A. What they do in a pornographic movie. I assume -- I imagine we all know.

Q. It's what we all know.

What were the people doing in the movie that you were watching?

A. The woman was on her knees.

Q. And was there -- was the woman naked?

A. Yes.

Q. Was there a man in the movie?

A. Yes.

Q. Was the man naked?

A. Yes.

Q. Was the man doing something to the woman?

A. Yes.

Q. Was the man having anal sex with the woman?

A. I wouldn't be able to tell you. I looked at it and they were not doing that.

Q. What were they doing?

A. Sex.

Q. Would you get the pornographic movies from the same place that you would get the kids' videos at the video store?

A. As I told the detective, I never rented pornographic movies.

Q. So that one was yours? You owned it?

A. I borrowed it from a friend.

Q. How many did you have?

A. One.

Q. You said when Crystal pushed open the door, she right away ran away?

A. She didn't run. I closed the door in front of her.

Q. When you watch pornography, do you use the pornography to get yourself aroused?

A. No.

Q. Do you watch the pornography to get your partner aroused?

A. No.

Q. You watch it because the acting is so good and the plots are so complicated?

MR. PALLARES: Objection, your Honor; argumentative.

THE COURT: Sustained.

MS. LOWRY: I'm sorry. I didn't hear it.

THE COURT: I sustained the objection.

BY MS. LOWRY:

Q. So you watch pornography to rest?

A. Not all the time.

Q. At night before you go to bed, do you sometimes watch pornography to relax?

A. No.

Q. You only watch it in the daytime?

A. No. As I told you, only once in a while.

Q. That wasn't my question. My question was: Do you ever watch it at night?

THE COURT: I think he answered that one.

MS. LOWRY: He said no. And then I said -- I asked if he watched it in the daytime.

THE COURT: I think that was the answer, he only watched it in the daytime.

BY MS. LOWRY:

Q. Do you only watch it in the daytime?

A. I watch it when I come home tired, to rest, to go to sleep.

Q. Mr. Garcia, do you only watch it in the daytime?

A. As I said, I have no set time to watch it.

Q. So you watch it in the daytime or you could watch it in the nighttime?

A. Depends.

Q. Did you watch that movie -- did that happen before -- before the night Crystal stayed over or after?

A. Before.

Q. Did it happen the same day?

A. No.

Q. Do you recall the day that the police officers

came out to the apartment complex after Alejandra called 911?

A. Not the exact date.

Q. But you remembered that the police came out?

A. Yes.

Q. And the police talked to you for a little bit?

A. Just enough to ask me for my information, my date --

Q. And information would be: What's your name?

A. Yes.

Q. And what's your Social Security number?

A. Yes.

Q. And you lied.

A. No, because I gave them my ID, my license, the telephone number where I work and my Social Security.

Q. So you didn't originally tell the police a wrong name and a wrong Social Security number?

A. At no time.

Q. You mentioned in direct examination that there was a time that you wouldn't let your own kids come over because there were only men in your apartment?

A. Correct.

Q. And you had a concern about, particularly, your daughter being around males.

A. Not especially for my daughter, for all my children.

Q. So you had a concern about your children being around adult males?

A. No, because I always told them to play with children.

Q. There were a lot of times that you would keep your own daughter inside and let your boys go play outside because you didn't want your daughter being around boys or men, correct?

A. No.

Q. Mario lived with you, didn't he?

A. He didn't live exactly with me. He lived in the living room.

Q. Was your living room in your apartment?

A. Yes.

Q. Mario knew what you did to Crystal, didn't he?

MR. PALLARES: Objection; that calls for speculation.

MS. LOWRY: If he knows.

MR. PALLARES: Also, your Honor, I object on the grounds that it's vague. She's asking what he did to Crystal. That's ambiguous.

MS. LOWRY: Oh, I'll be specific.

THE COURT: All right. Yeah. Well. Go on.

BY MS. LOWRY:

Q. Mario knew that you sexually assaulted Crystal,

didn't he?

A. How could he know if I never talked to him at any time -- I never talked to him.

Q. What's Mario's last name?

A. You should ask Maria that.

Q. No. I'm asking you, Mr. Garcia.

A. I told you he was not my friend. He asked me permission for him to stay in my living room.

Q. Mr. Garcia, my question to you was: What is Mario's last name?

A. I don't know.

Q. Mario lived with you at your house, correct?

A. Yes.

Q. How long did he live there?

A. About two or three months.

Q. Where is Mario now?

A. I wouldn't be able to tell you.

Q. You talk about Germina -- I'm sorry. Is she your girlfriend or your wife?

A. For us Latins, the woman that lives with you already is your wife.

Q. Okay. I'll refer to her as your wife.

You said that you started dating her in September of 1997?

A. '96. That's when I met her. That's when we

started.

Q. So you made a mistake when you said that you had started dating her in '97?

A. I think you understand it better than I do.

Q. Germina is very devoted to you?

A. I can say that I love her and she returns that love.

Q. You said that you refer to people that you live with as your wife?

A. Yes.

Q. And when did you live with Germina?

A. Within a month of having met her.

Q. And has she always referred to herself as your wife?

A. Yes.

Q. Now, in April -- okay.

You see Germina almost every single week, correct?

A. You say April?

Q. I said: You see Germina almost every week.

A. Not every week.

Q. You see her fairly often?

A. Yes.

Q. And now last April, 1997, you sent Germina on a little mission for you.

A. No, I never sent her.

Q. You never sent Germina with a message to Maria Ingram to tell Crystal not to testify?

A. One thing is I sent a message to the family that stayed with the apartment, to give it to Maria.

Q. Part of the message that you sent to Maria was to tell her nine year old child not to testify against you, correct?

A. No.

Q. You mentioned that you went to Mexico on vacation sometimes, correct?

A. Yes.

Q. And that was during the time that you lived on Ellis Street?

A. Yes.

Q. What kind of things did you do in Mexico?

A. I went to visit my mother's grave and see my other brothers that I have in Mexico.

Q. Did you go to Tijuana when you went to Mexico?

A. No.

Q. What parts of Mexico would you go to?

A. Jalisko (ph) and Muchocana.(ph)

Q. Remember when you talked to Detective Anderson, that one of the things that you said was that you have paid money to be with women?

A. I told her I had no reason to have sexual relations with children seeing as I had money to pay for a prostitute.

Q. In fact, you prefer to pay for sex with virgins; isn't that right?

A. Why do you ask me that question?

Q. Because I'm the DA and I get to ask you questions.

A. Well, if you're talking about buying virgins, I'm not a maniac.

Q. My question is: You prefer to have sex with virgins?

A. I do not.

Q. Did you ever say that you like to go to Mexico and pay to have sex with virgins?

A. I've never said anything like that.

Q. Pretty safe to assume that a nine year old would be a virgin?

MR. PALLARES: Objection, your Honor.

THE COURT: Sustained.

BY MS. LOWRY:

Q. Now, when Crystal spent the night at your house, she slept in your room.

A. Yes.

Q. So that was correct when she said that?

A. Yes.

Q. And at night, when you're sleeping in your room, you close your door, don't you?

A. Yes.

Q. You want privacy?

A. Yes.

Q. Did you say when you were lying in your bed watching your movie that you had your door closed?

A. I wasn't in my bed.

Q. My question was: When you were watching the movie in your bedroom, you had your door closed?

A. Yes.

Q. Crystal slept on your bed?

A. Yes.

Q. When Crystal stayed over that night, she had on shorts and a little blouse and underwear, correct?

A. No, she didn't have a blouse. She had shorts, sort of like the ones she came to court in yesterday.

Q. What did she have on?

A. Almost the same thing that she had on yesterday.

Q. And she wore underwear?

A. I wouldn't be able to tell you.

Q. And you watched movies when Crystal was there, correct?

A. With my children.

Q. Now, during the time that you spent with Crystal and her family, you knew that Crystal's mother was sick?

A. Yes.

Q. And you knew she was sick because you gave her rides to dialysis?

A. Yes.

Q. And you knew she was sick because you knew she had been in the hospital?

A. Yes.

Q. And you knew that one of the scariest things for this nine year old child --

MR. PALLARES: Objection, your Honor; she's going for speculation.

THE COURT: Sustained. You have to lay the proper foundation.

BY MS. LOWRY:

Q. You spent time with Crystal at your house, didn't you?

A. Not with Crystal.

Q. Did you testify on direct that Crystal and her mother and her family were at your apartment almost on a constant basis?

A. Yes.

Q. And so you spent time with Crystal?

A. With Crystal -- I've already said I was never

alone with Crystal.

Q. You knew Crystal was afraid of her mother getting sick.

You knew that?

A. Not as far as I know.

Q. In your experience as a parent, do you think it would be scary for a child if their parent got ill and died?

A. They would not be scared because they don't think.

Q. Children don't think?

A. They don't think of the bad that can happen. They think of the good things that they have done or the bad things that they have done to them.

Q. So you don't think children get scared?

A. Some.

MS. LOWRY: I'll pass the witness.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. PALLARES:

Q. Jose, when you gave your statement to Detective Anderson, did you ever tell her that you would pay to have sex with virgins?

A. No, I never said that.

Q. And in 1996, did you ever give rides to Maria

Ingram to dialysis?

A. Yes.

Q. Do you remember how many times or how often you would take her?

A. Once or twice a week.

MR. PALLARES: Nothing further.

THE COURT: Anything else?

MS. LOWRY: No.

THE COURT: All right. You're excused, sir. You may take your seat.

Call your next witness.

MR. PALLARES: Geraldo Garcia.

THE COURT: Geraldo needs a Spanish interpreter?

MR. PALLARES: Yes.

GERALDO GARCIA,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: Gerardo is G-e-r-d-o -- G-e-r --

THE COURT: Excuse me. You're not supposed to testify. He is.

He didn't say anything, so you're spelling it and

or by any medium of information, including, without limitations, newspapers, television or radio.

We'll take a 10 or 15 minute recess.

(Whereupon, a brief recess ensued.)

THE COURT: Let the record reflect the presence of all the parties and all members of the jury panel.

State, call your next witness.

MS. LOWRY: The State calls Dr. Jay Johnson.

JAY JOHNSON,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: Jay D. Johnson; J-o-h-n-s-o-n.

DIRECT EXAMINATION

BY MS. LOWRY:

Q. Sir, what is your occupation?

A. I'm a physician and a professor of medicine of pediatrics and medicine at the University of Nevada School of Medicine.

Ex. 8

Q. How long have you been a physician?

A. Over 20 years.

Q. And what education do you have that enables you to be a doctor?

A. Well, first, I trained in family medicine, and then I trained in pediatrics. I'm board certified in pediatrics; and I'm actually doubly board certified in pediatrics.

I trained in a fellowship in adolescent medicine. I have a fellowship in addiction medicine, and I've also partially trained in dermatology and psychology.

Q. When did you get your initial degree in medicine?

A. 1978.

Q. And where was that?

A. Oklahoma.

Q. I need to ask you: You aren't dressed like a doctor.

Why do you have the camouflage stuff on?

A. I'm currently on active duty at Nellis Air Force Base.

Q. And what do you do for Nellis?

A. Well, I'm a hospital -- I'm the second in command of the Nevada Air National Guard. I'm what's called the Chief of Hospital Services-Professional Services; and so I'm providing that for Nellis at the present time.

And I'm also providing education for the physicians and the nurse practitioners and the other people in the hospital, specifically on pediatric psychiatry and abuse.

Q. Presently, do you hold more than one position or do you have more than one job?

A. I have many different jobs and positions. Besides being a professor with the School of Medicine, I also am the director of adolescent medicine for not only the school of medicine, but for the University Medical Center here in southern Nevada.

I'm also the medical director at Southern Nevada Child and Adolescent Mental Health Services out on Jones and Charleston. I have two in-patient psychiatric units there.

I'm the medical director for the Huntridge Team Clinic over on Maryland Parkway. I'm also the medical director of the Sierra Nevada Job Corps Center in Reno.

And last, but not least, I'm the medical director and supervisor for the State of Nevada Sexual Abuse Investigative Teams, both here and in Reno.

Q. Could you tell us about that, the sexual abuse investigation teams? What is the one here called?

A. The one here is called SAINT. It's over at Child Haven at Pecos and Bonanza, just north of there, and it stands for Sexual Abuse Investigative Team is what the acronym is.

The one in Reno is called the same thing. It's

at Washoe Medical Center. And both units are essentially exactly the same; we use the same forms, same format.

I do the review of all the records from both areas, and we basically see every single child or adolescent who has been potentially sexually abused in the state of Nevada. I review every one of the cases and have done so since 1991.

Q. Since 1991, in both southern Nevada and northern Nevada?

A. Yes.

Q. And when you say you review essentially all of the cases, tell us what a review is, what you do.

A. Okay. Either I see the child myself or one of our other medical care providers sees the child. That could be either a physician or a nurse practitioner.

And once the child has been seen, not only for the historical information that's contained in the chart, but also for the physical examination, to include the sexual examination, that's all videotaped by what's called a culpascope.

And a culpascope is an instrument that allows magnification of the area around the vagina or the penis or the rectum, or wherever we're happening to be looking at, and we can videotape through that culpascope for an accurate record of what the exam looked like at the time the examiner

was doing it.

What I review with the entire team, on at least an every two week basis, is each one of these records, each one of the video tapes. I listen to the examination report by the individual that did the exam; look at the videotape and see whether or not I agree with the findings, and almost always I agree.

I've had very little disagreement because our people are trained extensively and trained by the same people in southern California and central California. So we do think very much the same way.

Q. Talking about the culpascope, is that an instrument that goes inside a child's body?

A. Oh, definitely not. The one thing we don't want to do in an examination is to cause further victimization. So this is an external instrument, much like binoculars, on a stand, and it stays quite a distance from the child and there is no touching of the child by the instrument whatsoever.

And to add to that, the examiner only touches the child externally on the skin, on the outside.

Q. Approximately how many child sexual abuse examinations have you been involved in or reviewed?

A. I stopped counting at 10,000. I assume past that point, it didn't really make too much difference, so greater than 10,000.

Q. Would those exams be exclusively in the state of Nevada or have you also worked in this field outside the state of Nevada?

A. I was the chief of Adolescent Medicine and Child Protective Services at Wilford Hall, which is the world's largest Air Force center in San Antonio, Texas -- it's actually at Lackland Air Force Base -- besides being qualified in reviewing examinations in California, Colorado, Kansas, Missouri and Texas.

Q. And when you say you were qualified in those states, are you talking about being qualified as an expert in court in the field of child sexual abuse examinations?

A. That's correct.

MS. LOWRY: Your Honor, at this point, I would offer Dr. Johnson as an expert in the area of child sexual abuse examinations.

MR. PALLARES: No objection.

THE COURT: All right. That will be -- the Court will recognize the doctor as an expert.

BY MS. LOWRY:

Q. Dr. Johnson, could you describe for the jury basically what a SAINT examination here in southern Nevada of the child would entail?

A. Okay. Basically, when we see a child, they come in with either a parent or with a guardian or a CASA worker.

Have you discussed CASA workers?

Q. No. And when you use terminology like that, I'm going to ask you to say what a CASA --

A. A CASA worker is a court appointed worker to be with the child, and so they are a support system basically.

When the child comes in, we either get a history on them that's detailed, or if they've already seen one of the detectives and had an interview, then we may or may not get as much detail in the history because we don't want to go over the same thing and traumatize the child further.

What we then do is we have -- our examination room is actually quite attractive for children. We had an individual come in and paint a number of Disney characters over the walls, and it's -- really, it's very comfortable for the child and they don't usually feel particularly threatened.

When they come in, we do an entire physical examination on them, so we don't immediately come right in on the sexual aspect of it because we don't really want to do that. We want to make it seem like an entire exam which, actually, it is, because we'd like to know that they're healthy otherwise.

They get to choose whether they want the sexual exam first -- and what I'm referring to is an examination of the external genitalia -- or whether they want to start out with the eyes, ears, nose, mouth and all the other things that

go along with the physical exam.

During this time, the culpascope is off, but the interviewer and the examiner -- usually, there is only one person in the room with the child unless the child chooses to have someone else in. They have that choice as well.

During this time, the examiner is either asking questions or not and is doing the examination. Once we get to the examination of the genitalia, then we use two particular positions that allow us to make a determination as to whether there has been any possible abuse or not.

The first position is called supine, and the child is on his or her back on the table and, basically, we get a view of the genitalia from that position.

In this particular case, if it's a male, the penis would be on top and the testicles on the bottom. And if it's a female, the clitoris is on top and the vagina on the bottom.

Then they use another position that allows gravity to help us determine if there is enough -- especially hymenal tissue, and that's the knee-chest position.

And we have them turn over and they get on their hands and knees, on their arms, and we can then get gravity to pull the hymen down and we get a much better view sometimes that it's actually normal, when in the supine position, it may not look normal.

We like to be very thorough and we don't want to make any mistakes in something this serious.

So once that's been done and it's been videotaped and the examiner is finished, the examiner fills out the record of the physical examination and the sexual examination, and the child is either released, or anything further that needs to be done is done.

Q. Was an examination done at the SAINT clinic here on the child named Crystal Ingram?

A. Yes.

Q. And when was that examination done?

A. May I refer to the record that I have here?

Q. Would that refresh your memory?

A. Yes.

Q. Yes.

A. Thank you.

MS. LOWRY: Defense counsel, he's referring to the SAINT report.

THE WITNESS: The date of the examination was October 24, 1996.

BY MS. LOWRY:

Q. Could you tell us who conducted that examination?

A. Dr. Kevin Olson.

Q. And do you know Dr. Olson?

A. Oh, yes.

Q. And how long did Dr. Olson work at the SAINT clinic doing exams on kids?

A. For a few years.

Q. And did he work anywhere else in town?

A. Yes. He was at Sunrise Hospital. He also saw and took care of kids that were acutely sexually assaulted.

Q. Where is Dr. Olson now?

A. He is in Huntridge, Alabama.

Q. And what's he doing in Huntridge?

A. He's doing the sexual abuse team in Huntridge -- Huntsville -- excuse me -- not Huntridge. Huntsville, Alabama.

He's doing that, as well as working in the emergency room, which is his primary specialty.

Q. When Dr. Olson did the examination of Crystal Ingram, did he fill out a medical report?

A. Yes, he did.

Q. Did he also use the video culpascope when he did the exam on Crystal?

A. Yes.

Q. So was there a videotape of that examination?

A. Yes.

Q. Have you had an opportunity to review Dr. Olson's reports and the videotape of Crystal's exam?

A. Yes.

Q. Furthermore, after the exams are done at SAINT, is there some kind of review that you're involved in in the exams?

A. In this particular case, this chart was reviewed in what we call peer review on the 30th of October, six days later; and it was reviewed by the entire team, which, at that time, consisted of two other nurse practitioners and the administrator and the assistant administrator and myself.

