

Code 1350

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

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Elizabeth A. Brown
Clerk of Supreme Court

LUIGY RICHARD LOPEZ-DELGADO,

Plaintiff,

vs.

THE STATE OF NEVADA,

Defendant.

Case No. CR18-1654

Dept. No. 9

SCN. No. 83885

**CORRECTED CERTIFICATE OF CLERK AND TRANSMITTAL
SUPPLEMENTAL RECORD ON APPEAL**

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 24th day of August, 2022, I electronically filed the Transcript of Proceedings for November 2nd, 2021, in the above entitled matter to the Court of Appeals of the State of Nevada.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court in accordance NRAP 11(2)(b).

Dated this 24th day of August, 2022.

Alicia L. Lerud
Clerk of the Court
By /s/Y.Viloria
Y.Viloria
Deputy Clerk

4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE SCOTT N. FREEMAN, DISTRICT JUDGE

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THE STATE OF NEVADA,

Plaintiff,

Case No. CR18-1654

vs.

Dept. No. 9

LUIGY RICHARD LOPEZ-DELGADO,

Defendant.

TRANSCRIPT OF PROCEEDINGS

MOTION TO DISMISS

Tuesday, November 2, 2021

Reported by:

EVELYN J. STUBBS, CCR #356

A P P E A R A N C E S

For the State:

KEVIN NAUGHTON, ESQ.
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Reno, Nevada 89502

For the Defendant:

ORRIN J. H. JOHNSON, ESQ.
Attorney at Law
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Reno, Nevada 89511

The Defendant:

LUIGY RICHARD LOPEZ-DELGADO

1 RENO, NEVADA; TUESDAY, NOVEMBER 2, 2021; 10:00 A.M.

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3
4 THE COURT: Let the record reflect this session of the
5 Court is taking place at 10:00 o'clock on November 2nd and is
6 being held remotely consistent with the most recent
7 administrative orders issued in 2021. The Court and all the
8 participants are appearing through simultaneous audiovisual
9 transmission.

10 I am physically located in Reno, Washoe County, Nevada,
11 which is the site of today's court session. The other court
12 personnel who are present will identify themselves for the record
13 and note which county and state they are appearing from.

14 I'll start with my court clerk.

15 THE CLERK: Greg Bartlett, Washoe County, Nevada.

16 THE COURT: My court reporter.

17 THE REPORTER: Lynn Stubbs, court reporter, Washoe
18 County, Nevada.

19 THE COURT: Thank you.

20 It's my understanding that Mr. Lopez-Delgado, his
21 matter is being heard today, and he's located at the Lovelock
22 Correctional Center in Nevada.

23 Further the record shall reflect this session and all
24 the hearings today are open to the public for viewing and

1 listening to the proceedings in a video-audio link found on the
2 Washoe Courts website.

3 If at any time anyone who is appearing in their case
4 cannot see or hear all the other participants in their case while
5 it is going on, please notify the Court.

6 I want to additionally request that the attorneys and
7 other the participants, other than those who have already made
8 their appearances to state their physical location as well as
9 their name when they make their first appearance to participate
10 in this proceeding.

11 Counsel, as I call on each of you and you make your
12 first appearance, please acknowledge you've received notice this
13 hearing is taking place pursuant to Nevada Supreme Court Rule
14 Part IX relating to simultaneous audio-visual transmission in
15 criminal proceedings and the Second Judicial District Court
16 administrative order previously mentioned, and in 2021. Also,
17 tell me if you have any objection to going forward in this manner
18 today.

19 I now proceed with the calendar.

20 Luigi Richard Lopez-Delgado, Petitioner, versus the
21 State of Nevada in Case No. CR18-1654.

22 Appearances, please. I'll start with the Petitioner.

23 MR. JOHNSON: Good morning, Your Honor. Orrin Johnson
24 on behalf of Mr. Lopez-Delgado, who, as you noted previously, is

1 in custody in Lovelock, Pershing County, Nevada. I am located
2 physically in Reno, Washoe County, Nevada. I have received all
3 applicable notices and orders, and I have no objection to
4 proceeding in this manner today.

5 THE COURT: Thank you.

6 Mr. Naughton for the State.

7 MR. NAUGHTON: Good morning, Your Honor. Kevin
8 Naughton for the State. I'm located in Reno, Washoe, County,
9 Nevada. I have received all the applicable notices, and also I
10 have no objection to proceeding in this manner this morning.

