assistance from a Spanish speaking inmate law clerk. In fact, it appears Martinez had only limited assistance from the law library and relied almost exclusively on other inmates who were not law clerks to translate for him.

The court further found that the paging system is no different from what other inmates face and thus, did not create an extraordinary circumstance for Martinez. (EOR 4.) The district court failed to consider that the paging system would have proven especially difficult for a non-English speaking inmate. The impediment imposed by the paging system may not be an extraordinary to similarly situated English speaking inmates but it certainly aggravated Martinez' ability to access any Spanish language legal materials he needed to litigate his case. Martinez contends that his lack of English language skills, the lack of meaningful access to the prison law library, and the prison's failure to provide Spanish language materials or Spanish speaking law clerks were extraordinary circumstances that stood in the way of his filing the federal petition timely.

The prisons in which Martinez was housed did not maintain Spanish-language libraries, books, employees, or other materials that would inform him of the AEDPA time limits or assist him with filing in petition. (See EOR 54-59.) Like the petitioner in Mendoza, Martinez was able to eventually file state and federal post-conviction motions and petitions, but only because he diligently sought and fortuitously received the assistance of Spanish-speaking inmates who were willing to help him.

In early 2010, Martinez met an inmate, Gene Allen, in the yard at Lovelock Correctional Center. Mr. Allen was not a Spanish speaker but, with translation

assistance from other inmates, Martinez was able to communicate with him about his case. Mr. Allen was not a law clerk but provided legal advice to Martinez. With Mr. Allen's assistance, Martinez sought information about the status of his case and requested state habeas corpus documents from the law library. (Id.) At the end of January 2010, appellate counsel sent Martinez his file. (EOR 534.) Shortly thereafter, Martinez, with Mr. Allen's help and translation assistance from other inmates prepared and filed the Motion to Vacate and State Habeas Petitions in state court. (EOR 543-54.)

Due to Martinez's inability to communicate in English, he was effectively denied meaningful access to the law library and legal assistance. These problems were further compounded by Martinez' lack of education and the prison's paging system protocols, which were especially difficult for a non-English speaker. Martinez contends these factors combined to impede his ability to timely file the federal petition.

b. Martinez could not obtain a copy of his case file from appellate counsel.

Further compounding Martinez' struggles to pursue his case was his inability to obtain his file from counsel and counsel's failure to notify him of the Nevada Supreme Court's decision.

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

In Holland, the Court specifically recognized that a lawyer's failure to notify his client of the state supreme court's final decision was one of several errors that went beyond "simple negligence" and instead "violated fundamental canons of professional responsibility." Id. at 2564. The Court also cited, with approval, several lower court decisions recognizing that equitable tolling was appropriate when an attorney's misconduct obstructed the timely filing of a petition. Id. at 2560, 2564. This Court has previously held that "equitable tolling may be appropriate when a prisoner has been denied access to his legal files." Lott v. Mueller, 304 F.3d. 918, at 924. Without access to his files, it was "unrealistic to expect [a petitioner] to file a meaningful petition on his own within the limitations period." Id. This Court concluded the failures of counsel may rise to the level to warrant equitable tolling. Id. at 802.

In the present case, Martinez was unable to communicate with his appellate counsel and obtain a copy of his case file, and was never advised as to the status of his appeal. During this time, Martinez worked diligently to obtain, not only his case file, but also information regarding the outcome of his direct appeal. He was unable to do so because his appellate attorney, Kedrick Bassett, did not return his calls nor respond to his letters. (EOR 54-59.) Bassett had an ethical obligation to “keep [his] client reasonably informed about the status of the matter” and to “promptly comply with reasonable requests for information.” Nevada Rules of Prof’l Conduct, Rule 1.4 (a)(3) and (4). Bassett met neither of these obligations.