So there was four medical care providers in there, and what we did was review all the cases from the previous two weeks, this being one of them; and, at that time, it was played on our monitor, and we all looked at it and determined if we agreed with the findings; and the provider read us his findings from the chart.

And in this particular case, I signed it without question, because I agreed with the diagnosis.

Q. And you reviewed this and signed off on it in agreement back on October of '96?

A. That's correct.

Q. Before coming to court today, did you review the chart on this child, the medical reports and the video?

A. Yes, I did.

Q. Did you bring anything to court with you?

A. Besides a copy of the medical record, I brought a videotape with me, which includes not only the videotape of

the victim, but also a videotape of a normal examination in exactly the same age girl.

Q. And is it helpful to you to have a video of a normal exam of a nine year old child in order to explain the findings in Crystal's case?

A. When someone hasn't seen an examination before, it's difficult to make a comparison. Therefore, it makes it much clearer for someone to be able to see the differences looking at a normal examination and then Crystal's examination in this case.

Q. So in explaining that to the jury, you find using that videotape to be helpful in explaining the differences to them?

A. Most definitely.

Q. Could you tell us what the results were in Crystal's examination?

A. Okay. The final page, which is page six of the report, basically what was agreed upon was that there had been hymenal trauma and that there were behavioral changes; and that under "Conclusions," there was clear evidence of penetrating injury of the hymen, and that the findings were consistent with her history, and that medical follow-up was recommended for sexually transmitted disease testing, and psychological follow-up was recommended as well.

Q. Under the physical finding conclusions, how many

potential conclusions are there there?

A. Okay. There is -- I'll go through them for you.

There is normal, which would be the majority of the cases that we see. There is non-specific, which indicates that there is something there, but it's not necessarily a finding because of trauma.

In other words, it could be simply because of hygiene. It could be because of a number of different things, but it's not specifically dealing with trauma.

The next category down is "suspicious for abuse," and there are criteria that deal specifically with each one of these areas. And I'm not going to go through that, because it gets to be very long and involved, but suffice it to say that suspicious for abuse is enough more abnormal than a non-specific to make you feel as though, by the criteria, that it's potentially because of abuse.

The next category is "suggestive of abuse or penetration," and that is even stronger evidence, but not clear evidence of penetration. That might be scarring; it might be some diminished tissue without absent tissue. There are other things that go on with that as well.

And the final one is "clear evidence of penetrating injury" and that's -- that goes along in Crystal's case.

Q. Would the videotape help us what the clear

evidence of penetrating injury was to Crystal?

A. Yes.

Q. Did you put it in the VCR?

A. Yes, I did.

Q. What comes first on the video, Crystal's exam or the normal exam?

A. The normal exam comes first; it's relatively short. And then Crystal's exam comes immediately after that. The normal examination does not have a patient indicator on it, for privacy. Crystal's exam, however, is labeled and labeled throughout the examination for verification.

Q. Okay. Do you have that laser pointer I gave you?

A. Yes, I do.

Would you like me to come up?

MS. LOWRY: Judge, can he stand in a position where he can kind of at least use the laser pointer?

THE COURT: Does it have to be that close over to the jury?

MS. LOWRY: Well, the TV is not real big.

THE COURT: Turn it on and let's see how we can do it here; and they can let me know when they can't see it.

THE WITNESS: May I leave the box?

THE COURT: Yes.

Is it running?

THE WITNESS: It's not running, but I put it on

pause and they can see the picture.

MS. LOWRY: Procedurally, the videotape has been marked as State's proposed Exhibit 12, and I would move for its admission.

THE COURT: Any objection?

MR. PALLARES: No, your Honor.

THE COURT: It will be admitted.

(State's Exhibit 12 admitted into evidence.)

THE COURT: Can all you folks see that picture?

All right.

THE WITNESS: First of all, let me explain to you what you're looking at, because you probably have absolutely no idea.

This is -- I'm just trying to stay out of everyone's way here.

This is a very close upshot of what we call the introitus or the entrance to the vagina. This area that I'm indicating in here is actually the vaginal wall. That's totally inside the vagina.

This tissue right here is the hymen, which is like -- it's very much like a curtain across the opening of a door. If you took a sheet and put it across the lower two-thirds of that door over there, that's basically what a hymen is. And in order to get through the door, you either

have to remove it or you have to go through it. And that's basically what tears the hymen.

THE COURT: Now, it doesn't cover the whole area, does it?

THE WITNESS: It can. In certain cases, it can actually completely cover it and allow no opening whatsoever. So it's extremely variable. There always is a hymen; that's not an issue. But there are different forms of hymen.

THE COURT: All right. Go ahead.

THE WITNESS: So, basically, out here -- this is the examiner's gloves. We use latex gloves -- and the examiner has ahold of what's called the labia or the fleshy tissue that's on either side of the opening to the vagina.

And the way we do the examination -- and this is in a supine position, so this is with the individual, this particular girl, which is not Crystal Ingram, on her back.

And we have them do basically like a frog leg position, where they let their knees fall apart and then we grasp the labia between the forefinger and the thumb and gently pull towards you and out.

And it's not painful. I've asked. I mean, obviously, I wouldn't know myself, but I've asked, and it's not an issue as far as pain or discomfort goes.

What it allows the introitus -- which is this whole open area -- to do is open up and let the hymen spread

apart so you can see whether or not it has -- as in this particular case here -- a nice sharp, clear edge.

And this nice sharp, clear edge does not allow you to see into the base of the floor of the vagina, which is down behind it. It's as if -- okay. You can't see my hand at the present time. That would be on the backside of the hymen.

In order to see my hand, you'd have to look over the top and down in, and that's basically what we're looking at there.

So the posterior vaginal wall, which is back there, could also be considered the floor in front of you that you can't see. That's basically how I'm going to explain this.

So we look for whether or not there is sufficient hymenal tissue and whether it's got a nice sharp edge like that one does; whether there is sufficient tissue to keep you from being able to see the floor of the vagina; and whether or not there is any unusual blood vessels; whether or not there is any unusual or scar tissue whatsoever.

And scar tissue, since there isn't in this particular picture, would simply look like a very pale area. The blood vessels might not go into it very well. And, sometimes, it's very subtle; sometimes it's very pliant, but, in any event, the tissue is very, very flexible and very distinguishable. And you will see it -- when I turn the

machine back on, you'll notice how much it moves around. It's very fluid and very flexible tissue.

You can see again, the vagina has little wings that are folding inside. It's very, very elastic tissue. And this other hole up at the top, that's the urethra right there.

The clitoris would be right up at the very, very top and the rectum would be clear down here, below the bottom of the vagina.

And what you're seeing is the tissue just simply flopping around and making its way from side to side. And this is just to show you how incredibly elastic this tissue is.

But bear in mind, when you see the other film, how much tissue was there, because on the other film, you won't see that.

Am I in anybody's way? Can you see okay?

Okay. We also look at the rectal area; and when we look at the rectal area, what we're looking for is all these little folds that come out should be relatively regular.

And what I mean by that is: One of them shouldn't be considerably deeper than another. It shouldn't go off at an odd angle. There is no reason for it to look odd. Also, there is a developmental defect.

In this particular case, there is nothing to show you here that's abnormal, because it's a normal film. But

suffice it to say, that we look at the entire area, and we also look at the area between the rectum and the vagina as well to make sure no damage has been done there.

This was --

Q. And what's that called?

A. It's a perineum, which is the area that a woman is without to allow more space. She is now in the knee-chest position, so she's on her hands and knees.

Q. This is still our normal --

A. This is still the normal, that's correct.

And what you'll know is now the rectum is clear up here, up above the top of the screen, and here is the hymen tissue; and it has a very, very sharp crescent shaped edge all around it and there is quite a bit of tissue all the way around it.

You can still see into the vagina, but that's not the issue. The issue is there is plenty of tissue and it's got a very, very sharp, clean edge all the way around.

Now we go to Crystal's examination.

Now, if you'll look here, you'll notice that you can see directly into the posterior vaginal wall. It looks as though there is nothing there and, indeed, there is nothing there; there is no curtain; there is no sheath.

There is nothing to block the view of the posterior vaginal wall right there. So this is where the

hymen was, but is no longer.

THE COURT: Can I see that? Do you want to stop it and turn it around so I can see that?

THE WITNESS: Sure.

Okay. Your Honor, did you see the normal?

THE COURT: Right. I know I've seen a normal.

THE WITNESS: Here is where the hymen used to be, right there. You can see directly into the posterior vaginal wall. I'll run it for you in just a moment, but I'm just trying to show you.

And, basically, there is just simply no tissue around there. This is the perineum, which goes into what's called the fossa, and that goes directly into the posterior vaginal wall, without anything going into the top of it.

And I'll run the video for you, and I believe you'll be able to see that there is -- basically, we're looking straight at the posterior wall. And it's also -- see how square it is? It's almost like a box. They're not supposed to be square. There are very few right angles in people's bodies.

Now, she's in the knee-chest position. Now, if we could see more tissue, this would be the position to see it in. As you will notice, it's still square, and that little sort of a tongue-like thing that's coming down is a ridge that's inside the vagina.

There is a ridge there that, because there is no tissue, you can actually see one of the ridges that goes into the vagina. Normally, you can't ever see that either, so that's just simply further confirmation that there is no hymen left, on this particular exam.

Here is the rectal exam, and there are no abnormal findings on the rectal exam.

Would you like it replayed at all, your Honor, or is that sufficient?

THE COURT: That's sufficient.

BY MS. LOWRY:

Q. Doctor, let me ask you: When you are dealing with trauma to children's hymens, is there any particular positioning of the trauma that can be significant --

A. The --

Q. -- or the placement of the trauma?

A. I understand. The area that you're asking about, I believe, is the area that we look at -- if you look at a clock face, and you put a clock face on the vaginal opening, the area between three o'clock and nine o'clock -- in other words, the lower section of the clock -- is the area that we're concerned about, because, normally, it is not a disrupted area.

The area between nine o'clock and three o'clock -- in other words, the upper half -- can have a lot of

variations in this, developmentally; the lower half does not.

So we look specifically from three to nine o'clock in the supine position. And even more significantly is the four-eight o'clock position. That area is basically the area that we can call an abnormal with surety.

Q. And what portion of the clock was Crystal's trauma in?

A. Let me verify the fact that it was five to seven o'clock. Yes, it was, five to seven o'clock.

Q. And that positioning is significant?

A. Yes, because that is the least likely area to have an abnormality in it unless there was attempted or successful penetration.

Q. Was her examination consistent with vaginal penetration by an adult penis?

A. Yes.

Q. You mentioned that her anal examination was normal.

A. Yes.

Q. Given the history that there was anal penetration, is that an unusual result?

A. Not at all. It depends on how cooperative the child is. It depends on how adept the assailant is at leaving no injuries; and, unfortunately, it has come to the point where the Internet now provides techniques on how not to leave

any evidence. So it's not something that's difficult to find.

The assailant can use lubrication. The assailant can do many different things to not leave any trace of injury.

The hymen is a more difficult thing to not leave a trace of injury on, as opposed to the anus, because if the anus is penetrated slowly, there may simply be superficial tearing of the tissue -- in other words, just the very, very top layer of the tissue -- and that will heal rapidly and without scarring, oftentimes, so the fact that there was no evidence found in this particular case was not unusual.

Q. The tissue around the anal area, is it particularly elastic?

A. It's elastic as well, yes.

Q. So if the history was that there was no lubrication used, but there was some penetration and there was pain, could you still have a normal examination?

A. Yes.

Q. The fact that the trauma to Crystal's hymen was between the five and seven o'clock position, is that consistent with her being penetrated while she's laying on her back?

A. It would be more consistent with her being penetrated on her back, yes, because of the force involved.

If I can explain?

Q. Yes.

A. It's -- a downward force is directed toward the posterior area, and so the three to nine o'clock position is going to be the first area contacted and the most power directed to that area, yes.

Q. Now, there was no history by this child that, at the time of the sexual assault, that she bled.

Do you automatically find that if a child is sexually assaulted that they're going to bleed?

A. Not at all.

Q. And why is that?

A. Again, because of the elasticity of the tissue and the technique of the assailant. Some children have very elastic hymens and don't bleed whatsoever. Some have very, very fragile tissue and bleed easily. And it's simply a difference between individuals.

Q. So could you still have the results of Crystal's examination where she had trauma to the hymen, but not have a history of having bled?

A. Absolutely.

Q. The fact that Crystal delayed disclosing that she had been sexually abused, in your training and experience, did you find that unusual?

A. No. That's probably the very most common thing that ever occurs. In the vast majority of patients, they delay the fact that they've been sexually abused, the

disclosure, and for various reasons. Normally, they're either threatened or they feel threatened or they simply are embarrassed. It's a number of different reasons for that.

Q. Could -- the fact that Crystal had none of that hymenal tissue in the five to seven o'clock position, could that have been a pre-existing condition; and by that, I mean could that have been some kind of birth defect where she was born without a hymen or something?

A. No. There has been a number of studies done on tens of thousands of newborn female infants, and there has never been a female infant found yet without a hymen at birth.

MS. LOWRY: Thank you, Dr. Johnson.

I'll pass the witness.

CROSS-EXAMINATION

BY MR. PALLARES:

Q. Dr. Johnson, you mentioned that one of the criteria about which -- one of the criteria which would indicate the amount of damage done to the anus would be whether or not the child was cooperative; is that correct?

A. That's a potential difference, whether the child is cooperative or not.

Q. I believe you mentioned whether or not the child was cooperative and whether or not lubrication was present, correct?

A. Among other things, yes.

Q. Would you expect an uncooperative child to have more damage to the anus than a cooperative child?

A. Not necessarily. It's not -- again, it involves the individual and how elastic the tissue is and a number of different things, so you could potentially have an uncooperative child that wasn't damaged and a cooperative child that was. It's extremely variable. I'm sorry I can't answer that for you exactly, but it's very variable.

Q. But, usually, there is some correlation between the amount of tissue damage and whether or not the child was fighting or resisting?

A. No. I can't say that.

Q. Then I'm not understanding your testimony about how the lack of damage to this child's anus is a fact -- is affected by whether or not she was cooperative. I don't understand.

A. Well, let me try to explain that. There is more likelihood, as a single variable in multiple variants -- let's say there are ten variables that are going to give you damage or no damage. Okay? And I don't know that there are that many, but let's just give a number of ten. Okay?

That one variable, of whether or not the child's cooperative, if they are cooperative, they stand a less chance of being damaged from that one variable.

If they are less cooperative, they stand a chance of being injured because of that one variable -- more of a chance of being injured.

But when you throw in all the rest of the variables, you can't say that it makes a difference or doesn't make a difference in this particular case.

Q. Okay. Let's throw in two variables then: Suppose you had an uncooperative child and no lubrication.

Would that child be more likely to exhibit more tissue damage?

A. Again, it depends on whether or not she just had a bowel movement, whether or not the assailant used a condom that was already lubricated without having to deal with any other lubrication.

There is, again, too many variables, but, yes, if you said, given two children with exactly the same variables -- which hardly ever exists -- but if you said that and you said which one would be more likely to show damage, it would be the one who did not cooperate and lubrication wasn't used.

Q. As far as hymenal trauma, is a child's cooperation and whether or not there was lubrication used also factors in the amount of tissue damage that would be produced?

A. Not particularly. It's not as significant as the end, although, again -- and I'm not trying to avoid answering

your question with a yes or no; it just isn't possible -- there is too many variables involved.

And if you, again, used lubrication or if you used cooperation from the victim, there might be less damage in the hymen. It depends on what was used to penetrate the hymenal opening.

Q. Was a measurement taken of Crystal Ingram's anus or drain opening diameter of it?

A. No. There was no need to because it wasn't abnormal.

Q. So you don't have any way of judging how elastic it is?

A. No. We don't put anything inside of the rectum, if that's what you're asking. That would be further trauma added to the child.

Q. Well, was a measurement taken of Crystal's vaginal opening?

A. No; no. That's not something that is standard practice, nor is it in the literature that that's significant.

Q. You testified that psychological follow up was recommended?

A. Yes.

Q. Do you know if any counseling or anything was done?

A. I have nothing further after these records to go

by, no.

Q. I note that you reviewed Dr. Olson's records and signed off your agreement with your observations?

A. That's correct.

Q. In fact, the whole team was in agreement with his observations?

A. Yes.

Q. Looking through his records, I noted that she was ordered tested for HIV and RPR?

A. Yes.

Q. HIV is?

A. The human immunodeficiency virus or AIDS; and RPR is a test for syphilis.

Q. Do you know what the results for those were?

A. They were both negative.

Q. And I also note that there was STD testing follow up.

Do you know if that was -- I take it STD, first of all, is sexually transmitted disease?

A. That's right, sexually transmitted disease.

Q. Was the presence of any sexually transmitted diseases found?

A. There was no tests done, and the two diseases that we test for would be chlamydia and gonorrhea. Those weren't done at the time of the examination because that's not

a common practice to do. I do not know if she had any testing done after the examination.

Q. And I also note that there was a whitish discharge observed inside her vagina?

A. Yes.

MR. PALLARES: Pass the witness.

REDIRECT EXAMINATION

BY MS. LOWRY:

Q. Dr. Johnson, the medicals indicate that the whitish discharge could have been physiologic?

A. Right.

Q. What does that mean?

A. When girls are beginning to develop and go through adolescence and get close to menstruating, they start -- the cells that line the vagina change from a flat cell to a cell that looks like a column and that cell puts out a mucous-like discharge.

So practically every female of child bearing age has some sort of physiologic or normal discharge. That doesn't indicate that there is any disease process, sexually transmitted diseases or anything else. Normally speaking, especially at her age and her developmental status, this would be the most likely thing.

Q. I got to ask you: Do we consider nine year olds

to be of child bearing age?

A. That's a good question. The beginning of adolescence in females is normal as early as seven and a half years of age. That doesn't mean they're child bearing at that point, but it doesn't mean that they will potentially become child bearing.

I guess what I'm referring to here is that a nine year old could easily have a physiological discharge because she has hormones in her system and her gonads are developing and her breasts are developing. That's perfectly normal for her age group.

Q. The findings regarding the hymen, were those findings consistent with the history that this was a one time sexual assault?