11 THE COURT: Very good. Thank you.

12 This is the time set for combination, really, a motion
13 to dismiss, as well as a supplemental petition for habeas corpus.
14 I'm going to allow you to make the record, Mr. Johnson, to begin
15 with.

16 MR. JOHNSON: Thank you, Your Honor. I do have a
17 preliminary thing. So I met with my client on October 22nd. We
18 discussed the matter at length; some of the arguments he makes,
19 some of the strategies. As a result of that negotiation my
20 client and myself would ask you to no longer entertain the
21 failure to investigate claim. We're going to abandon that claim
22 here today for a variety of reasons.

23 And so we wish to proceed just on the breach of the
24 plea negotiations claims, which include failure to object at the

1 sentencing itself and failure to raise that issue on appeal.

2 THE COURT: Very good. Is that correct,
3 Mr. Lopez-Delgado?

4 You have to unmute yourself.

5 MR. JOHNSON: I don't know that he has the ability to
6 unmute himself, Your Honor.

7 THE COURT: Can you hear me okay, Mr. Lopez-Delgado?
8 If you can wave your hand.

9 Okay. Do you have a way from your machine to unmute
10 yourself? There might be a button there that says Mute on it,
11 and you can push it. Looks like one of those kind of machines.

12 I'll do this, Mr. Lopez-Delgado if you are -- there you
13 are. You did it. You did it.

14 Are you in agreement with that representation,
15 Mr. Lopez-Delgado?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Thank you. Very good. All right.

18 You can mute yourself again now that you know how to
19 turn it off and turn it on, that way we'll be able to hear
20 everything and we won't hear any background noise. Appreciate
21 that.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. Very good. So I appreciate
24 that Mr. Johnson.

1 MR. JOHNSON: Yes, Your Honor.

2 THE COURT: Go ahead. Please continue.

3 MR. JOHNSON: And then with that, really the legal and
4 factual issues are all contained on the record. And so I don't
5 know that further testimony from my client is necessary. The
6 record speaks for itself.

7 To that end, and I don't know that it's necessary
8 because they've already been submitted as part of the petition.
9 In the case it is necessary -- every jurisdiction does it a
10 little bit differently -- we submit Exhibits A through M, as in
11 Mike, as part of the petition.

12 If the Court deems it necessary to separately admit
13 them as exhibits for purposes of this hearing -- most of them are
14 already part of the Court's record -- nevertheless, we'd ask that
15 they be admitted now.

16 THE COURT: Any objection, Mr. Naughton?

17 MR. NAUGHTON: No, Your Honor. I believe they're
18 already in the record.

19 THE COURT: They are all admitted.

20 (Exhibits A through M were admitted into evidence.)

21 THE COURT: And I received a late notice, an exhibit,
22 proposed exhibit today. That was an Exhibit 1 that was filed.

23 MR. NAUGHTON: Your Honor, if I may?

24 THE COURT: Yes.

1 MR. NAUGHTON: I filed that proposed exhibit in
2 anticipation of going forward with that failure to investigate
3 claim. Since that claim has been abandoned, I do not believe
4 that that exhibit is necessary any longer, and I will not be
5 seeking its admission this morning.

6 THE COURT: All right. I will not consider it
7 accordingly. Thank you very much.

8 So I guess where we're at, I would say, Mr. Johnson, is
9 that we're still subject to a motion to dismiss on those two
10 remaining counts. So based on that, unless you see it
11 differently, Mr. Johnson, I want to shift gears to Mr. Naughton
12 and have him justify his motion to dismiss.

13 Is that where you are at, Mr. Johnson?

14 MR. JOHNSON: That is perfectly acceptable to me, Your
15 Honor.

16 THE COURT: Great.

17 Mr. Naughton.

18 MR. NAUGHTON: Thank you, Your Honor.

19 I would largely rely on the motion that we filed in
20 this case and the authorities related therein. I would just like
21 to highlight the record in this case as it pertains to
22 Mr. Graham's arguments at the time of sentencing.

23 By my count, at three different times in his argument
24 he told the Court that he was not asking for anything more than

1 what was agreed upon in this case, which was a joint
2 recommendation for a sentence of 4 to 10 years.

3 When the Court indicated that it was inclined to go
4 higher, Mr. Graham immediately responded that he was not asking
5 for that, and that he wanted the record to be crystal clear that
6 he was not asking for anything more than what was stipulated.