Martinez made efforts to obtain his files and/or information about his case. (See EOR 513-14; 515-16.) At some point in early 2009, Martinez made contact with Bassett, who advised that the appeal was still pending. (EOR 515-16.) This was incorrect. In the end, appellate counsel, did not send Martinez his file until late January 2010. (EOR 534.) This occurred well after Martinez’ federal limitations period had expired. Martinez had one full year on his federal limitations period at the conclusion of his direct appeal. By the time he learned of the Nevada Supreme Court’s decision and received his file from Bassett, his federal limitations period had

already expired.⁵ At any time within that 365 day period had Bassett simply responded to Martinez' letters, in Spanish, Martinez could have obtained his files and filed the federal petition within the limitations period.⁶ Accordingly, Bassett's failure to send Martinez his file and to notify his client of the resolution of his case, directly impacted Martinez' ability to meet the federal limitations deadline.

Martinez maintains that his inability to communicate with his appellate attorney, obtain his case files, and learn of the status of his appeal, created an extraordinary circumstance which prevented him from filing his federal petition in a timely manner.

4. Martinez exercised reasonable diligence in pursuing his rights.

Martinez must show for equitable tolling purposes that he was reasonably diligent. Holland v. Florida, 130 S.Ct. 2549, 2565. The diligence that is required for equitable tolling purposes is not "maximum feasible" diligence but "reasonable"

⁵ It is not entirely clear when Martinez learned that his appeal was concluded. However, it is logical to assume he learned of the Nevada Supreme Court's decision sometime after he wrote a letter to the court asking for the status of his appeal. (See EOR 539-42.) Or when Bassett sent the file in late January 2010. (EOR 534.)

⁶ Bassett may have written to Martinez regarding his case but Martinez' letters to Bassett suggest that he did not understand what was written in Bassett's letters (assuming there were any). Thus, it does not appear that any correspondence coming from Bassett was translated into Spanish for the benefit of his client. (See EOR 535-38.)

diligence. Id. (citing Starns v. Andrews, 524 F.3d 612, 618 (5th Cir. 2008))(quoting Moore v. Knight, 368 F.3d 936, 940 (7th Cir. 2004)). Martinez showed reasonable diligence in the pursuit of his rights.

Prior to receiving his file from Bassett, Martinez attempted to pursue information about his case by writing to counsel (see EOR 513-14; 515-16), and the courts (see EOR 522, 531.) The district court found that Martinez was not diligent in litigating his case because after learning that his appeal had concluded in February 2010 he did not file his federal petition for seven (7) months. (EOR 5.) The court found that Martinez points only to the efforts he took to find out about his case before filing his state habeas petition but does not explain how he was diligent from that time, April 30, 2010, to the time he filed his federal petition on December 11, 2010. (Id.)

Martinez contends that he was reasonably diligent in filing his federal petition after his impediments were finally removed. Seven months is not an unreasonable amount of time to file a federal petition after receiving the file, especially considering Martinez' language difficulties and the fact that he was attempting to exhaust his federal claims in state court. Further, this period of time is not as long as that involved in the case cited by the district court. See Waldron-Ramsey, 556 F.3d at 1014 (340 days after expiration of statute of limitations); see also Lott, 304 F.3d at 920-921

(over a year); Allen v. Lewis, 255 F.3d 798 at 801, vacated by 278 F.3d 1357 (9th Cir. 2002) (petitioner had over 11 months left in statute of limitations to file petition after alleged extraordinary circumstances expired); Mendoza, 449 F.3d at 1067 (petitioner waited 11 months to file federal petition after filing untimely state petitions). At the very least, the district court erred in summarily concluding that this delay was unreasonable, without seeking to further develop the record. See Spitsyn v. Moore, 345 F.3d 796, 802 (holding that five-month delay in filing petition after expiration of extraordinary circumstances did not necessarily mean that petitioner was not diligent, and ordering district court to hold further proceedings on the matter).

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

VI.

CONCLUSION

For the reasons stated in this Opening Brief, Martinez respectfully asks that this Court grant the relief he seeks in the appeal.

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VII.

STATEMENT OF RELATED CASES

Counsel for Petitioner/Appellant is not aware of any related cases pending at either the trial or appellate level.

VIII.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point font. the total number of words is 5,004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

FREDYS A. MARTINEZ,

Petitioner-Appellant,

v.

JACK PALMER, et al.,

Respondent-Appellee.

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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