A. There is no way to tell that by looking at the examination, whether it was one time or many times.

Q. So not inconsistent with the history that it was one time?

A. Oh, it could have been one.

Q. Okay. If there were injury to the anal opening or the anal tissue, how quickly could that injury heal?

A. Within a matter of days.

Q. And is it possible that the injury to her hymen was some kind of -- what is commonly known as a straddle injury?

A. No. A straddle injury, first of all, doesn't affect the hymen by itself and no other tissue.

If she had a straddle injury, which, generally speaking, is falling onto a bar or a fence or a bicycle -- the center of a bicycle or something that goes between the legs forcefully and it's a long object that then produces injury -- normally, what we see there is bruising outside of the vagina, especially where the bony prominences are and, normally, the hymen is not affected at all.

If it would be, you'd see damage considerably more significant on the outside. And there is no indication that she ever had a straddle injury.

Q. And regarding the ability of the anal tissue to heal very rapidly, why is that, that that could heal in days?

A. Simply because of the blood flow to the area. It's a very rich blood supply and it's something that, physiologically, is designed to heal quickly because it's an area where a lot of bacteria exist, and you don't want to open the skin where a lot of bacteria exist for a long period of time or you risk systemic whole body infection.

Q. And could it heal without any scars or any kind of --

A. Yes. That's been demonstrated.

MS. LOWRY: Thank you. Nothing further.

THE COURT: Counsel.

RECROSS-EXAMINATION

BY MR. PALLARES:

Q. You say that the anus is very rich in its blood supply?

A. Yes.

Q. Do you often find bleeding from the anus in the case of sexual or anal intercourse between an adult and a child?

A. You can.

MR. PALLARES: Nothing further.

THE COURT: Anything else?

MS. LOWRY: No, sir.

THE COURT: Dr. Johnson, thank you, sir.

THE WITNESS: Thank you.

THE COURT: Appreciate it.

Folks, it's almost 5:30, so we'll take our evening recess.

During this recess, you're admonished not to converse among yourselves or with anyone else on any subject connected with this trial;

Or to read, watch or listen to any report of or commentary on the trial by any medium of information, including without limitation, newspapers, television or radio.

And we'll see you tomorrow morning at 10:30.

(Whereupon, the jury panel was excused except for one juror.)

THE COURT: Sir, the bailiff informed me that you thought you might have recognized or knew someone?

THE JUROR: Yes, sir.

THE COURT: Who is it?

THE JUROR: I believe that a woman that I teach with at the Advanced Technology Academy, her husband has the same name as counsel.

THE COURT: Pallares?

THE JUROR: I've never met her husband, but with the same name -- and all of a sudden, I think he's in law, it occurs to me that --

THE COURT: Is your wife a teacher, Mr. Pallares?

MR. PALLARES: My mother-in-law is.

THE COURT: Your mother-in-law is?

THE JUROR: Pallares? I'm sorry. Her name is Solaris.

(Whereupon, the juror was excused.)

THE COURT: Just for the record, the State had objected and the Court allowed Mr. Pallares to ask the defendant -- ask Miss Maria --

MS. TOGLIATTI: Ingram.

THE COURT: -- Ingram what the defendant said when she went down and talked to him, and he said that he

didn't do it.

And, of course, the State objected, saying that was disallowable hearsay, which is probably correct. However, the Court allowed that in because she had gone down there and made statements and talked to him and said that he could have -- she asked him -- told him why -- and why had he done it and why she hit him and the guy was silent.

And it was the implication that it was inculpatory that he might have done it and it was an implication that he was being silent and had admitted to having done something.

So that's why the Court allowed him to ask him about whether or not, in fact, he had denied it. So that was the reason for that.

And I know that Miss Lowry had made the objection again at the bench, and I forgot to bring it back up because we were talking about something else.

So that's why the Court did it. All right?

We're in recess.

(Proceedings recessed until Wednesday, June 17, 1998 at 10:30 a.m.)

ATTEST: Full, true, and accurate transcript of proceedings.

YVONNE M. VALENTIN, CCR 342

Attorney; District Court, Clark County, Nevada.

The State of Nevada, Plaintiff, versus Jose Lopez Garcia, Defendant; Case Number C142741; Department Number 8, Docket M.

Information: State of Nevada, County of Clark; Stewart L. Bell, District Attorney, within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That Jose Lopez Garcia, the defendant above named, having committed the crimes of sexual assault with a minor under 16 years of age, felony, NRS 200.364 and 200.366, lewdness with a child under the age of 14, felony, NRS 201.230, and child abuse and neglect, gross misdemeanor, NRS 200.508, on or between April 1996 and September 1996, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada:

Count I, sexual assault with a minor under 16 years of age: Did then and there willfully, unlawfully and feloniously sexually assault and subject Crystal Ingram, a female child under 16 years of age, to sexual penetration, to wit: Sexual intercourse, by inserting his penis into the vagina of said Crystal Ingram,

EX. 9

against her will or under conditions in which the defendant knew, or should have known, that the said Crystal Ingram was mentally or physically incapable of resisting or understanding the nature of defendant's conduct.

Count II, sexual assault with a minor under 16 years of age: Did then and there willfully, unlawfully and feloniously sexually assault and subject Crystal Ingram, a female child under 16 years of age to sexual penetration, to wit: Anal intercourse, by inserting his penis into the anal opening of the said Crystal Ingram against her will, or under conditions in which defendant knew, or should have known, that the said Crystal Ingram was mentally or physically incapable of resisting or understanding the nature of the defendant's conduct.

Count III, sexual assault with a minor under 16 years of age: Did then and there willfully, unlawfully and feloniously sexually assault and subject Crystal Ingram, a female child under 16 years of age, to sexual penetration, to wit: Digital penetration, by inserting his finger into the vagina of the said Crystal Ingram against her will, or under conditions in which the defendant knew, or should have known, that the said Crystal Ingram was mentally or physically incapable of

resisting or understanding the nature of defendant's conduct.

Count IV, lewdness with a child under the age of 14: Did then and there willfully, lewdly, unlawfully and feloniously commit a lewd or lascivious act with the body of Crystal Ingram, a child under the age of 14, by fondling and/or touching the said Crystal Ingram's breast with the intent of arousing, appealing to or gratifying the lust, passions or sexual desires of said defendant or said child.

Count V, child abuse and neglect: Did willfully, unlawfully and knowingly neglect, cause or permit a child under the age of 18 years, to wit: Crystal Ingram, being approximately nine years of age, to suffer unjustifiable physical pain or mental suffering or by permitting the said Crystal Ingram to be placed in a situation where she might have suffered unjustifiable physical pain or mental suffering, by forcing said Crystal Ingram to watch pornographic movies.

Stewart L. Bell, District Attorney, by Teresa M. Lowry, deputy District Attorney.

To which, the defendant has entered a plea of not guilty.

THE COURT: All right. Thank you, Miss Clerk.

testimony is that they don't know exactly when this occurred, and what the State is eliciting from this witness is the fact that the conversation she had was the first time that there was disclosure, that this child ever told, and that's the stress of the event.

THE COURT: No. First of all, as I understand it, this happened quite a while before she told; is that correct?

THE WITNESS: Uh-huh.

THE COURT: Is that right?

THE WITNESS: Well, we don't know when it happened. That was the first time she told us.

THE COURT: And it wasn't like -- was it a week before or had it been more than a week before?

THE WITNESS: I think it was later than that.

THE COURT: What do you mean later?

THE WITNESS: She didn't told us right away. We didn't know until a couple months maybe.

THE COURT: A couple months.

So that can't be an excited utterance if it happened -- the incident happened a couple months before, so you have to find another exception.

MS. TOGLIATTI: Well, Judge, the State's position, just for the record, is that in this type of case, where a child delays disclosure, when she finally does tell,

CRIMINAL COURT MINUTES

97-C-142741-C STATE OF NEVADA vs Garcia, Jose L

CONTINUED FROM PAGE: 010

08/07/98 09:00 AM 00 CONFIRMATION OF COUNSEL

HEARD BY: Lee A Gates, Judge; Dept. 8

OFFICERS: MELISSA SPYHALSKI, Court Clerk
TERI ERBE, Reporter/Recorder
MARIA U PETERS, Court Interpreter

PARTIES:	STATE OF NEVADA	Y
004902	Adams, Danae	Y
0001 D1	Garcia, Jose L	Y
000580	Taves, Barbara L.	Y

Ms. Taves appearing on behalf of Mr. Gowen. Prior to Court, Mr. Gowen called and spoke to Court Clerk advising that Ms. Taves would be appearing on his behalf and can confirm as counsel. COURT ORDERED, Mr. Gowen APPOINTED as counsel. Ms. Adams advised matter is calendared for August 12, 1998 for a new PSI as defendant was sentenced under the new guidelines. COURT ORDERED, date STANDS and the Division of Parole and Probation to prepare a new PSI reflecting the correct sentencing guidelines. Further, Mr. Pallares to be notified and be present.

CLERK'S NOTE:8/10/98 Clerk called Mr. Pallares office and advised of the court date./ms

CUSTODY

08/12/98 09:00 AM 00 STATE'S REQUEST FOR PSI

HEARD BY: Lee A Gates, Judge; Dept. 8

OFFICERS: MELISSA SPYHALSKI, Court Clerk
ROSA ARDESCH/RA, Relief Clerk
YVONNE VALENTIN, Reporter/Recorder
GERMAN SANTANILLA, Court Interpreter

PARTIES:	STATE OF NEVADA	Y
003901	Lowry, Teresa	Y
0001 D1	Garcia, Jose L	Y
004020	Pallares, Jose	Y

Court noted Defendant was sentenced incorrectly; under the new guidelines. Court corrected sentence and ORDERED sentence to reflect in addition to the $25.00 Administrative Assessment fee, COUNT I TWENTY (20) YEARS in the Nevada Department of Prisons with parole eligibility after FIVE (5) YEARS; COUNT II, TWENTY (20) YEARS in the NDP with parole eligibility after FIVE (5) YEARS and to run CONSECUTIVE to COUNT I; COUNT III, a MINIMUM of

CONTINUED ON PAGE: 012

Ex. 10

CRIMINAL COURT MINUTES

97-C-142741-C STATE OF NEVADA vs Garcia, Jose L

CONTINUED FROM PAGE: 011

FORTY-EIGHT (48) MONTHS with a MAXIMUM term of ONE HUNDRED TWENTY (120) MONTHS in the NDP; COUNT IV a MINIMUM of FORTY-EIGHT (48) MONTHS with a MAXIMUM HUNDRED TWENTY (120) MONTHS in the NDP and COUNT V, ONE (1) YEAR in the Clark County Detention Center with COUNTS III-V to run CONCURRENT to COUNT II. Defendant to receive 496 DAYS CREDIT FOR TIME SERVED as of 8/5/98.

NDP

12/28/04 08:30 AM 00 ALL PENDING MOTIONS (12/28/04)

HEARD BY: Jackie Glass, Judge; Dept. 5

OFFICERS: Sandra Jeter, Court Clerk
Liz Garcia, Reporter/Recorder

PARTIES: STATE OF NEVADA Y
003801 Robinson, Lynn M. Y

DEFT'S PRO PER MOTION FOR TRANSCRIPT...DEFT'S PRO PER MOTION TO PROCEED IN FORMA PAUPERIS

Defendant not present and in custody at the Nevada Department of Corrections. Court stated its findings, and ORDERED, Defendant's Pro Per Motions are GRANTED.

NDC

08/23/05 08:30 AM 00 DEFT'S PRO PER MTN TO SHOW CAUSE /22

HEARD BY: Jackie Glass, Judge; Dept. 5

OFFICERS: Sandra Jeter, Court Clerk
Cynthia Georgilas/cg, Relief Clerk
Carlaya Lewis, Reporter/Recorder

PARTIES: STATE OF NEVADA Y
006237 Brierly, Tracey J. Y

Defendant not present and in custody in the Nevada Department of Corrections. Ms. Brierly advised her office mailed a copy of the transcript to Deft. on 8/15/05. COURT ORDERED, motion DENIED as it is MOOT.

NDC

CONTINUED ON PAGE: 013

LAS VEGAS, NEVADA, TUESDAY, JUNE 16, 1998, 10:15 A.M.

-oOo-

(The following proceedings were had in open court outside the presence of the jury:)

THE COURT: Let the record reflect the presence of the defendant with his attorney; representatives of the State.

MS. TOGLIATTI: Your Honor, at this time, the State would like to make a record and a motion regarding the defense witness list.

Basically, the State was -- a witness list was filed with our office late Thursday afternoon and received by the attorneys Friday -- obviously, not 21 days before trial -- that listed 11 witnesses; and Mr. Pallares indicated that his investigator would be available to talk to us about those witnesses, and Mr. Levin was kind enough to talk to us on Sunday about these witnesses.

On Sunday afternoon, or I think like about noon, he -- Mr. Levin briefly mentioned, well, we might be calling his sisters, too, names not in the witness list. He also mentioned a neighbor that they had spoken to.

And then yesterday afternoon, as we were picking the jury, we saw a witness list, which we don't have a copy of, which apparently has five additional witnesses on it, the

Ex. 11

three sisters and two more witnesses, apparently, neighbors, to attack the character of the nine year old victim in this case.

The problem the State has is: First of all, the three sisters certainly aren't new witnesses, that there is some reason we shouldn't know about them except as we're picking a jury. He's certainly known about these witnesses his whole life.

And these neighbors, we have no statements from these people; we have no information as to these people. We just know he's going to call them and we know it from yesterday afternoon, and we would object to him calling those witnesses.

He lists at least five or six character witnesses in this original witness list that he served us with, and now he just wants to call his three sisters as three more character witnesses to talk about his character.

Certainly, there is a prejudice to the State: We've never talked to these people; we don't know their names; we don't know anything about them. And if he was going to call them as character witnesses, he should have known that when he filed the original witness list last week or when he should have, 21 days before trial.

And the same as to the neighbors. We don't have any names of these people. He's just going to call them, and

we have no idea -- we know one name of one neighbor.

THE COURT: You didn't give them the names of the people you're talking about calling?

MR. PALLARES: Your Honor, no. We did give them the name of the neighbor on Sunday and Monday, yesterday, when Mr. Levin found out about the neighbors.

Let me make this representation: As far as the witness list goes, the people that the objection adheres to are the last five names. We'll go ahead and strike the last four. Those are the three sisters and one neighbor. Okay?

We'll go ahead and strike those names and not call them; and that takes care of that controversy.

There is one neighbor, Arana Duval, (ph) which my investigator just found yesterday, and this is North Las Vegas. None of -- these people don't speak English. A lot of them are afraid of officials coming around.

We just found out about this person yesterday morning. There is no witness statement, it's true. The only person that has spoken with her is my investigator. I have the lady's phone number and address and all. I'd be happy to provide that to the State. The other four witnesses, the three sisters and the neighbors, we'll go ahead and strike that.

THE COURT: All right.

MR. PALLARES: In fact, there is one other

witness we can strike from this list, the custodian of records from the school district, if the State will stipulate to the authenticity from the school, the subpoena.

MS. LOWRY: What's the relevance of admitting a nine year old's school records?

THE COURT: I have no idea.

MR. PALLARES: If you'll stipulate to their authenticity, we can dispense with bringing the custodian of records from the school district.

As far as the relevance of the school records, your Honor, the relevance is the fact that --

THE COURT: We are not arguing relevance now.

MR. PALLARES: All right.

THE COURT: Do you want to do that or not, State?

Authenticity has nothing to do with the relevance. You can still argue the relevance.

MS. LOWRY: I have no objection that the school records are what they purport to be.

THE COURT: You can still reserve the right to object on the basis of relevance or any other reason.

MR. PALLARES: Okay.

THE COURT: You can strike the other four people, and you give them the name and address of the person you intend to call.

MR. PALLARES: Yes.

OFFICE

TRANSMITTAL

Gary E. Gowen
Lawyer
6600 W. Charleston Blvd.
Suite 134
Las Vegas, Nevada 89146
Telephone: (702) 822-1400
Facsimile: (702) 240-8046

MEMO

To: Mr. Jose Garcia - - Inmate No. 58710
From: Gary E. Gowen
Subject: Post Conviction Relief - - Case No. 142741
Date: July 10, 2001

Dear Mr. Garcia:

Please be advised that your brother and sister came to see me about your case I am unable to provide much information because Mr. Pallares was your attorney at trial, and he was responsible for filing the Fast Track Appeal for you. The law says tha: Mr. Pallares must file the Fast Track appeal, and that if the Supreme Court wants to see full briefing, then another attorney can be appointed to do the full appeal.

I am advised that in December, 1999, the Supreme Court dismissed your appeal. I received the dismissal in 1999, but since Pallares was your attorney, there was nothing for me to do in your case. However, I am advised that you were never informed that the appeal was dismissed by the Supreme Court. That is important because you have ONE (1) year from the date the Supreme Court sends its Remittitur to the District Court dismissing your Fast Track Appeal to file your petition for post conviction relief in District Court.

I enclose a copy of the Petition for Post Conviction Relief for you to fill out and file in the District Court. If Mr. Pallares did not tell you that the Supreme Court had dismissed your appeal then you must state that fact in your Petition for Post Convictior Relief. In Paragraph 19. State that the reason you have not filed the Petition within 1 year is because your attorney did not inform you that the appeal was denied by the Supreme Court, if that is the case.

Petitions for post conviction relief are tricky. You should consult an inmate counsel or a lawyer to write your petition for you.

Yours truly,

Gary E. Gowen

EX. 12

0042
JOSE C. PALLARES, ESQ.
Nevada Bar No. 4020
521 S. Sixth St.
Las Vegas, NV 89101
(702) 388-0568
Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JOSE LOPEZ GARCIA, #857283 Defendant.	CASE No. C142741 DEPT. No. VIII DOCKET M HEARING DATE: 12/23/97 HEARING TIME: 9 AM

NOTICE OF MOTION AND MOTION
TO WITHDRAW AS ATTORNEY OF RECORD

COMES NOW JOSE C. PALLARES, ESQ., and hereby moves to withdraw as attorney of record for Defendant JOSE LOPEZ GARCIA. This Motion is made pursuant to E.D.C.R. 7.40 and is supported by the attached Affidavit of Jose C. Pallares, Esq. This Motion is made in good faith and not for any deleterious motive.

DATED this 12th day of December, 1997.

JOSE C. PALLARES, ESQ.

JOSE C. PALLARES, ESQ.
521 S. Sixth Street
Las Vegas, NV 89101
NV Bar #4020/CA Bar #15803
(702) 388-0568

EX. 13

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

TO: THE OFFICE OF THE CLARK COUNTY DISTRICT ATTORNEY, its Counsel.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the MOTION TO WITHDRAW AS ATTORNEY OF RECORD and on for hearing before this Honorable Court on the 29 day of December, 1997, at 9 a.m. of said day, or as soon thereafter as counsel will be heard.