7 In this case I think there are two cases that primarily
8 myself and Mr. Johnson agree are applicable here, and those are
9 Kluttz and Sullivan. In both of those cases the State was held
10 to the most meticulous standard of performance, both in terms of
11 the explicit negotiations, as well as the spirit of the
12 negotiations.

13 In those cases the prosecutor at the time of the
14 sentencing either agreed with the recommendation that was greater
15 than what was recommended or told the Court that it wasn't privy
16 to all of the facts at the time it had struck the negotiation.
17 That's simply not the case that we have here. I would submit
18 that Sullivan is applicable here, directly applicable. In that
19 case the prosecutor spoke at the time of sentencing about the
20 defendant's criminal history and about the instant offenses that
21 were committed in that case. And the Supreme Court held that
22 because the prosecutor, their comments did not implicitly or
23 explicitly seek a harsher sentence than they had agreed to
24 recommend, that they had not undercut the recommendation and had

1 not violated the terms or the spirit.

2 Here, again, Mr. Graham pointed out three times that he
3 was asking for a sentence of 4 to 10 years. He provided some
4 background information, some information about who the defendant
5 was and who the victim was, the disparity in their ages, and the
6 offenses as they occurred. I think that's exactly in line with
7 the rationale in Sullivan, and I don't think the record supports
8 any finding that Mr. Graham had violated the terms or the spirit
9 of the negotiation.

10 For that reason, we would submit that, I believe it's
11 Ground C of the supplemental petition is belied by the record as
12 a legal matter. And to the same extent, Ground D, alleging
13 ineffective assistance of counsel by appellant counsel for
14 failing to raise that issue on appeal would fail as a matter of
15 law. In fact, we submit that should also be dismissed at this
16 point in time.

17 THE COURT: Okay. Thank you.

18 Mr. Johnson, your response.

19 MR. JOHNSON: Thank you, Your Honor.

20 So like Mr. Naughton, I think these arguments that have
21 been made in the briefings, if I can briefly read right here,
22 what Kluttz tells us, what the Supreme Court told us in Kluttz,
23 is that it's not enough for a D.A. to say ostensibly, yes, this
24 is my recommendation, but, and then going from there. And each

1 time that Mr. Graham said no, no, no, this is the recommendation
2 he followed up with a "but," and then proceeded to, quite
3 frankly, unload upon -- in a vehement way upon Mr. Lopez-Delgado.

4 And I understand, the facts are what the facts are, but
5 this is an argument that we'd expect to hear after trial. In
6 sentencing after a trial. After Judge Polaha made clear, and he
7 made it clear at the beginning, Judge Polaha was concerned that
8 Mr. Graham's arguments were breaching the agreement.

9 THE COURT: Let me stop you there, because one thing I
10 would like you to reconcile for me, because I carefully reviewed
11 the sentencing transcript, I'm showing for the record, it's been
12 highlighted and tabbed by the Court. I carefully reviewed the
13 entire transcript, because I was believing that the focus of your
14 argument was going to be the sentencing, which is really what
15 this litigation is about at this point.

16 It clearly says at page 6, line 3-5 that, Mr. Graham
17 said, "The reason I'm going to argue, is not because he's
18 breaching the plea agreement, it's because the Division of Parole
19 and Probation recommended less than their agreement."

20 And he seemed to manifest his argument in aggravation
21 more so to justify the 4 to 10 in the face of a lesser
22 recommendation, which he was concerned about at the time when the
23 Division of Parole and Probation legally was allowed to make a
24 recommendation. They are not now. But at the time they did, and

1 it was less.

2 In my calculation from the Presentence Investigation
3 Report it was actually a 36 to 11, a 3-year to 11-year sentence
4 was the recommendation. A little less on the low end. And so he
5 felt it was appropriate to argue an aggravation, seemed like,
6 because the Division of Parole and Probation said that. And then
7 when the judge said at line 7-8, "Okay. Because I'm inclined to
8 go higher than that, so go ahead."

9 Mr. Graham said, "So the record is crystal clear, I'm
10 not arguing for anything other than the stipulated sentence in
11 this case," in response to that colloquy.