DATED this 12th day of December, 1997.

JOSE C. PALLARES, ESQ.

JOSE C. PALLARES, ESQ.
521 S. Sixth Street
Las Vegas, NV 89101
NV Bar #4020/CA Bar #15803
(702) 388-0568

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing NOTICE OF MOTION AND MOTION TO WITHDRAW AS ATTORNEY OF RECORD is acknowledged this 15 day of December, 1997.

STEWART BELL, ESQ.
CLARK COUNTY DISTRICT ATTORNEY
District Attorney Office
200 S. Third Street
Las Vegas, NV 89151

CERTIFICATE OF SERVICE

I, DANIELLE CLAY, an employee of Jose C. Pallares, Ltd., hereby certify that I delivered a copy of JOSE C PALLARES ESQ.'s Motion To Withdraw, along with a cover letter written in Spanish, to the Clark County Detention Center in a sealed envelope addressed to inmate JOSE LOPEZ GARCIA, identification number 857283 on December _____, 1997.

DATED this 15 day of December, 1997.

DANIELLE CLAY

JOSE C. PALLARES, ESQ.
521 S. Sixth Street
Las Vegas, NV 89101
NV Bar #4020/CA Bar #15803
(702) 388-0568

CLARK COUNTY)
STATE OF NEVADA) ss

AFFIDAVIT OF JOSE C. PALLARES, ESQ.

JOSE C. PALLARES, ESQ., having been duly sworn, hereby states and affirms that:

1. I am an attorney in good standing duly licensed to practice in all courts in the state of Nevada;

2. I am the attorney of record for Defendant JOSE LOPEZ GARCIA in case number C142741 pending in Department VIII of the Eighth Judicial District Court.

3. Trial in case number C142741 is scheduled to begin February 2, 1998.

4. Case Number C142741 was previously assigned to Deputy Public Defender LINDA BELL of the Clark County Public Defender's Office.

5. Defendant JOSE LOPEZ GARCIA and his family have been unable to make payment of the agreed-upon retainer in this matter.

6. Defendant JOSE LOPEZ GARCIA and his family are unable to reimburse counsel for costs of investigators and expert witnesses.

7. Reappointment of the Clark County Public Defender's office to represent Defendant GARCIA would promote the interests of justice.

8. Granting of the pending Motion To Withdraw would not result in the delay of trial or of any hearing in this matter.

9. FURTHER AFFIANT SAYETH NAUGHT

DATED this 12th day of December, 1997.

JOSE C. PALLARES, ESQ.

Subscribed To And Sworn Before Me This 12th Day of December, 1997.

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
MARIA ISIS WALLS
Appt. No. 95-1409-1
My Appointment Expires Nov 20, 1999

Notary Public

JOSE C. PALLARES, ESQ.
521 S. Sixth Street
Las Vegas, NV 89101
NV Bar #4020/CA Bar #15803
(702) 388-0568

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF JOSE C. PALLARES, ESQ.

No. 42535

March 25, 2005

ORDER OF SUSPENSION

This is an automatic appeal from a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Jose Pallares be suspended for one year, to run from the date of his temporary suspension, May 24, 2003. Pallares did not file an opening brief contesting the recommendation.[1] The state bar, however, filed an opening brief arguing that the recommended discipline was too lenient and that disbarment under the circumstances of this case is warranted. Pallares moved to strike the state bar's brief; the state bar opposed the motion, and asked in the alternative for leave to file an opening brief.

We conclude that the procedural rules regarding bar discipline do not provide for an appeal by the state bar, and so we grant Pallares' motion to strike the state bar's opening brief. We also deny the state bar's request for leave to file an opening brief. Additionally, although clear and convincing evidence supports the panel's findings concerning Pallares' misconduct, the recommended one-year suspension is too lenient. We therefore impose a two-year suspension, to run from the date of Pallares' temporary suspension.

FACTS

Pallares was admitted to practice in Nevada in 1991. He worked for the Clark County District Attorney's office, and then for two small Las Vegas law firms, before opening his own solo practice in 1995. He mainly practiced criminal defense, but also accepted some personal injury work.

In December 2000, Pallares was diagnosed with anxiety, depression and alcoholism. Over the next two years, Pallares' compliance with his treatment plan was sporadic. According to Pallares, he would begin to feel better as the medication and abstinence took effect, and he would believe that he had "conquered" his problems and was cured. He would stop the medication, stop attending regular Alcoholics Anonymous (AA) meetings and allow himself "one or two" drinks. Of course, this would result in a relapse.

[1] *See* SCR 105(3)(b).

EX. 14

This cycle was repeated three or four times from early 2001 to early 2003.

From April to September 2001, Pallares withheld part of a personal injury settlement that was earmarked to pay a chiropractor's bill. Apparently, Pallares believed that the bill was inflated, but instead of properly contesting the lien, he simply failed to pay it. The chiropractor complained to the state bar, which asked Pallares for a response. By this time, however, Pallares had given the money to the client. Pallares paid the chiropractor in November 2001. The resulting discipline case was resolved when Pallares entered into a conditional plea agreement in exchange for a 90-day suspension for the misappropriation from the chiropractor.[2] Pallares did not disclose his problems with depression or alcohol to the state bar at that time; he testified that he was embarrassed and wanted to keep them private. The plea agreement was forwarded to this court for approval in September 2002.

Pallares testified that, in anticipation of the 90-day suspension, he began to shut down his practice. He reduced his staff and stopped taking new cases. He also ceased taking his medication and going to AA meetings. According to Pallares, he would go to court for his remaining criminal calendar in the mornings, return to the office with his files, and then go drink for the afternoon.

The two instances of misconduct charged in the complaint arise from Pallares' representation of three personal injury plaintiffs in a suit to recover underinsured motorist insurance benefits. The misconduct occurred in December 2002 and January 2003, after Pallares had entered into the conditional guilty plea for a 90-day suspension, but before it was approved by this court. Pallares obtained an arbitration award, which was paid by the insurer in December 2002 and January 2003. One plaintiff had a medical bill from a company called Primax for $623.36. Her settlement statement, prepared by Pallares, indicated that this amount had been paid, along with other medical bills and Pallares' fees and costs. Pallares remitted the net amount owed to the client, about $40,000, but he did not pay Primax.

Another plaintiff was also to receive a net amount of about $40,000. In addition, she had a $950 medical bill from a doctor that was to be paid from the proceeds. Pallares prepared a settlement statement stating that the doctor had been paid, and he sent a check for $24,000 to the client. At this time, Pallares told the client that another check would be coming from the insurance company, and that she would be paid the remainder then. In fact, the insurance company had already sent Pallares all amounts owed

[2] *See Discipline of Pallares,* Docket No. 40168 (Order Approving Conditional Guilty Plea in Exchange for Stated Form of Discipline, February 7, 2003).

under the arbitration award. Also, the doctor had not been paid. Instead, Pallares used the funds to pay his office lease and his remaining staff member. This court's order of suspension was entered on February 7, 2003.

Pallares testified that he planned to repay the client by selling his house, which in the current market he expected to sell quickly and at a substantial profit. But his wife, who shared title to the house, refused to agree to his plan since it was their sole asset and also was the home for their two small children.

The two clients were subjected to collection efforts by Primax and the doctor and complained to the state bar. Pallares, who by now was serving the 90-day suspension, stipulated to a temporary suspension under SCR 102(4), beginning when his 90-day suspension ended.[3] A formal complaint was filed, charging violations of SCR 154 (communication), SCR 165 (safekeeping property), and SCR 203(3) (conduct involving misrepresentation, deceit, dishonesty or fraud).[4] In his answer, Pallares admitted that he had misappropriated the remainder of the client's recovery, and denied that he had failed to pay Primax or the doctor. Sometime before the hearing, Pallares changed counsel. At the hearing, Pallares admitted that after going through his records, he could not locate evidence that Primax and the doctor had been paid. Shortly after the complaint was filed, Pallares paid restitution of all amounts owed to the client, Primax and the doctor; Pallares obtained the money from his father.

By March 2003, Pallares realized that he needed continuous treatment, and he began consulting his doctor again. He started taking medication, and enrolled in an outpatient detoxification clinic. After Pallares had successfully completed the clinic's program, he was also prescribed medication to help alleviate alcohol cravings, and he began attending regular AA and Lawyers Concerned for Lawyers meetings. Pallares testified at the hearing that he now realizes he needs help, and that he cannot control his problems on his own. Also, he has developed a positive attitude toward taking his medications for the long term. He has also learned to overcome his reluctance to ask for help when needed.

Before the hearing, the state bar filed a well-researched trial brief strongly arguing that disbarment was the only appropriate discipline in this case, because Pallares had already been subject to a suspension for similar misconduct, and in fact was awaiting entry of the suspension order when he engaged in the misconduct

[3] *Discipline of Pallares*, Docket No. 41438 (Order of Temporary Suspension, May 21, 2003).

[4] The complaint also included allegations that Pallares had violated SCR 187 (nonlawyer assistants) and 189 (unauthorized practice of law), but these charges were dropped before the formal hearing.

at issue in this case. The state bar maintained its position at the hearing.

Pallares' doctor, Dr. Michael Levy, who specializes in addictions, testified at the hearing on Pallares' behalf. Dr. Levy is one of 200 fellows in addiction medicine in this country. Dr. Levy testified that alcoholism, and in Pallares' case, his depression, too, are chronic, incurable, but treatable conditions. According to Dr. Levy, these conditions are not unlike diabetes, asthma or hypertension, which cannot be cured but can be controlled with proper care. He stated that any prediction for the future would be speculation, but that he would not hesitate to recommend Pallares as a lawyer so long as Pallares adheres to his treatment plan. Dr. Levy noted that he sits on the state bar's Moral Character & Fitness Committee, and so he is aware of attorney ethical standards.

Pallares admitted his misconduct and recognized its seriousness, but he presented a vigorous defense concerning the discipline to be imposed and pled for a suspension. He stated that he would agree to whatever conditions the panel and any eventual reinstatement panel thought appropriate, including limiting his practice areas or practice settings for some probationary period and continuing to adhere to his treatment plan.

Pallares presented extensive character evidence. District Judge Valerie Adair, and Justices of the Peace Doug Smith and Tony Abbatangelo, who were subpoenaed for the hearing, along with Clark County Deputy District Attorney Lynn Robinson and lawyers Tony Sanchez and Joseph Sciscento all testified on Pallares' behalf. They uniformly praised Pallares' legal skills, especially as a criminal defense attorney, and stated that they would trust him despite the misconduct charged. Judge Abbatangelo and attorney Sciscento met Pallares in law school. Judge Adair, Judge Smith and attorney Robinson met him while they all worked at the district attorney's office. Attorney Sanchez met Pallares through their work together at the Latin Chamber of Commerce and their efforts to reestablish the Latino Bar Association. Sanchez praised Pallares' community activities.

The panel unanimously decided to recommend a one-year suspension, running from May 24, 2003, the date of Pallares' temporary suspension. The panel further recommended several conditions for any eventual reinstatement. These conditions are: (1) that Pallares continue treatment for his anxiety, depression and alcoholism, as prescribed by his physician; (2) that Pallares continue regular attendance at AA and Lawyers Concerned for Lawyers meetings, as directed by his physician; and (3) that Pallares be prohibited from acting as a signatory on any client trust account for a period to be determined by any reinstatement panel. The panel also assessed the costs of the proceedings against Pallares. At the end of

the hearing, one panel member cautioned Pallares that this was his last chance—if he committed additional misconduct after his reinstatement, then he would be disbarred.

The panel specifically stated that it had seriously considered the state bar's position, and believed that the state bar's arguments had some merit and were well-supported in the case law. But the panel determined that since Pallares will be required to demonstrate his fitness in a reinstatement hearing before he can practice again, and in light of mitigating factors, including the significant support shown for him, his cooperation in the discipline process, his payment of restitution and his resumption of treatment and counseling, a suspension rather than disbarment is appropriate.

After the record was docketed in this court, the state bar filed an opening brief, arguing that the panel's recommendation is too lenient and that disbarment is warranted. Pallares moved to strike the brief, asserting that under SCR 105, the state bar may not appeal from a panel's recommendation. The state bar opposed the motion, and alternatively asked for permission to file an opening brief in this matter. Pallares has also moved to expedite this matter.

DISCUSSION

Motion to strike

In moving to strike the state bar's opening brief, Pallares argues that SCR 105(3)(b) does not contemplate an opening brief by the state bar. The state bar argues that the rule does not preclude it from filing an opening brief, but to the extent that the rule is viewed as not authorizing a brief, the state bar asks for leave to file its brief.

SCR 105(3) provides, in pertinent part and with emphasis added:

> **3. Review by supreme court.**
>
> (a) Time and manner of appeal. A decision of a hearing panel shall be served on the respondent . . . . Except as provided in subsection 3, paragraphs (b) and (c) of this rule, a decision is final and effective 30 days from service, *unless an appeal is taken by the respondent* within that time. An appeal from a decision of a hearing panel shall be treated as would an appeal from a civil judgment of a district court and is governed by the Nevada Rules of Appellate Procedure.
>
> (b) Automatic appeal of suspension or disbarment. A decision recommending suspension or disbarment . . . shall be automatically appealed to the supreme court. An appeal under this paragraph shall be commenced by the hearing panel forwarding the record of the proceedings before it to the court within 30 days of entry of the decision. Receipt of the record in such

> cases shall be acknowledged in writing by the clerk of the supreme court. Thereafter, the matter shall be treated as any other civil appeal following docketing of the record.
>
> *Respondent-attorney shall have 30 days from the date this court acknowledges receipt of the record within which to file an opening brief* or otherwise advise the court if he or she intends to contest the hearing panel's findings and recommendations. *If the attorney files an opening brief,* briefing shall thereafter proceed in accordance with NRAP 31(a). *If the attorney does not file an opening brief, the matter will be submitted for decision on the record without briefing or oral argument.*

Pallares argues that the emphasized portions of the rule mean that only the disciplined attorney, not the state bar, may challenge a hearing panel's recommendation. According to Pallares, this result is further supported by SCR 105(1)(d), which specifically grants bar counsel the right to appeal, to a five-member hearing panel, a screening panel's dismissal of a grievance. According to Pallares, similar language would appear in SCR 105(3) if bar counsel could appeal to this court from a hearing panel's recommendation.

The state bar relies on the language in SCR 105(3)(a) stating that an appeal from a hearing panel's recommendation is to be treated like any other civil appeal and is governed by the Nevada Rules of Appellate Procedure. The state bar argues that under *Ching v. State Bar of Nevada*,[5] it is an aggrieved party that may appeal under NRAP 3A(a).

In one sense, neither side in a bar discipline appeal is the appellant or the respondent, because the appeal is automatic and this court's review is plenary and de novo. Also, *Ching* does not address whether the state bar may file a brief in the absence of an attorney's opening brief. If the rule's language merely set forth the most common briefing schedule, when an attorney wishes to challenge recommended discipline, then perhaps the state bar's argument would have more force. But the rule goes further: if the attorney does not file a brief, the matter is submitted for decision. Thus, the rule does not contemplate briefing initiated by the state bar rather than the attorney, and so the state bar has no right to file an opening brief. We therefore grant the motion to strike.

We also deny the state bar's request for leave to file an opening brief. This court should not ignore the provisions of SCR 105(3). Also, we note that the thorough trial brief already contained in the record more than adequately sets forth the state bar's position, and

[5]111 Nev. 779, 895 P.2d 646 (1995) (holding that the state bar had standing as a "complainant" to file a bar complaint against an attorney).

so it does not appear that additional briefing is necessary and would only further delay resolution of this matter.

Propriety of recommended discipline

As noted above, Pallares admitted to the misconduct found by the panel. Thus, the only issue to be determined is the discipline to be imposed.

In its trial brief, the state bar notes that this case represents Pallares' fourth discipline proceeding. The previous three cases were resolved through conditional guilty pleas under SCR 113, with progressively more severe discipline: first a private reprimand, then a public reprimand, and finally the 90-day suspension for misconduct that was almost identical to the conduct at issue in this proceeding. Moreover, Pallares' agreement to be suspended for ninety days was pending before this court when Pallares misappropriated his client's money.

The state bar cites ABA Standard for Imposing Lawyer Sanctions 4.11,[6] which provides that disbarment is generally appropriate when a lawyer knowingly converts a client's property and causes injury or potential injury to a client. In addition, Standard 8.1(b) states that disbarment is warranted when a lawyer has been previously suspended for similar misconduct and knowingly engages in further acts of misconduct.[7] The state bar's trial brief also points out that the record supports several aggravating factors, including selfish motive, vulnerable victims,[8] and substantial experience in the practice of law.[9]

The state bar's trial brief also relies on several cases holding that disbarment is presumptively appropriate in misappropriation cases, especially when coupled with intentional deceit.[10] These cases em-

[6]*ABA Compendium of Professional Responsibility Rules and Standards* 345 (1999).

[7]*Id.* at 352.

[8]According to the state bar, the two clients are both seniors, and the one whose money was taken by Pallares lives in North Dakota and relied on Pallares to protect her interests in this state.

[9]*Id.* at 352-53 (Standard 9.22, listing factors which may be considered in aggravation).

[10]*People v. Torpy*, 966 P.2d 1040 (Colo. 1998); *In re Addams*, 579 A.2d 190 (D.C. 1990) (containing an excellent discussion of the differing views on this topic in the majority, concurrence and dissent); *The Florida Bar v. Massari*, 832 So. 2d 701 (Fla. 2002); *In re Stillo*, 368 N.E.2d 897 (Ill. 1977); *Attorney Grievance v. Smith*, 829 A.2d 567 (Md. 2003); *Matter of Wilson*, 409 A.2d 1153 (N.J. 1979); *Matter of Reynolds*, 39 P.3d 136 (N.M. 2002); *Matter of Marks*, 424 N.Y.S.2d 229 (App. Div. 1980); *Conduct of Murdock*, 968 P.2d 1270 (Or. 1998); *Office of Discipl. Counsel v. Monsour*, 701 A.2d 556 (Pa. 1997); *Carter v. Ross*, 461 A.2d 675 (R.I. 1983); *Discipline of Ennenga*, 37 P.3d 1150 (Utah 2001).

phasize the public trust purposes served by lawyer discipline. Additionally, many of these cases state that the presumption of disbarment can only be overcome by extraordinary mitigating circumstances, such as addictive behavior that caused the misconduct and that is demonstrated to be under control. The "usual" factors such as cooperation and restitution have been held to be insufficient.

We agree with the cases relied upon by the state bar that misappropriation is one of the most serious forms of misconduct that a lawyer can commit. A lawyer occupies a position of trust and must always strive to protect the client's interests. But in light of the substantial mitigating evidence presented by Pallares, we conclude that discipline in the form of disbarment would be too harsh in this case. On the other hand, a one-year suspension, as recommended by the panel, would be too lenient. Instead, a two-year suspension, to run from the date of Pallares' temporary suspension, best serves the purposes of lawyer discipline in this case.

Accordingly, we suspend Pallares for two years, beginning May 24, 2003. We further agree that the conditions recommended by the panel are appropriate for consideration by any reinstatement panel, but we specifically note that the reinstatement panel is not limited to these conditions and may issue its recommendation based on the evidence presented to it. Finally, Pallares shall pay the costs of the disciplinary proceeding. To the extent not already completed with respect to Pallares' 90-day suspension and temporary suspension, Pallares and the state bar shall comply with the notice and publication provisions of SCR 115 and SCR 121.1.

It is so ORDERED.[11]

BECKER, C. J.
ROSE, J.
MAUPIN, J.
GIBBONS, J.
DOUGLAS, J.
HARDESTY, J.
PARRAGUIRRE, J.

[11]This order is our final disposition of this matter. Any future cases concerning Pallares shall be filed under a new docket number. We deny the motion to expedite as moot in light of this order.

DATE: 02/20/09 I N D E X TIME11:21 AM
CASE NO. 97-C-142741-C JUDGE:Villani, Michael

STATE OF NEVADA [ ] vs Garcia, Jose L [ ]

0001 D1 Jose L Garcia Pro Se
P O Box 7000
Carson City, NV 89702-7000

NO.	FILED/REC	CODE	REASON/DESCRIPTION	FOR	OC	SCH/PER	C
0001	05/06/97	CBO	/CRIMINAL BINDOVER Fee $0.00				
0002	05/06/97	ARRN	/INITIAL ARRAIGNMENT	0001		05/12/97	
0003	05/12/97	CALC	/CALENDAR CALL	0001		08/27/97	
0004	05/12/97	JURY	/TRIAL BY JURY VJ 8/27/97	0001	VC	09/02/97	
0005	05/12/97	INFO	/INFORMATION	0001		05/12/97	
0006	05/06/97	CBOR	/CRIMINAL BINDOVER RECEIPT	0001			
0007	05/14/97	TRAN	/REPORTER'S TRANSCRIPT PRELIMINARY HEARING	0001 0001		05/02/97	
0009	08/27/97	CALC	/CALENDAR CALL	0001		01/26/98	
0010	08/27/97	JURY	/TRIAL BY JURY VJ 1/26/98	0001	VC	02/02/98	
0011	08/26/97	REQT	/MOTION TO CONTINUE	0001		08/27/97	
0012	08/26/97	REQT	/MOTION TO COMPEL PSYCHOLOGICAL EXAMINATION OF CRYSTAL INGRAM	0001 0001		08/27/97	
0013	09/30/97	SUBT	/SUBSTITUTION OF ATTORNEY	0001			
0014	11/06/97	MOT	/DEFT'S MOTION TO COMPEL PSYCHOLOGICAL EXAMINATION OF CRYSTAL INGRAM	0001 0001	DN	11/20/97	
0015	11/07/97	ROC	/RECEIPT OF COPY	0001		11/07/97	
0016	11/17/97	OPPS	/OPPOSITION TO DEFENDANTS MOTION TO COMPEL PSYCHOLOGICAL EXAMINATION OF CRYSTAL INGRAM	0001 0001			Y
0017	12/10/97	ORDR	/ORDER DENYING DEFENDANTS MOTION TO COMPEL PSYCHOLOGICAL EXAMINATION OF CRYSTAL INGRAM	0001 0001			Y
0018	12/15/97	MOT	/JOSE C. PALARES' MOTION TO WITHDRAW AS COUNSEL	0001 0001	DN	12/29/97	
0019	12/15/97	REQT	/NOTICE OF MOTION AND MOTION TO WITHDRAW AS ATTORNEY OF RECORD	0001 0001			
0020	01/14/98	REQT	/EX-PARTE MOTION FOR EXCESS INVESTIGATORS FEES	0001 0001			
0021	01/26/98	CALC	/CALENDAR CALL	0001		04/10/98	
0022	01/26/98	JURY	/TRIAL BY JURY VJ 4/10/98	0001	VC	04/13/98	
0023	01/27/98	ORDR	/ORDER APPOINTING INVESTIGATOR	0001			
0024	02/09/98	MOT	/DEFT'S MOTION FOR IN-CAMERA REVIEW OF JUVENILE FILE	0001 0001	GR	02/26/98	
0025	02/09/98	ORDR	/ORDER APPOINTING INVESTIGATOR	0001			
0026	02/09/98	ORDR	/ORDER GRANTING ADDITIONAL INVESTIGATIVE SERVICES	0001 0001			
0027	03/04/98	ORDR	/ORDER FOR PRODUCTION OF JUVENILE FILE	0001			
0028	04/10/98	CALC	/CALENDAR CALL	0001		06/10/98	
0029	04/10/98	JURY	/JURY TRIAL	0001		06/18/98	
0030	04/21/98	HEAR	/AT THE REQUEST OF THE COURT: PAYMENT OF VOUCHER	0001 0001	GR	04/23/98	
0031	05/04/98	ORDR	/ORDER APPOINTING ATTORNEY	0001			
0032	05/19/98	LIST	/NOTICE OF EXPERT WITNESSES	0001			
0033	06/11/98	REQT	/EX-PARTE MOTION FOR EXCESS INVESTIGATORS FEES	0001 0001			

(Continued to page 2)

[redacted] EX. 15

NO.	FILED/REC	CODE	REASON/DESCRIPTION	FOR	OC	SCH/PER	C
0034	06/16/98	CRJL/CRIMINAL JURY LIST 004020D1FC				06/16/98	Y
D1004020							
0035	06/16/98	LIST/JURY LIST		0001			
0036	06/18/98	SENT/SENTENCING		0001	GR	08/05/98	
0037	06/18/98	INST/INSTRUCTIONS TO THE JURY		0001			
0038	06/18/98	VER /VERDICT		0001		06/18/98	
0039	06/18/98	VER /VERDICT		0001		06/18/98	
0040	06/18/98	VER /VERDICT		0001		06/18/98	
0041	06/18/98	VER /VERDICT		0001		06/18/98	
0042	06/18/98	VER /VERDICT		0001		06/18/98	
0043	06/25/98	ORDR/ORDER GRANTING ADDITIONAL INVESTIGATIVE SERVICES		0001 0001			
0044	08/05/98	HEAR/CONFIRMATION OF COUNSEL		0001	CM	08/07/98	
0045	08/05/98	HEAR/STATE'S REQUEST FOR PSI		0001	GR	08/12/98	
0046	08/18/98	NOAS/NOTICE OF APPEAL		0001	AP		
0047	08/18/98	CASO/CASE (RE)ACTIVATED ON					
0048	08/19/98	NOAS/NOTICE OF APPEAL		0001	AP		
0049	08/24/98	JUDG/JUDGMENT OF CONVICTION JURY TRIAL		0001		08/24/98	
0050	08/24/98	JMNT/ADMINISTRATION/ASSESSMENT FEE		0001		08/25/98	
0051	08/26/98	ORDR/ORDER APPOINTING APPELLATE COUNSEL		0001			
0052	09/24/98	NOEV/NOTICE OF EXHIBIT(S) IN THE VAULT				06/15/98	
0053	10/02/98	ORDR/ORDER		0001			
0054	12/02/98	TRAN/REPORTER'S TRANSCRIPT OF JUNE 16, 1998 JURY TRIAL		0001 0001		06/16/98	
0055	12/02/98	TRAN/REPORTER'S TRANSCRIPT OF JUNE 17, 1998 JURY TRIAL				06/17/98	
0056	12/03/98	NOTC/NOTICE TRANSCRIPTS ON SHELF				06/16/98	
0057	12/23/98	ASSG/Reassign Case From Judge Gates TO Judge Lehman					
0058	12/16/99	ASSG/Reassign Case From Judge Lehman TO Judge Gates					
0059	02/02/00	NSCO/NEVADA SUPREME COURT JUDGMENT / ORDERED APPEAL DISMISSED		0001 0001	GR	02/02/00	
0060	02/02/00	JMNT/REMITTITUR APPEAL DISMISSED		0001		02/03/00	
0061	12/02/00	ASSG/Reassign Case From Judge Gates To Judge Sobel					
0062	12/10/04	CASO/CASE (RE)OPENED				12/10/04	
0063	12/10/04	ASSG/REASSIGNMENT OF JUDGE Sobel TO JUDGE Glass					
0064	12/10/04	MOT /DEFT'S PRO PER MTN FOR TRANSCRIPT/18		0001	GR	12/28/04	
0065	12/10/04	MOT /DEFT'S PRO PER MTN TO PROCEED IN FORMA PAUPERIS /19		0001 0001	GR	12/28/04	
0066	12/10/04	AFFD/AFFIDAVIT IN SUPPORT FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS		0001 0001			Y
0067	12/28/04	MOT /ALL PENDING MOTIONS (12/28/04)		0001		12/28/04	
0068	12/29/04	FTA /FAILURE TO APPEAR		0001		12/28/04	
0069	12/21/04	OPPS/STATES OPPOSITION TO DEFENDANTS MOTION FOR TRANSCRIPTS AT STATE EXPENSE		0001 0001			
0070	01/06/05	ORDR/ORDER GRANTING DEFENDANTS MOTION FOR TRANSCRIPTS AT STATES EXPENSE		0001 0001	HG	12/28/04	

(Continued to page 3)

NO.	FILED/REC	CODE	REASON/DESCRIPTION	FOR	OC	SCH/PER	C
0071	01/19/05	ORDR/	ORDER GRANTING DEFENDANTS MOTION FOR TRANSCRIPTS AND MOTION TO PROCEED IN FORMA PAUPERIS	0001 0001	HG	12/28/04	Y
0072	05/18/05	CCPD/	CASE CLOSED PER DEPARTMENT			05/18/05	
0073	08/11/05	MOT /DEFT'S PRO PER	MTN TO SHOW CAUSE /22	0001	MT	08/23/05	
0074	08/11/05	CASO/	CASE (RE)OPENED			08/11/05	
0075	08/16/05	OPPS/	STATES OPPOSITION TO DEWFENDANTS MOTION TO SHOW CAUSE	0001 0001			
0077	09/29/05	MOT /DEFT'S PRO PER	MTN TO SHOW CAUSE /24	0001		10/11/05	
0078	09/29/05	CASO/	CASE (RE)OPENED			09/29/05	
0079	09/29/05	NOTC/	NOTICE	0001			
0080	10/03/05	OPPS/	STATES OPPOSITION TO DEFENDANTS PRO PER MOTION TO SHOW CAUSE	0001 0001			
0081	10/27/05	ORDR/	ORDER DENYING DEFENDANTS MOTION TO SHOW CAUSE	0001 0001	GR	10/27/05	
0082	05/17/07	CRTF/	CERTIFICATE OF INMATES INSTITUTIONAL ACCOUNT	0001 0001			
0083	05/18/07	CASO/	CASE (RE)OPENED			05/18/07	
0084	05/17/07	MOT /DEFT'S PRO PER	MTN FOR APPOINTMENT OF	0001	DN	05/31/07	
0085	05/17/07	MOT /DEFT'S PRO PER	MTN TO VACATE CONVICTION FOR ACTUAL/26	0001 0001	DN	05/31/07	
0086	05/17/07	MOT /DEFT'S PRO PER	MTN FOR LEAVE TO PROCEED/27	0001 0001	GR	05/31/07	
0087	05/31/07	MOT /ALL PENDING	MOTIONS 5/31/07	0001		05/31/07	
0088	05/30/07	OPPS/	STATES OPPOSITION TO DEFENDANTS MOTION TO VACATE CONVICTION FOR ACTUAL INNOCENCE AND APPOINTMENT OF COUNSEL	0001 0001			Y
0089	05/31/07	CSCL/	CASE CLOSED			05/31/07	
0090	06/11/07	NOTC/	NOTICE TO THE COURT	0001			
0091	06/14/07	ORDR/	ORDER DENYING DEFENDANTS MOTION TO VACATE CONVICTION FOR ACTUAL INNOCENCE AND APPOINTMENT OF COUNSEL	0001 0001	HG	05/31/07	Y
0092	01/12/08	CASO/	CASE (RE)OPENED			01/12/08	
0093	01/11/08	MOT /DEFT'S PRO PER	RQST FOR STATUS CHECK/29	0001	DN	01/22/08	
0094	10/14/08	REQT/	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	0001 0001			
0095	10/14/08	AFFD/	AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS	0001 0001			
0096	10/14/08	PET /PETITION FOR	WRIT OF HABEAS CORPUS POST CONVICTION	0001 0001			
0097	10/21/08	PET /PTN FOR	WRIT OF HABEAS CORPUS	0001	DM	12/11/08	
0098	10/21/08	PPOW/	ORDER FOR PETITION FOR A WRIT OF HABEAS CORPUS	0001 0001	SH	12/11/08	
0099	11/20/08	RSPN/	STATES RESPONSE AND MTN TO DISMISS DEFTS PETITION FOR WRIT OF HABEAS CORPUS POST CONVICTION	0001 0001			Y
0100	12/12/08	OPPS/	PETITIONERS OPPOSITION TO THE STATES RESPONSE AND MTN TO DISMISS HIS PETITION FOR WRIT OF HABEAS CORPUS POST CONVICTION	0001 0001			Y
0101	12/28/08	ASSG/	Reassign Case From Judge Glass To Judge Villani				
0102	01/05/09	FFCO/	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	0001 0001	HG	12/11/08	

(Continued to page 4)

NO.	FILED/REC	CODE	REASON/DESCRIPTION	FOR	OC	SCH/PER C
0103	01/07/09	NOED	NOTICE OF ENTRY OF DECISION AND ORDER	0001		01/05/09
0104	01/22/09	REQT	REQUEST FOR TRANSCRIPTS	0001		
0105	01/22/09	NOAS	NOTICE OF APPEAL (SC 53154)	0001	AP	
0106	01/23/09	STAT	CASE APPEAL STATEMENT	0001		
0107	02/04/09	CCPD	CASE CLOSED PER DEPARTMENT			02/04/09

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FILED

2008 OCT 21 A 9:01

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

JOSE L. GARCIA,

Petitioner,

vs.

THE STATE OF NEVADA BY AND THROUGH JIM BENEDITTI, WARDEN OF NNCC,

Respondent,

Case No: C142741
Dept No: 5

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on October 14, 2008. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 11 day of DECEMBER, 200 8, at the hour of 8:30 o'clock for further proceedings.

KATHY GLASS

District Court Judge

[C1]

[redacted]

EX. 16

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 20th day of November, 2008, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOSE LOPEZ GARCIA, BAC#58710
N.N.C.C.
P.O. BOX 7000
CARSON CITY, NV 89702

/s/ HOWARD CONRAD
Secretary for the District Attorney's Office

hjc/SVU

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CLERK OF THE COURT

RSPN
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JOSE L. GARCIA, #0857283 Defendant.	CASE NO: C142741 DEPT NO: V

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

DATE OF HEARING: DECEMBER 11, 2008
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition for Writ of Habeas Corpus (Post Conviction).

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

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EX. 17

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On May 12, 1997, Defendant was charged by way of Information with TWO (2) COUNTS of SEXUAL ASSAULT ON VICTIM UNDER AGE 16, TWO (2) COUNTS of LEWDNESS WITH A CHILD UNDER 14 and ONE (1) COUNT of ABUSE, NEGLECT or ENDANGERMENT OF CHILD.

On June 18, 1998, a jury found Defendant guilty of all counts. On August 5, 1998, Defendant was sentenced as follows: As to Count I – TWENTY (20) YEARS in the Nevada Department of Prisons with parole eligibility after FIVE (5) YEARS; As to Count II – TWENTY (20) YEARS in the Nevada Department of Prisons with parole eligibility after FIVE (5) YEARS, Count II to run concurrent with Count I; As to Count III – LIFE in the Nevada Department of Prisons; Count III to run concurrent with Counts I and II; As to Count IV – LIFE in the Nevada Department of Prisons, Count IV to run concurrent with Counts I-III; As to Count V – TWELVE (12) MONTHS in the Clark County Detention Center to run concurrent with counts I-IV. The Judgment of Conviction was filed on August 24, 1998.

On August 18, 1998, Defendant filed a Notice of Appeal. On December 27, 1999, the Nevada Supreme Court filed an Order Dismissing Appeal. Remittitur issued on January 25, 2000.

On May 17, 2007, Defendant filed a Motion to Vacate Conviction for Actual Innocence. The State filed its Opposition on May 30, 2007. The district court denied Defendant's Motion on May 31, 2007. The Order denying Defendant's Motion to Vacate Conviction was filed on June 14, 2007.

Defendant filed the instant petition on October 14, 2008. The State's Response is as follows.

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ARGUMENT

I. DEFENDANT'S PETITION IS TIME BARRED.

The mandatory provisions of NRS 34.726 state:

> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

Here, Remittitur from Defendant's direct appeal issued on January 25, 2000. Defendant did not file the instant petition until October 14, 2008, almost eight and a half years later. Thus, Defendant's petition is time barred under NRS 34.726.

II. DEFENDANT FAILS TO ESTABLISH GOOD CAUSE FOR THE DELAY IN FILING HIS POST CONVICTION PETITION.

Once the State raises procedural grounds for dismissal, the burden then falls on defendant "to show that good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." Phelps v. Dir. of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). To establish good cause, a defendant must demonstrate that some impediment external to the defense prevented compliance with the mandated statutory default rules. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); see also Hathaway 119 Nev. at 252, 71 P.3d at 506, (citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001)); Passanisi v. Dir. of Prisons, 105 Nev. 63, 769 P.2d 72 (1989); Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps, 104 Nev. at 659, 764 P.2d at 1305. Valid impediments external to the defense giving rise to "good cause" could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 252, 71 P.3d at 506, (quoting Murray v.

Carrier, 477 U.S. 478, 488 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904, (citing Harris v. Warden, 114 Nev. 956, 959-60, 964 P.2d 785, 787 n.4 (1998)).

In this case, Defendant has not established good cause for failing to file a timely post-conviction petition, as Defendant has not alleged any specific facts or circumstances that if true, would entitle him to relief. He has not alleged or proven an impediment external to the defense. He has not argued that a certain factual or legal basis for a claim was not available to either trial or appellate counsel. He has not asserted any fact or circumstance that would have made his compliance with the mandatory default statutes impracticable. As such, Defendant's petition should be dismissed.