12 Could you distinguish that for me, please.

13 MR. JOHNSON: Certainly, Your Honor.

14 So if Judge Polaha had remained silent, and Mr. Graham
15 did not know whether the judge was inclined to go higher or
16 lower, then that argument makes sense, but he didn't. And we
17 have to look at that sentencing transcript as a whole. Judge
18 Polaha told him, and it is appropriate for Judge Polaha to kind
19 of give him a guidepost about what he was thinking and where he
20 was coming from, and I think that also helps suggest to us and
21 helps us be confident that Judge Polaha was a little bit
22 concerned that Mr. Graham was going above and beyond what he
23 thought was appropriate. And so he told him, "I'm inclined to go
24 higher."

1 And at that point it's Mr. Graham's obligation to say,
2 well, wait a minute, Judge. We don't want you to go lower than
3 the recommendation, but we don't want you to go higher either,
4 and this is why. So once the judge indicated very, very clearly
5 that he was inclined to deviate from the plea agreement, it
6 became incumbent upon the district attorney to argue, not for the
7 highest sentence or the lowest, but in favor of the stipulated
8 agreement. And he did not do that.

9 He said -- he said the words, we're maintaining an
10 agreement, and then he said the word "but," and then he went on
11 to vehemently argue, even knowing that Judge Polaha was inclined
12 to deviate upwards, as vehemently as he could about the kind of
13 awfulness of it and how reliable the psychosexual evaluation
14 should be considered, all the rest of those things, and there was
15 even some back and forth that almost seemed to kind of peg each
16 other up between Mr. Graham and the judge.

17 And again, I get it. This is the kind of case and the
18 kind of facts that it's easy for those emotional considerations
19 to come into play in exactly this way. Which is why the State is
20 held to the strictest standards of performance. And so our
21 argument is not that he explicitly violated the plea agreement,
22 clearly he did not, the argument is that he implicitly did so,
23 but with vehemence implicitly did so, because that's exactly what
24 Kluttz says you can't do. Kluttz says you can't say, we're

1 following the agreement, but here's all the reasons you should go
2 a little bit higher. I think it's clear when you take it as a
3 whole, not just listen, but you take the entire argument as a
4 whole. And if you'll look, Judge, you'll see that Mr. Picker
5 gave a very brief argument, because again it was stipulated, and
6 then Mr. Graham's argument went on for many, many pages.

7 So all of that in context helps to see with some common
8 sense that he was going above and beyond.

9 THE COURT: So let me talk a little bit about what you
10 seek in the case by way of relief. The ineffective assistance of
11 counsel related to the failure to investigate has been withdrawn.
12 So your remedy, potentially, if you're successful is a
13 resentencing in front of me.

14 It's pretty clear that plea bargains are not binding on
15 me, and I could give your client consecutive time on each count
16 based upon the facts of this case. I mean, it's always a roll of
17 the dice with the law in Nevada, a judge has discretion to do
18 whatever he chooses to do, you're just hoping I'm going to be
19 fairer, I guess, than Judge Polaha was.

20 And for the record, I did some research on how a
21 Department 3 case ended up before me, as opposed to being in
22 front of Judge Riggs, who has been elected to be in Department 3.
23 And by way of an administrative order I issued in my capacity as
24 chief judge of the district when the specialty courts in the

1 Second Judicial District Court separated in individual
2 departments, Judge Polaha, at the time agreed to be the specialty
3 court judge prior to that division of cases, and all of us in the
4 district subsumed his cases, and I got CR18-1654 as my case. So
5 that's how I ended up with Mr. Lopez-Delgado's case. I wanted
6 the record to reflect that as well.

7 So that being said, Mr. Johnson, do you agree with the
8 analysis that if you're successful in your writ of habeas corpus
9 it's for resentencing in front of me under the circumstances?

10 MR. JOHNSON: Yes. And I advised Mr. Lopez-Delgado of
11 that. I'd also argue that such a remedy would include the State
12 marking an affirmative argument why they believe that the
13 recommendation is appropriate.

14 THE COURT: And I think we could intellectually debate,
15 based on your vast experience, Mr. Johnson, that nothing is
16 binding on me. It's up to my sole discretion within the
17 parameters of the law what I would choose to sentence. The
18 argument I think is not better spent in a state where the parties
19 can bind the judge, but in our state they cannot. So
20 Mr. Naughton or his predecessor, upon your successful granting of
21 the writ, could argue until they're blue in the face it should be
22 a 4 to 10 stipulated, I still can give him consecutive time on
23 every count and max him out if I choose. Is that true?