III. DEFENDANT'S ACTUAL INNOCENCE CLAIM IS INSUFFICIENT.

In Calderon v. Thompson, 523 U.S. 538, 560, 118 S.Ct. 1489, 1503 (1998), the U.S. Supreme Court held that in order for a defendant to obtain a reversal of his conviction based on a claim of actual innocence, he must prove that "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." *quoting* Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995).

Here, Defendant's bare claim of "actual innocence" is not sufficient to meet the criteria set forth in Calderon, as Defendant has not presented new evidence in light of which no reasonable juror would have found him guilty. Accordingly, Defendant's petition should be dismissed.

IV. THE STATE PLEADS LACHES.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction..." The statute also requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The State pleads laches in the instant case.

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Defendant's judgment of conviction was entered on August 24, 1998, and he filed a timely notice of appeal. Remittitur issued on the dismissal of his appeal on January 25, 2000. Defendant filed the instant habeas petition on October 14, 2008. Since over ten years have elapsed between the Defendant's judgment of conviction and the filing of the instant petition, NRS 34.800 directly applies in this case.

Many of the claims in Defendant's petition are mixed questions of law and fact that will require the State to prove facts that are over ten years old from the date of Defendant's conviction. NRS 34.800 was enacted to protect the State from having to go back years later to re-prove matters. There is a rebuttable presumption of prejudice for this very reason and the doctrine of laches must be applied in the instant matter. Over such a lengthy period of time, witnesses become unavailable, the memories of available witnesses fade, and physical evidence is lost or destroyed. Therefore, this Court should dismiss the instant petition as barred by the doctrine of laches.

CONCLUSION

Based on the aforementioned arguments, the State respectfully requests that Defendant's Petition for Writ of Habeas Corpus be DISMISSED.

DATED this 20th day of November, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ LISA LUZAICH
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

JOSE LOPEZ GARCIA, #58710
N.N.C.C.
P. O. BOX 7000
CARSON CITY, NV 89702-7000

FILED

2008 DEC 12 P 3:44

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

JOSE L. GARCIA, Petitioner, vs. THE STATE OF NEVADA BY AND THROUGH JIM BENEDITTI, WARDEN OF NNCC, Respondent.	Case No.: C142741 Dept. No.: 5

PETITIONER'S OPPOSITION TO THE STATE'S RESPONSE AND MOTION TO DISMISS HIS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the Petitioner, Jose Lopez Garcia, appearing Pro Se, and hereby makes his opposition to the State's Response and Motion to Dismiss. Pursuant to NRS 34.750(4); "the petitioner shall respond within 15 days after service to a motion by the state to dismiss the action."

This Opposition is made and based upon the pleading, exhibits on filed with the Court, the following points and authorities, and the attached exhibits in support thereof.

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CLERK OF THE COURT

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CLERK OF THE COURT

POINTS AND AUTHORITIES

STATEMENT OF FACTS

1. Petitioner was never informed of the denial of his direct appeal by counsel, Jose C. Pallares. On July 10, 2001, Mr. Gary E. Gowen wrote a letter to Petitioner regarding the outcome of the Nevada Supreme Court denial of his direct appeal, and this Counsel sent a copy of the application forms of petition for post-conviction to the Petitioner. See Exhibit "A," attached hereto.

2. On July 15, 2001, Petitioner wrote a letter to trial and appellate Counsel, Jose Pallares and demanded all records on appeal, the appeal brief Counsel filed

EX. 18

this Court.

in Nevada Supreme Court on Petitioner's behalf in order to pursue his petition for writ of habeas corpus. See Exhibit "B," attached hereto.

3. There was no response by Jose Pallares, and on January 1, 2002, Petitioner wrote a letter to Counsel demanding all the documents in Counsel's possession to be forwarded to him without delay. Otherwise, Petitioner would be precluded from litigating his conviction. See Exhibit "C," attached hereto.

4. Once again, there was no response from Counsel, and on May 13, 2002, Petitioner wrote a letter to terminate Jose Pallares as counsel and requesting the files to be delivered to him pursuant to NRS 7.055. See Exhibit "D," attached hereto.

5. There was no response, no records or files were delivered to the Petitioner. On January 20, 2003, Petitioner wrote a third letter to Counsel, by requesting that Counsel provide him with the trial transcripts, the files, and the direct appeal brief without further delay. Otherwise, Petitioner would be precluded from filing a timely writ of habeas corpus petition. See Exhibit "E," attached hereto.

6. As a result, there was no response by Counsel. On February 6, 2004, Petitioner wrote another letter to Counsel regarding his refusal in responding to Petitioner's letters which violated the Nevada Supreme Court rules of professional conduct, and Petitioner would be forced to take action with the court by his failing to provide him with his criminal case files and the trial transcripts. See Exhibit "F," attached hereto.

7. Jose Pallares refused to respond to Petitioner's letters. On November 1, 2004, Petitioner submitted an additional termination of this Counsel and requested all records and case files to be delivered to him pursuant to NRS 7.055, with no action being taken by Counsel. See Exhibit "G," attached hereto.

8. Finally, Petitioner was forced to submit a motion for trial transcripts and affidavit in support for withdrawal of attorney of record and transfer of records. See Exhibit "H," attached hereto. On January 19, 2005, the District Court granted Petitioner's motion for transcripts. See Exhibit "I," attached hereto.

9. The State refused to provide petitioner with the transcripts, and on May 24,

2005, Petitioner wrote a letter to the District Attorney's office requesting the trial records and there has been no response. See Exhibit "J," attached hereto. On August 10, 2005, and on September 23, 2005, Petitioner submitted a motion to show cause and a notice to the Clark County District Attorney's office requesting the transcripts which were ordered by the Court. See Exhibit "K," attached hereto. On August 16, 2005, the District Attorney filed an opposition to Petitioner's motion to show cause. See Exhibit "L," attached hereto.

10. The State failed to provide the trial transcripts of Petitioner's criminal case until 2007. When Petitioner's motion to vacate conviction for actual innocence and motion for appointment of counsel were filed with the Court on May 17, 2007, after receiving the trial records. See Exhibit "M," attached hereto. On May 30, 2007, the State filed their opposition to Petitioner's motion to vacate conviction for actual innocence and motion for appointment of counsel. See Exhibit "N," attached hereto. In June, 2007, Petitioner submitted an additional notice to the Court by requesting counsel to be appointed to assist in supplementing his motion and to represent him in his motion to vacate conviction for actual innocence. Exhibit "O," attached hereto.

11. Petitioner's motion for appointment of counsel and motion to vacate conviction for actual innocence were denied on May 31, 2007, without finding of facts or conclusions of law and no order denying or notice were served upon the Petitioner. On January 22, 2008, Petitioner submitted a request for status check and the Court conducted a hearing by denying both motions with no order issued or no notice of denying his motions were berved upon the Petitioner as required by Nevada rules of appellate procedure. See Exhibit "P," attached hereto.

12. Petitioner's motion to vacate judgment is now still pending in the Clark County District Court where because the Court failed to issue an order with finding of facts and conclusions of law and no notice of the denial were served upon him. He is unable to appeal to the Nevada Supreme Court because no final judgment has been rendered by the District Court. On September 23, 2008, Petitioner's petition for writ of habeas corpus and his motion to proceed in forma pauperis were submitted to the Clerk which

were filed with the Court on October 14, 2008. On October 21, 2008, this Court issued an order directing the State to file an answer or otherwise respond to the Petition and file a return in accordance with the provision of NRS 34.360 to 34.830, within 45 days after the date of that order.

13. On November 20, 2008, the State filed their response and motion to dismiss Petitioner's petition for writ of habeas corpus (Post-Conviction) and Petitioner received the State's documents on November 25, 2008.

ARGUMENT

I. Petitioner's Petition Is Equitable Tolling And Was Not Time Barred.

The facts alleged in the above paragraphs 1-13, showing where undisputed Counsel, Jose Pallares refused to provide the Petitioner with his legal files, trial records and the State delayed in providing the Petitioner with the trial transcripts for filing his petition in complying with the statute limitation, that Petitioner has demonstrated to the satisfaction of the Court pursuant to NRS 34.726, which good cause exists due to the State and Counsel actions or inactions by causing the delay in filing of unitimely petition. There are extraordinary circumstances beyond Petitioner's control and this Court must presume circumstances exists.

"We have held that the one-year statute of limitations for filing a habeas petition may be equitably tolled if 'extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time.'" Brambles, 330 F.3d at 1202. "[T]he prisoner must show that the 'extraordinary circumstances' were the but-for and proximate cause of his untimeliness." Allen v. Lewis, 255 F.3d 798, 800-01 (9th Cir. 2001) amended on other grounds by Allen v. Lewis,295 F.3d 1046 (9th Cir. 2002).

"Some of our sister Circuits have had occasion to recognize the equitable tolling is appropriate when a delay in filing a habeas petition resulted from sufficiently egregious performance of counsel. In Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001), the petitioner alleged that

> his attorney failed to inform him when the Pennsylvania Supreme Court denied review of his motion to withdraw his guilty plea; that his attorney refused to

> remove herself as appointed counsel after the Pennsylvania Supreme Court decision, thus preventing him from 'moving his case forward,' [citation to brief omitted]; that his attorney led him to believe that she was going to file the federal habeas petition on his behalf; and that his attorney told him that there were no time constraints for filing a petition.

In remanding the case, the Third Circuit reasoned that those were serious allegations, which, if true, may constitute extraordinary circumstances to justify equitable tolling." Id.

The Second Circuit has also recently held that attorney malfeasance may warrant equitable tolling. Baldayaque v. United States, 338 F.3d 145 (2d Cir. 2003), posed a factual situation similar in some respects to the one before us: "In spite of being specifically directed by his client's representatives to file a '2255,' [Petitioner's attorney] Weinstein failed to file such a petition at all. By refusing to do what was requested by his client on such a fundamental matter, Weinstein violated a basic duty of an attorney to his client." Id. at 152. In that context, the court concluded:

> "Weinstein's actions were far enough outside the range of behavior that reasonably could be expected by a client that they may be considered 'extraordinary.' ... [W]e hold that an attorney's conduct, if it is sufficiently egregious, may constitute the sort of 'extraordinary circumstances' that would justify the application of equitable tolling to the one-year limitations period of AEDPA."

Id. at 152-53. Although Baldayaque's pro se petition was ultimately filed thirty months late, the Second Circuit vacated a dismissal of the habeas petition and remanded the case to the district court for further proceedings aimed at determining whether petitioner acted with reasonable diligence, and whether the extraordinary circumstances caused his petition to be untimely.

"We similarly conclude that the misconduct of Spitsyn's attorney was sufficiently egregious to justify equitable tolling of the one-year limitations period under AEDPA. Though he was hired nearly a full year in advance of the deadline, Huffhines completely failed to prepare and file a petition. Spitsyn and his mother contacted Huffhines numerous times, by tele-phone and in writing, seeking action, but these efforts proved fruitless. Furthermore, despite a request that he return Spitsyn's file, Huffhines retained it for the duration of the limitations period and more than

two months beyond. That conduct was so deficient as to distinguish it from the merely negligent performance of counsel [citations omitted]. The fact that the attorney retained by petitioner may have been responsible for the failure to file on a timely basis does not mean that petitioner can never justify relief by equitable tolling." See Spitsyn v. Moore, Case No.: 02-35543, pp. 14696.

II. Petitioner Has Established Good Cause That The State And Counsel Actions Constituted The Delay In Filing His Untime Petition, Which Were Extraordinary Circumstances Beyond His Control Making It Impossible To Litigate On Time.

The above facts in paragraphs 1-13, showing Petitioner was not informed by his trial and appellate Counsel of the denial of his direct appeal, denial of access to Petitioner's legal files and the trial transcripts within the one-year statute of limitations for filing a habeas petition. In addition, after the Court granted Petitioner's motion for trial transcripts, there has been refusal to provide him with the records and the delay had continued over several years before providing the Petitioner with the records in 2007 by the State.

"We have previously held that equitable tolling may be appropriate when a prisoner had been denied access to his legal files. Lott v. Mueller, 304 F.3d 918, 924 (9th Cir. 2002). That logic would apply to Spitsyn's situation as well. Id. at 146-96. "We have also held that equitable tolling was appropriate when a district court incorrectly dismissed a petition filed by a pro se prisoner for reasons of form and then subsequatly lost the body of his petition when he sought to refile it." Corijasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002). "Failures on the part of prison officials to prepare a check for the filing fee or to obtain a petitioner's signature have also been held to constitute 'extraordinary circumstances' beyond the petitioner's control that have warranted equitable tolling." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); Stillman, 319 F.3d at 1202. "It has been argued that Spitsyn could have satisfied the deadline despit Huffhines's misconduct by filing a petition pro se. But without the file, which Huffhines still possessed, it seems unrealistic to expect Spitsyn to prepare and file a meaningful petition on his own

within the limitations period. Id. at 14696.

III. Petitioner's Actual Innocence Claim Is Warranted Relief Because The Lack Of Scientific Evidence Of DNA Testing To Prove He Is Innocent By The State.

To determine whether the issue of Petitioner's innocence is sufficient to grant relief or insufficient, this Court should evaluate whether the central piece of evidence, the DNA sperm the victim claimed was on her cloths has been tested. If not, then Petitioner's convictions were unconstitutionally infirm by precluding him from proving his innocence by using scientific evidence in terms of trustworthiness and reliability for the trier of facts to decide his convictions. Therefore, the jury was excluded and/or prevented from learning of the evidence of Petitioner's innocence during the trial proceeding.

The United States "Supreme Court defined the responsibility of federal trial courts to ensure that proffered scientific evidence is in fact scientific, and will be of use to the trier of fact in deciding an issue to be trier." See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592, 113 S.Ct. 1786, 125 L.Ed.2d 469 (1993). "In order to do so, trial courts must assess whether a proffered scientific theory can be and has been tested, whether it has been subjected to peer review and publication, and whether it has achieved general acceptance, see id. at 593-94, 113 S.Ct. 1786." See U. S. v. Cuff, 37 F. Supp.2d 279, 282 (S.D.N.Y. 1999).

"This Court has repeatedly assessed that admissibility of scientific evidence in terms of trustworthiness and reliability." Santillanes v. State, 104 Nev. 699, 704, 764 P.2d 1147, 1150 (1988). The district court did not err in admitting DNA evidence. Brown v. State, 934 P.2d 235, 241 (Nev. 1997).

"We remain confident that, for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard' ...Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a ... habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 477 U.S. 478, 495-96, 106 s.Ct. 1639, 2649, 91 L.Ed.2d 397 (1986). To

satisfy the Carrier gateway standard, Petitioner shows that it is more likely than not that no reasonably juror would have found petitioner guilty beyond a reasonable doubt. Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 867, 130 L.Ed.2d 808 (1995). "In seeking to prove actual innocence, to avoid a procedural default, a petitioner for a writ of habeas corpus need not always affirmatively show physical evidence that he or she did not commit the crime with which he or she is charged."Schlup, 513 U.S. at 330, 115 S.Ct. 851; Carroger v. Steward, 132 F.3d 463, 481 (9th Cir. 1997). "We retain authority to issue the writ if the petition implicat[es] a fundamental miscarriage of justice.'" Deutsher v. Whitley, 946 F.2d 1443, 1444 (9th Cir. 1991). In the Petitioner's case, he asserts that if the DNA evidence had been tested and presented at his trial it would show the jury that he never sexaully assaulted Crystal Ingram. Thus, there would be no reason the jury would have found him guilty of the crime of sexual assault beyond a reasonable doubt.

IV. The State Is Not Entitled To Plead For Laches Because The Delay Was Not The Fault Of Petitioner.

The records are clear, the delay in filing Petitioner's petition was due to Counsel, who had been retained to assist the Petitioner in his criminal case. From the outset, Counsel, Jose Pallares, knew he was unable to provide effectively assistance to Petitioner with his trial because of suffering from anxiety, depression and alcoholism when Counsel filed a motion to withdraw as Counsel before the trial. The Court denied Counsel's motion and Jose Pallares was forced to provide the Petitioner with ineffective assistance throughout the trial proceeding and on direct appeal. See Ex. "9," attached to original petition.

As alleged in the above paragraphs 1-13 and the claims in the original habeas corpus petition pp. 12-16. There is no doubt that Counsel's conduct falls outside the range of reasonable professional assistance, and that Petitioner has demonstrated that the delay in filing his petition was due to this Counsel's failures. In addition, there were complaints filed against this Counsel for unprofessional misconduct and ultimately Counsel was found guilty by the Board hearing panel which

recommended that Jose Pallares be suspended for one-year without practicing law in the State of Nevada. The Nevada Supreme Court held that the one-year suspension against Jose Pallares was too lenient and imposed a two-year suspension against this Counsel. See Ex. "10," attached to original petition.

Under the circumstances of ineffective assistance of counsel, the Nevada Supreme Court set a standard and held that "this result would not punish the criminal defendant for the errors of his attorney. Our system already provides for reversal of criminal sentences that result from attorney error." See Butler v. State, 102 P. 3d 71, 90 (Nev. 2004).

CONCLUSION

Based upon the foregoing reasons, Petitioner respectfully requests that this Honorable Court issues an order denying the State's motion to dismiss his petition for writ of habeas corpus, and granting Petitioner's petition or in the interest of justice an order directing the State to conduct DNA testing and set the matter for an evidentiary hearing by allowing Petitioner the opportunity to demonstrate his actual innocence of the crime in which he was accused of and that trial and appeal Counsels were ineffective.

DATED this 4th day of December, 2008.

José Garcia L.

Jose L. Garcia, #58710
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

CERTIFICATE OF SERVICE BY MAIL

I, Jose L. Garcia, hereby certify pursuant to N.R.C.P. 5(b), that on this 4th day of December, 2008, I mailed/handed to a correction officer for mailing a true and correct copy of the foregoing PETITIONER'S OPPOSITION TO THE STATE'S RESPONSE AND MOTION TO DISMISS HIS PETITION FOR WRIT OF HABEAS CORPUS, addressed to:

Lisa Luzaich
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89155-2212

Jose L. Garcia, #58710
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

Jose Lopez Garcia #58710
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE LOPEZ GARCIA, Appellant, vs. THE STATE OF NEVADA, Respondents.	)	Case No.: 53154

APPELLANT'S OPENING BRIEF

ATTORNEY FOR APPELLANT

Jose Lopez Garcia
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

ATTORNEY FOR APPELLEES

Lisa Luzaich
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89155-2212

EX. 19

Year in the Clark County Detention Center with Counts III-V to run concurrent to Count II. See Original Petition p. 2 and Exhibit "6," attached to the Petition.

STATEMENT OF FACTS

1. Appellant's petition for writ of habeas corpus was filed in the District Court on October 14, 2008. See Indix Docket Sheet App. "1," attached hereto. The State of Nevada was ordered to answer or otherwise respond to the petition and filed a return within 45 days after the date of the District Court's order. See App. "2," attached hereto.

2. On November 20, 2008, the State's response and motion to dismiss Appellant's petition was filed. See App. "3," attached hereto. Appellant received the State's response on November 25, 2008, and his opposition to the State's response was mailed on December 4, 2008, which was not filed until December 12, 2008. See App. "4," attached hereto.

3. The District Court issued an order dismissing Appellant's petition as time barred on December 11, 2008, one day before his opposition was filed. See District Court's order App. "5," attached hereto. As a result, Appellant's opposition was actually filed on December 12, 2008, one day after that Court already had a hearing and denied his petition. See App. "4."

ARGUMENT

THE DISTRICT COURT DEPRIVED APPELLANT'S RIGHT TO DUE PROCESS BY HOLDING A HEARING TO DENY HIS PETITION AS TIME BARRED WITHOUT ENTERTAINING HIS OPPOSITION TO THE STATE'S RESPONSE WHICH CONSTITUTED UNFAIRNESS AND INJUSTICE IN VIOLATION OF THE 5th AND 14th AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

A. The District Court findings of fact, conclusions of law and Order was without the benefit of Appellant's claims of the equitable tolling and his petition was not time barred as alleged herein:

1. From the out set Appellant was never informed of the denial of his direct appeal by counsel, Jose C. Pallares. On July 10, 2001, Mr. Gary E. Gowen wrote to Appellant regarding the outcome of the Nevada Supreme Court denial of his direct

appeal, and Mr. Gary sent a copy of the application forms of petition for post-conviction to Appellant. See Exhibit "A," attached to App. "4."

2. On July 15, 2001, Appellant wrote a letter to trial and appellate counsel, Jose Pallares and demanded all records on appeal, and the appeal brief counsel filed in this Court on his behalf in order to pursue his petition for writ of habeas corpus. See Exhibit "B," attached to App. "4."

3. There was no response by Jose Pallares, and on January 1, 2002, Appellant wrote a letter to counsel demanding all the documents in counsel's possession to be forwarded to him without delay. Otherwise, Appellant would be precluded from litigating his convictions. See Exhibit "C," attached to App. "4."

4. Once again, there was no response from counsel Jose, and on May 13, 2002, Appellant wrote a letter to terminate Jose Pallares as counsel and requesting the files to be delivered to Appellant pursuant to NRS 7.055. See Exhibit "D," attached to App. "4."

5. There was no response, no records or files were delivered to the Appellant. On January 20, 2003, Appellant wrote a third letter to counsel, by requesting that counsel provide him with the trial transcripts, the files, and the direct appeal brief without further delay. Otherwise, Appellant would be precluded from filing a timely writ of habeas corpus petition. See Exhibit "E," attached to App. "4."

6. As a result, there was no response by counsel. On February 6, 2004, Appellant wrote another letter to counsel regarding his refusal in responding to Appellant's letters which violated the Nevada Supreme Court rules of professional conduct, and Appellant would be forced to take action with the court by counsel failing to provide Appellant with his criminal case files and the trial transcripts. See Exhibit "F," attached to App. "4."

7. Jose Pallares refused to respond to Appellant's letters. On November 1, 2004, Appellant submitted an additional termination of this counsel and requested all the records and case files to be delivered to Appellant pursuant to NRS 7.055, with no action being taken by counsel. See Exhibit "G," attached to App. "4."

8. Finally, Appellant was forced to submit a motion for trial transcripts and affidavit in support for withdrawal of attorney Jose Pallares from the record and transfer of records to Appellant. See Exhibit "H," attached to App. "4." On January 19, 2005, the District Court granted Appellant's motion for transcripts. See Exhibit "I," attached to App. "4."

9. In addition, the State refused to provide Appellant with the transcripts, and on May 24, 2005, Appellant wrote a letter to the District Attorney's office requesting the trial records as ordered by the Court and has been ignored with no response. See Exhibit "J," attached to App. "4." On August 10, 2005, and on September 23, 2005, Appellant submitted a motion to show cause and a notice to the Clark County District Attorney's office requesting the transcripts pursuant to court's order. See Exhibit "K," attached to App. "4." On August 16, 2005, the District Attorney filed an oppostion to Appellant's motion to show cause claiming their refusal to provided Appellant with the records. See Exhibit "L," attached to App. "4."

10. The State did not provide Appellant with the trial transcripts of his criminal case until 2007. After receiving the trial records, Appellant filed his motion to vacate conviction for actual innocence and motion for appointment of counsel which were filed with the court on May 17, 2007. See Exhibit "M," attached to App. "4." On May 30, 2007, the State filed an opposition to Appellant's motion to vacate conviction and his motion for appointment of counsel. See Exhibit "N," attached to App. "4." In June, 2007, Appellant submitted an additional notice to the Court by requesting counsel to be appointed to assist in supplementing Appellant's motion and to represent him in his motion to vacate conviction for actual innocence. See Exhibit "O," attached to App. "4."

11. Appellant's motion for appointment of counsel and motion to vacate conviction for actual innocence were denied on May 31, 2007, without finding of facts or conclusions of law and no order denying was issued and no notice of denial was served upon the Appellant. On January 22, 2008, Appellant submitted a request for status check and the Court conducted a hearing in denying both motions with no order

issued or no notice of denial were served upon Appellant as required by Nevada rules of Appellate procedure. See Exhibit "P," attached to App. "4."

12. Appellant believed that his motion to vacate judgment is now still pending in the Clark County District Court where that Court declined to make an order finding of facts and conclusions of law and no notice of the denial was served upon Appellant. He is unable to appeal to this Court because no final judgment has been rendered by the District Court. For this reason, Appellant is being made to choose either by serving his unconstitutional conviction or by seeking further relief by way of petition for writ of habeas corpus (post-conviction). Therefore, on September 23, 2008, Appellant submitted his petition for writ of habeas corpus and a motion to proceed in forma pauperis which were filed with the District Court on October 14, 2008. On October 21, 2008, the Court issued an order directing the State to file an answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, within 45 days after the date of that order. See App. "2."

13. On November 20, 2008, the State filed their response and motion to dismiss Appellant's petition for writ of habeas corpus (post-conviction). Appellant received the State's documents on November 25, 2008. His opposition was mailed on December 4, 2008, and it was not filed until December 12, 2008, after the Court denied his petition on December 11, 2008. App. "5."

The actions of counsel and the State as alleged in the above paragraphs 1-13, showing undisputedly that counsel, Jose Pallares refused to inform Appellant regarding the outcome of the denial of his direct appeal and counsel further refused to provide Appellant with his legal files, trial records, including that the State delayed in providing him with the trial transcripts for filing his petition in complying with the statute limitation. Thus, Appellant has demonstrated to the satisfaction of the court pursuant to NRS 34.726, which good cause exists due to the State and counsels actions or inactions by causing the delay in filing of untimely petition. These are extraordinary circumstances beyond Appellant's control and this

Court must presume circumstances exists.

"We have held that the one-year statute of limitations for filing a habeas petition may be equitably tolled if 'extraordinary circumstances beyond a prisoner's contol make it impossible to file a petition on time.'" Brambles, 330 F.3d at 1202. "[T]he prisoner must show that the 'extraordinary circumstances' were the but-for and proximate cause of his untimeliness." Allen v. Lewis, 255 F.3d 798, 800-01 (9th Cir. 2001) amended on other grounds by Allen v. Lewis, 295 F.3d 1046 (9th Cir. 2002).

"Some of our sister Circuits have had occasion to recognize the equitable tolling is appropriate when a delay in filing a habeas petition resulted from sufficiently egregious performance of counsel. In Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001), the petitioner alleged that

> his attorney failed to inform him when the Pennsylvania Supreme Court denied review of his motion to withdraw his guilty plea; that his attorney refused to remove herself as appointed counsel after the Pennsylvania Supreme Court decision, thus preventing him from 'moving his case forward,' [citation to brief omitted]; that his attorney led him to believe that she was going to file the federal habeas petition on his behalf; and that his attorney told him that there were no time constraints for filing a petition.

In remanding the case, the Third Circuit reasoned that those were serious allegations, which, if true, may constitute extraordinary circumstances to justify equitable tolling." Id.

The Second Circuit has also recently held that attorney malfeasance may warrant euitable tolling. Baldayaque v. United States, 338 F.#d 145 (2d Cir. 2003), posed a factual situation similar in some respects to the one before us: "In spite of being specifically directed by his client's representatives of file a "2255,' [Petitioner's attorney] Weinstein failed to file such a petition at all. By refusing to do what was requested by his client on such a fundamental matter, Weinstein violated a basic duty of an attorney to his client." Id. at 152. In that context, the court concluded:

> "Weinstein's actions were far enough outside the range of behavior that reasonably could be expected by a client that they may be considered 'extraordinary.' ... [W]e hold that an attorney's conduct, if it is sufficiently egregious, may constitute the sort of 'extraordinary circumstances' that would justify the application of equitable tolling to the one-year limitations period of AEDPA."

Id. at 152-53. Although baldayaque's pro se petition was ultimately filed thirty

months late, the Second Circuit vacated a dismissal of the habeas petition and remanded the case to the district court for further proceedings aimed at determining whether petitioner acted with reasonable diligence, and whether the extraordinary circumstances caused his petition to be untimely.

"We similarly conclude that the misconduct of Spitsyn's attorney was sufficiently egregious to justify equitable tolling of the one-year limitations period under AEDPA. Though he was hired nearly a full year in advance of the deadline, Huffhines completely failed to prepare and file a petition. Spitsyn and his mother contacted Huffhines numberous times, by tele-phone and in writing, seeking action, but these efforts proved fruitless. Furthermore, despite a request that he return Spitsyn's file, Huffhines retained it for the duration of the limitations period and more than two months beyond. That conduct was so deficient as to distinguish it from the merely negligent performance of counsel [citatiions omitted]. The fact that the attorney retained by petitioner may have been responsible for the failure to file on a timely basis does not mean that petitioner can never justify relief by equitable tolling." See Spitsyn v. Moore, Case No.: 02-35543, pp. 14696.

B. The District Court denied Appellant's petition without the benefit of his opposition to the State's response which established good cause that the State and counsels actions constituted the delay in filing his untimely petition. There were extraordinary circumstances beyond Appellant's control, making it impossible to litigate on time and that the State is not entitled to claim laches because the delay was not the fault of Appellant.

In the above paragraphs 1-13, clearly shown that Appellant was not informed by his trial and appellate counsel of the denial of his direct appeal, denial of access to Appellant's legal files and the trial transcripts within the one-year statute of limitations for filing a habeas corpus petition. In addition, after the court granted Appellant's motion for trial transcripts, there has been refusal to provide him with the records and the delay had continued over several years before providing him with

the records in 2007 by the State.

"We have previously held that equitable tolling may be appropriate when a prisoner had been denied access to his legal files. Lott v. Mueller, 304 F.3d 918, 924 (9th Cir. 2002). That logic would apply to Spitsyn's situation as well. Id. at 146-96." "We have also held that equitable tolling was appropriate when a district court incorrectly dismissed a petition filed by a pro se prisoner for reasons of form and then subsequatly lost the body of his petition when he sought to refile it." Corijasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002). "Failures on the part of prison officials to prepare a check for the filing fee or to obtain a petitioner's signature have also been held to constitute 'extraordinary circumstances' beyond the petitioner's control that have warranted equitable tolling." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); Stillman, 319 F.3d at 1202. "It has been argued that Spitsyn could have satisfied the deadline despit Huffhines's misconduct by filing a petition pro se. But without the file, which Huffhines still possessed, it seems unrealistic to expect Spitsyn to prepare and file a meaningful petition on his own within the limitations period. Id. at 14696. There is no doubt that counsel's conduct falls outside the range of reasonable professional assistance, and that Appellant has demonstrated that the delay in filing his petition was due to this counsel's failures. In addition, there were complaints filed against this counsel for unprofessional misconduct and ultimately counsel was found guilty by the Board hearing panel which recommended that Jose Pallares be suspended for one-year without practicing law in the State of Nevada. This Court held that the one-year suspension against Jose Pallares was too lenient and imposed a two-year suspension against this Counsel. See Exhibit "10," attached to the original petition.

Under the circumstances of ineffective assitance of counsel, this Court set a standard and held that "this result would not punish the criminal defendant for the errors of his attorney. Our system already provides for reversal of criminal sentences that result from attorney error." See Butler v. State, 102 P.3d 71, 90 (Nev. 2004).

Appellant asserts that if not, for the District Court's declination to entertain his opposition to the State's response and motion to dismiss, the lower court may not have denied his petition on the basis of being time barred.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse all the issues as presented in the original petition with instructions directing the trial court to release him as justice requires to which he is entitled.

DATED this 18th day of March, 2009.

José Garcia L.

JOSE L. GARCIA, #58710
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

CERTIFICATE OF SERVICE BY MAIL

I, Jose L. Garcia, hereby certify pursuant to N.R.C.P. 5(b), that on this 18th day of March, 2009, I mailed/handed to a correction officer for mailing a true and correct copy of the foregoing OPENING BRIEF addressed to:

Lisa Luzaich
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212

José Garcia L.

Jose L. Garcia, #58710
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

OFFICE

TRANSMITTAL

Gary E. Gowen
Lawyer
6600 W. Charleston Blvd.
Suite 134
Las Vegas, Nevada 89146
Telephone: (702) 822-1400
Facsimile: (702) 240-8046

MEMO

To: Mr. Jose Garcia - - Inmate No. 58710
From: Gary E. Gowen
Subject: Post Conviction Relief - - Case No. 142741
Date: July 10, 2001

Dear Mr. Garcia:

Please be advised that your brother and sister came to see me about your case I am unable to provide much information because Mr. Pallares was your attorney at trial, and he was responsible for filing the Fast Track Appeal for you. The law says that Mr. Pallares must file the Fast Track appeal, and that if the Supreme Court wants to see full briefing, then another attorney can be appointed to do the full appeal.

I am advised that in December, 1999, the Supreme Court dismissed your appeal. I received the dismissal in 1999, but since Pallares was your attorney, there was nothing for me to do in your case. However, I am advised that you were never informed that the appeal was dismissed by the Supreme Court. That is important because you have ONE (1) year from the date the Supreme Court sends its Remittitur to the District Court dismissing your Fast Track Appeal to file your petition for post conviction relief in District Court.

I enclose a copy of the Petition for Post Conviction Relief for you to fill out and file in the District Court. If Mr. Pallares did not tell you that the Supreme Court had dismissed your appeal then you must state that fact in your Petition for Post Conviction Relief. In Paragraph 19. State that the reason you have not filed the Petition within 1 year is because your attorney did not inform you that the appeal was denied by the Supreme Court, if that is the case.

Petitions for post conviction relief are tricky. You should consult an inmate counsel or a lawyer to write your petition for you.

Yours truly,

Gary E. Gowen

EX. 20

JOSE GARCIA LOPEZ, #58710
S.D.C.C.
P. O. BOX 208
INDIAN SPRINGS, NV 89070

JOSE C. PALLARES, LTD.
A PROFESSIONAL CORPORATION
521 S. 6th STREET
LAS VEGAS, NEVADA 89101

July 15, 2001.

Re: Case No.: C142741

Dear Mr. Pallares:

I received a letter dated July 10, 2001, from Mr. Gary Gowen stating that my direct appeal was denied by the Nevada Supreme Court in December, 1999, and a remittitur was issued on January 25, 2000. If that is the case than I am requesting that you please provided me with all records on appeal and the brief you filed on my behalf. Otherwise, I will be preclude from pursuing my petition for a writ of habeas corpus within the time limitation requirement.

Thank you for your attention and immediate response to this request.

Respectfully submitted,

Jose Garcia L.
Jose Garcia Lopez

JGL/cc
Enclosure
cc: Mr. Jose C. Pallares
Attorney at Law

EX. 21

JOSE GARCIA LOPEZ, #58710
S.D.C.C.
P. O. BOX 208
INDIAN SPRINGS, NV 89070

JOSE C. PALLARES, LTD.
A PROFESSIONAL CORPORATION
521 S. 6th STREET
LAS VEGAS, NEVADA 89101

January 1, 2002.

Re: Case No.: C142741

Dear Mr. Pallares:

Sincer my last letter I have asked an inmate here to write you to obtain the brief you filed in the Nevada Supreme Court and all the records on appeal. It has been almost six (6) months went by and I have not heard from your office. Once again, in order to comply with the one (1) year time limitation for filing my petition for a writ of habeas corpus as stated by Mr. Gary Gown, I must have all the trial transcripts and the brief you appealed on my behalf, including any and all other related files. With this letter, I am requesting that you, please, send me the above mentioned documents without delay, otherwise, I will be preclude from litigation of my convictions.

Thank you for your assistance in this matter.

Respectfully submitted,

José García L.
Jose Garcia Lopez

JGL/cc
Enclosure
cc: Mr. Jose C. Pallares
Attorney at Law

EX. 22

JOSE GARCIA LOPEZ, #58710
S.D.C.C.
P. O. BOX 208
INDIAN SPRINGS, NV 89070

JOSE C. PALLARES, LTD.
A PROFESSIONAL CORPORATION
521 S. 6th STREET
LAS VEGAS, NEVADA 89101

May 13, 2002.

RE: State vs. Jose Garcia Lopez Case No.: C142741
YOUR TERMINATION AS COUNSEL AND DELIVERY TO ME ALL OF MY CASE FILES AND MATERIALS PURSUANT TO NRS 7.055

Dear Counsel:

Be advised that as of the above date, your authority and authorization as attorney of record in the above entitled case is terminated and all professional relationship is ended. It is noted that I owe you no fees or debt of any type relating to the case at bar. Pursuant to NRS 7.055, I am demanding immediate delivery to me at the above address all papers, documents, pleadings, reports, indictment or information, preliminary hearing transcripts, trial transcripts and other tangible property which belongs to me or were prepared for me in relation to the above entitled case.

Be advised, that in the event I do not receive the requested materials in a timely manner as required by statute, i.e., five (5) days from the date above, I will file a motion with the court to obtain an order directing your compliance with the statutory requirements as requested herein.

Thank you for you attention to this matter, and I await your prompt response.