24 MR. JOHNSON: I believe that is true, yes, Your Honor.

1 THE COURT: Thank you. Anything else you want to add?

2 MR. JOHNSON: No, Your Honor.

3 THE COURT: Thank you.

4 Mr. Naughton, you get the last word. It's your motion.

5 MR. NAUGHTON: Thank you, Your Honor.

6 Just briefly in rebuttal I would point out that in the
7 transcript I don't believe that Judge Polaha was warning
8 Mr. Graham that he felt he was going beyond the scope of the
9 agreement. The first time that Judge Polaha interrupted
10 Mr. Graham's argument he said, quote, Counsel, let me ask, you
11 going to stick with the agreement that you had?

12 Mr. Graham said, "I am, yes, Your Honor."

13 Mr. Graham continued briefly, as you highlighted, that
14 quote that you provided earlier, that he was asking for the 4- to
15 10-year sentence. And then Judge Polaha said, "Okay. Because
16 I'm inclined to go higher than that. So go ahead."

17 I don't believe that Judge Polaha suggested or implied
18 in any way that he believed that Mr. Graham was inclined to go
19 higher. I think very early on in Mr. Graham's argument, Judge
20 Polaha, having read the PSI, having looked at all of the facts in
21 this case, he was already inclined to go higher than that and was
22 ensuring that Mr. Graham was not going to seek to violate the
23 terms of the plea agreement in this case.

24 And so based upon that, again, I think the record

1 clearly shows that Mr. Graham argued within the bounds of that
2 agreement, both explicitly and impliedly, by providing the
3 factual information behind this case. I don't think that he was
4 impliedly asking this Court to imply that, to apply for a more
5 harsher sentence than what was bargained for. And we can see
6 that both in the terms that he used three different times, and as
7 well in the body of his argument as well, that he was not asking
8 for anything harsher.

9 With that, again, I would submit that those claims are
10 belied by the record, those claims should be dismissed, and the
11 sentence should be affirmed.

12 THE COURT: All right. Thank you.

13 Is this submitted, Mr. Johnson and Mr. Naughton? I'll
14 go first to you, Mr. Johnson.

15 MR. JOHNSON: Yes, Your Honor.

16 THE COURT: Thank you very much.

17 Mr. Naughton.

18 MR. NAUGHTON: Yes, Your Honor.

19 THE COURT: Thank you for your time. I appreciate it.
20 And I'm glad that Mr. Lopez-Delgado got his time in court,
21 although remotely. Sorry about that, Mr. Lopez-Delgado, the
22 pandemic caused by COVID-19 didn't allow you to come to Washoe
23 County. I also heard there's some issues related to the timing
24 and things like that. I didn't want you to lose any credit for

1 time served because you had to come to our local jail, et cetera,
2 but I wanted to give you your day in court.

3 Thank you very much. Anything further from anybody?

4 Not seeing any, we'll be in recess.

5 This matter stands submitted. I'll get an order out as
6 soon as I possibly can.

7 Thank you very much for your arguments.

8 MR. JOHNSON: Thank you, Your Honor.

9 (Proceedings Concluded)

10 --o0o--

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

4 I, EVELYN J. STUBBS, official reporter of the
5 Second Judicial District Court of the State of Nevada, in and for
6 the County of Washoe, do hereby certify:

7 That as such reporter I was present in Department No. 9
8 of the above court on Tuesday, November 2, 2021, at the hour of
9 10:00 a.m. of said day, and I then and there took stenotype notes
10 of the proceedings had and testimony given therein upon the
11 MOTION TO DISMISS of the case of THE STATE OF NEVADA, Plaintiff,
12 vs. LUGY RICHARD LOPEZ-DELGADO, Defendant, Case No. CR18-1654.

13 That the foregoing transcript, consisting of pages
14 numbered 1 to 18, inclusive, is a full, true and correct
15 transcript of my said stenotype notes, so taken as aforesaid, and
16 is a full, true and correct statement of the proceedings had and
17 testimony given therein upon the above-entitled action to the
18 best of my knowledge, skill and ability.

19 DATED: At Reno, Nevada, this 24th day of August, 2022.

21 /s/ Evelyn Stubbs
22 EVELYN J. STUBBS, CCR #356

23 The document to which this certificate is
attached is a full, true and correct copy of the
original on file and of record in my office.

By: ALICIA L. LERUD, Clerk of the Second
Judicial District Court, in and for the County of
Washoe.