Respectfully submitted,

Jose Garcia L.
Jose Garcia Lopez

JGL/cc
Enclosure
cc: Mr. Jose C. Pallares, Esq.
Attorney at Law

EX. 23

JOSE LOPEZ GARCIA, #58710
N.N.C.C.
P. O. BOX 7000
CARSON CITY, NV 89702-7000

JOSE C. PALLARES, LTD.
A PROFESSIONAL CORPORATION
521 S. 6th STREET
LAS VEGAS, NV 89101

January 20, 2003.

Re: Case No.: C142741

Dear Mr. Pallares:

This is my third letter regarding the records on appeal and the brief you filed with the Nevada Supreme Court on my behalf. Since you refuse to respond to my letters and are refusing to inform me of the outcome of my direct appal I was informed by Mr. Gary Gowen that the Nevada Supreme Court denied my Fast Track in 1999 and a remittitur was issued on January 25, 2000.

I wrote you two (2) letters requesting that you deliver, to me, all of my case files and all related materials, pursuant to NRS 7.055, and another letter to terminate you as counsel without a response or your sending the records to me. As you already know, without the trial transcripts, the files, and the direct appeal brief you filed I am unable to pursue my conviction for relief. Therefore, I am requesting that you please provide me with the documents mentioned above without delay, otherwise, I will be prevented from filing a timely writ of habeas corpus petition.

I sincerely, hope you respond to this letter.

Respectfully submitted,

José García L.
Jose Garcia

JLG/cc
Enclosure
cc: Mr. Jose C. Pallares
Attorney at Law

EX. 24

JOSE LOPEZ GARCIA, #58710
N.N.C.C.
P. O. BOX 7000
CARSON CITY, NV 89702-7000

JOSE C. PALLARES, LTD.
A PROFESSIONAL CORPORATION
521 S. 6th STREET
LAS VEGAS, NV 89101

February 6, 2004.

Re: Case No.: C142741

Dear Mr. Pallares:

You are hereby informed that since you refuse to respond to my letters and your termination as my attorney I will be forced to take action with the Court for your failing to provide me with my criminal case records and the appeal brief for appealing my convictions. Due to your inaction I was precluded from complying with Nevada law under the writ of habeas corpus procedures and that your inaction/action was in violation of the Nevada Supreme Court Rules of professional conduct under Rules 151, 152 and 154.

With this letter, I look forward to hear from you as soon as possible.

Respectfully submitted,

José Garcia L.
Jose Garcia

JLG/cc
Enclosure
cc: Mr. Jose C. Pallares
Attorney at Law

EX. 25

Jose Lopez Garcia # 58710

Date this 1st day of November 2004

Executed at the Northern Nevada Correctional Center
Post Office Box 7000
Carson City, Nevada 89702-7000

RE: State v. Jose Lopez Garcia, Case NO: C142741
YOUR TERMINATION AS COUNSEL AND DELIVERY TO ME ALL OF MY CASE FILES AND MATERIALS PURSUANT TO NRS 7.055

Dear Counsel,

Be advised that as of the above date, your authority and authorization as attorney of record in the above entitled case is terminated and all professional relationship is ended. It is noted that I owe you no fees or debt of any type relating to the case at bar.

Pursuant to NRS 7.055, I am demanding immediate delivery to me at the above address all papers, documents, pleading and other tangible property which belongs to me or were prepared for me in relation to the above entitled case.

Be advised, that in the event I do not receive the requested materials in a timely manner as required by the statute, i.e., five (5) days from the date above, I will file a motion with the court to obtain an order directing your compliance with the statutory requirements as requested herein.

Thank you for your attention to this matter. I await your prompt response.

Respectfully

Jose Garcia

CC: File
Richard Davies, D.P.D.

EX. 26

Jose Lopez Garcia
(Petitioner Name)
Post Office Box 7000
Carson City, Nevada
89702

IN THE Eighth JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Clark

Jose Lopez Garcia
Petitioner
vs
State of Nevada
Respondent

Dept No. VIII

Case No. C142741

MOTION FOR TRANSCRIPT

COMES NOW the petitioner, Jose Lopez Garcia having previously been granted leave to proceed in the above numbered case in Forma Pauperis, motioning the Court for an Order that the following transcripts be transcribed at the expense of the State of Nevada and provided to the petitioner to wit:

Trial transcripts, Police reports, statements or any information deemed exculpatory or inculpatory

The petitioner states that the above documents are critical to the petitioner for proper prosecution of the above case.

Dated this _____ day of _____ 200 .

Respectfully Submitted

Jose Lopez
(Pro-Per)

EX. 27

Case No: C142741

Dept No: VIII

IN THE Eighth JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Clark

The State of Nevada

Plaintiff

vs.

Jose Lopez Garcia,

Defendant.

AFFIDAVIT IN SUPPORT FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS

I, Jose Lopez Garcia, in accordance with NRS 208.165, do hereby state the following is true and correct:

(1) I am the Defendant in the above entitled action.

(2) On the _____ day of _____ 2004, which was at least five (5) days prior to the filing of this Affidavit and Motion in Support, mailed a letter of Termination of Counsel and Demand for Delivery of Materials to Gary E. Gowen at 6600 W. Charleston Blvd Suite 154 Las Vegas, Nevada AND Jose C. Pallares at 521 S. 6th Street Las Vegas, Nevada

(3) I have given cause to file the herein referenced Motion pursuant to NRS 7.055 (1) and (2).

(4) I have received no response from said counsel, nor his office or representative

(4) The instant motion for withdrawal of attorney of record and transfer of records is submitted in good faith, and is so rendered because counsel has either ignored or disregarded this defendant's instructions in this matter, and defendant has no other recourse at law.

POINTS AND AUTHORITIES

Although attorneys may not withdraw from on going litigation if doing so would materially and adversely affect the interest of the client, Madrid v. Gomez , 150 F.3d 1030-39 (9th cir. 1998), [a] party may terminate his counsel's representation at any time, Kasheff-Zbaeh v. I.N.S. 791 F.3d 708, 711 (9th cir. 1986). This rule applies in Nevada as well as under NRS 7.055, Nevada Supreme Court Rules (SCR) 46 & 166, and the local rules of practice within certain judicial districts, e.g., Second Judicial District Court Rule 23 (1); Fourth Judicial District Court Rule 14 (2) (d); and Eight Judicial District Court Rule 7.40 (b) (2) (ii).

Upon being discharged by his client,

> [The] attorney who has been discharged by his client shall, upon demand and payment of the fee due from the client, immediately deliver to the client all papers, documents, pleading and items of tangible personal property which belong to or were prepared for the client.

NRS 7.055 (1) (emphasis added) .

As the judgement of conviction has been entered in this case, and appeal, if any, effected, counsel's services are no longer required in this criminal matter. Defendant has, pursuant to the mandates of NRS 7.055 (3), directed counsel to forward to defendant all documents generated in this action, but counsel has failed to honor this instruction. See affidavit in support of instant motion.

Counsel refusal to withdrew himself and forward said documentation violates the letter and spirit of SCR 166 (5), which directs a discharged attorney to "protect a client's interest" by

surrendering papers and property to which the client is entitled." Id. This rule governing attorney conduct is basic and one which the American Bar Association has required of all attorneys in Canon 9 of the Code of Professional Responsibility, EC2-32 and Disciplinary Rule 2-110(A) (2), and is adopted by the Nevada Supreme Court within SCR 150. See, also, Jones, Waldo, Holbrook, Etc. v. Dawson 923 P.2d 1366, 1376 (Utah 1996).

Counsel has no legal basis for with holding defendant's paperwork in this matter, as defendant owes counsel NO fees which would authorize counsel to maintain said paperwork under a general or retaining lien. Figliuzzi v. District Court, 111 Nev 338, 340-41, 890 P.2d 798, 800-02 (1995).

WHEREFORE, This Court is moved to exercise its jurisdiction in this matter and ORDER counsel to withdraw and deliver the entirety of documentation generated in the instant case to the defendant. Id. See also, Morse v. Eight Judicial District Court, 65 Nev. 275, 291, 195 P.2d 199, 206-207 (1948); and NRS 7.055 (2).

Dated this 6th day of December 2004.

Respectfully Submitted

José Garcia

Defendant In Pro Se

EXECUTION OF INSTRUMENT BY PRISONER

NRS 208.165. A prisoner may execute any instrument by signing his name immediately following a declaration "under penalty perjury" with same legal effect as if he had knowledge it or sworn to its truth before a person authorized to administer oaths. As used in this section, "prison" means a person confined in any jail or prison, or any facility for the detention of juvenile offenders, in this state.

VERIFICATION

Under penalties of perjury, the undersigned declares that he is the plaintiff\petitioner named in the foregoing affidavit and that he knows the contents thereof; that the pleading is true of his knowledge, except as to those matters stated on information and belief and that as to such matters he believes it to be true.

Dated this 6th day of December 2004.

Jose Pallares

Defendant In Pro Se

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP 5 (b), I hereby certify that on the 6th day of December, 2004 I mailed a true and correct copy of the foregoing motion for withdrawal of attorney of record and transfer of records addressed to the following persons:

Attorney of Record

Gary E. Gowen

Jose C. Pallares

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056
200 South Third Street
Las Vegas, NV 89155-2212
(702) 455-4711
Attorney for Plaintiff

FILED
2005 JAN 19 A 8:50

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
JOSE LOPEZ GARCIA,
#857283
Defendant.

Case No. C142741
Dept No. V

ORDER GRANTING DEFENDANT'S MOTION FOR TRANSCRIPTS AND MOTION TO PROCEED IN FORMA PAUPERIS

DATE OF HEARING: 12/28/04
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 28th day of December, 2004, the Defendant not being present, in Proper Person, the Plaintiff being represented by DAVID ROGER, District Attorney, through LYNN ROBINSON, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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EX. 28

IT IS HEREBY ORDERED that the Defendant's Motion for Transcripts and Motion to Proceed in Forma Pauperis, shall be, and it is granted.

DATED this 14 day of January, 2005.

JACKIE GLASS
DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

msf

EX. B
Pg. 2 OF 2

JOSE LOPEZ GARCIA, #58710
NNCC P.O. BOX 7000
CARSON CITY, NV 89702-7000

MAY 24, 2005

LISA LUZAICH, CHIEF DEPUTY DA
200 S. THIRD ST.
LAS VEGAS, NV 89155

RE: TRANSCRIPTS; CASE NO. C142741, STATE V. GARCIA

DEAR MS. LUZAICH,

PURSUANT TO COURT ORDER, ATTACHED, WHICH GRANTED MY MOTION FOR TRANSCRIPTS, PLEASE SEND ME A COPY OF THE TRIAL TRANSCRIPTS IN THIS MATTER. IF THE TRANSCRIPTS HAVE NOT BEEN TRANSCRIBED, PLEASE HAVE THIS COMPLETED AS SOON AS POSSIBLE AND SEND ME A COPY.

ALSO, I NEED A COPY OF ALL THE POLICE REPORTS IN THIS MATTER. IF YOU HAVE THOSE, PLEASE SEND ME A COPY.

THANK YOU .

SINCERELY,

José García L.
JOSE LOPEZ GARCIA, #58710

ATTACHMENT

EX. 29

MOT

JOSE LOPEZ GARCIA, #58710
NNCC P.O. BOX 7000
CARSON CITY, NV 89702-7000

DEFENDANT IN PRO PER

DISTRICT COURT
CLARK COUNTY

THE STATE OF NEVADA,
PLAINTIFF,

V.

JOSE LOPEZ GARCIA, #857283,
DEFENDANT.

CASE NO. C142741
DEPT. NO. V

MOTION TO SHOW CAUSE

COMES NOW DEFENDANT GARCIA IN PRO SE AND MOVES THIS COU
AN ORDER TO SHOW CAUSE WHY RELIEF SHOULD NOT BE GRANTED PU
TO THIS COURT'S ORDER FILED JANUARY 19, 2005, FOR TRIAL
TRANSCRIPTS. COPY OF SAID ORDER IS ATTACHED HERETO AS
A. ON MAY 24, 2005, GARCIA WROTE THE DISTRICT ATTORNE
COPY OF THE TRIAL TRANSCRIPTS, COPY ATTACHED HERETO
B. TO DATE, GARCIA HAS NOT RECEIVED THE TRIAL TRAN

CERTIFICATE OF SERVICE: DATED AND COPY MAILED
COUNTY DISTRICT ATTORNEY AUGUST 10, 2005, AS CERT
PENALTY OF PERJURY PURSUANT TO NRS 208.165 AND

JOSE LOPEZ G

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

FILED
AUG 16 8 21 AM '05
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
JOSE LOPEZ GARCIA,
#0857283
Defendant.

CASE NO: C142741
DEPT NO: V

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SHOW CAUSE

DATE OF HEARING: August 23, 2005
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Show Cause.

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

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Ex. 31

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On May 12, 1997, Jose Lopez Garcia (hereinafter "Defendant") was charged by way of a five count information with two counts of Sexual Assault on Victim Under Age 16, two counts of Lewdness with a Child Under Age 14, and one count of Abuse, Neglect or Endangerment of a Child. Defendant pled guilty to all counts on August 5, 1998 was sentenced to twenty (20) years in the Nevada State Prison on Counts One and Two, the sentence on Count Two to run consecutive to the sentence on Count One; a minimum of forty-eight (48) and a maximum of one hundred twenty (120) months in the Nevada State Prison on Counts Three and Four, with both sentences to run concurrent to the sentence on Count Two; and one year in the Clark County Detention Center on Count Five concurrent to the sentence on Count Two. The Judgment of Conviction was filed on August 24, 1998.

On August 18, 1998, Defendant filed a Notice of Appeal. Defendant's appeal was later dismissed on February 2, 2000 with the remittitur issuing on the same day.

On December 10, 2004 Defendant filed a Motion for Transcripts and a Motion to Proceed in Forma Pauperis. Defendant's motions were granted on December 28, 2004. Subsequent to granting these motions, rather than request transcripts from the Clerk's Office, Defendant mailed his request for transcripts to this office. Defendant now brings a Motion to Show Cause in an effort to get this office to supply Defendant with the ordered transcripts. The State opposes Defendant's motion with the following:

ARGUMENT

PROVIDING TRANSCRIPTS IS NOT THE RESPONSIBILITY OF THE DISTRICT ATTORNEY'S OFFICE.

The State has no objection to Defendant being supplied with transcripts as ordered by the court. However providing transcripts is a function of the Clerk's Office and not the District Attorney's office. *See* EJDCR 7.28. According to Defendant's motion, a request for transcripts was mailed to this office, but no such request was mailed to the Clerk's Office. Since the production of transcripts is not this office's responsibility and Defendant has failed

to request transcripts from the Clerk's Office, Defendant's motion should be denied.

CONCLUSION

For the foregoing reasons the State respectfully requests that Defendant's Motion to Show Cause be DENIED.

DATED this 16th day of August, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 16th day of August, 2005, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOSE LOPEZ GARCIA #58710
PO BOX 7000 (N.N.C.C.)
CARSON CITY, NV 89702

_____
Secretary for the District Attorney's Office

bk/JRS/sam

Jose Lopez Garcia
NDOC Inmate No. # 58710
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702-7000

Petitioner, In Proper Person

FILED
May 17 2 21 PM '87
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSE LOPEZ GARCIA,
Petitioner,
-vs-
THE STATE OF NEVADA,
Respondent.

CASE NO: C142741
DEPT NO: V

MOTION TO VACATE CONVICTION FOR ACTUAL INNOCENCE

COMES NOW, Petitioner, JOSE LOPEZ GARCIA, in proper person, and pursuant to all applicable Rules of Criminal Procedure; U.S.C.A. § 5, 6 and 14 Amendments to the U.S. Constitution; N.R.S. 178.556; Nevada Constitution Art. 1, Sec. 8, and the holdings of Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594 (1972), wherein, a proper person pleading is held to less stringent standards than professional attorneys, do hereby sumit the instant Motion to Vacate Conviction for Actual Innocence to this Honorable Court for it's review and decision. The Petitioner further request that this Court liberally construe his motion based upon the fact that he is a "layman," acting in proper person, without the benefit of assistance of counsel, and he is not skilled or trained in the in the preparation of legal documents or judicial procedures. See Brown v. Vasquez, 952 F.2d 1164, 1166 (9th Cir. 1991). Petitioner further requests that this Court review his Motion liberally and interpret it to raise the strongets inferences and arguments from

EX. 32

the facts in his favor. McPherson v. Coomb, 174 F.3d 279 (9th Cir. 1999).

This Motion is made and based upon the attached Points and Authorities; all pleadings, papers, records and documents on file with the Clerk of the Court.

Dated, this 11 day of MAY, 2007.

Respectfully Submitted,

José Garcia L.

JOSE LOPEZ GARCIA
Petitioner, In Proper Person

NOTICE OF MOTION

NOTICE IS HEREIN GIVEN that on the date noted above, a true and correct copy of the attached MOTION TO VACATE CONVICTION FOR ACTUAL INNOCENCE, was mailed to all counsel of record pursuant to N.R.C.P. Rule 5(b).

DATED: this 11 day of MAY, 2007.

JOSE LOPEZ GARCIA
NDOC Inmate No. #58710
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702-7000

Petitioner, In Proper Person

POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY

The Petitioner, JOSE LOPEZ GARCIA (hereinafter "Petitioner), was arrested on or about March 27, 1997, on alleged sexual assault charges which occurred sometime in the summer of 1996.

On May 12, 1997, Petitioner was charged by Information with two (2) Counts of Sexual Assault on Victim Under Age 16, two (2) Counts of Lewdness with a Child Under Age 14, and on (1) Count of Abuse, Neglect or Endangerment of a Child.

On June 16, 1998, Petitioner appeared in Department No. 8, District Court, Honorable Lee A. Gates, for jury trial and was represented by Jose Pallares, Esq., with appearances for the State by Teresa Lowry and Jennifer Togliatti, Deputy District Attorneys. Petitioner was ultimately found guilty on all counts on or about August 5, 1998, and was sentenced to twenty (20) years in the Nevada State Prison on Counts One and Two; the sentence on Count two to run consecutive to the sentence on Count One; a minimum sentence of forty-eight (48) months and a maximum of one hundred-twenty (120) months in the Nevada State Prison on Counts Three and Four, with both sentences to run concurrently to the sentence on Count Two, and one (1) year in the Clark County Detention Center on Count Five which is concurrent to the sentence on Count Two. Judgment of Conviction was filed on August 24, 1998.

On August 18, 1998, Petitioner filed a timely Notice of Appeal through his counsel Jose Pallares. The Nevada Supreme Court order Mr. Pallares to file Fast Track Appeal which was prepared and submitted by an attorney suffering from anxiety, depression and alcoholism. The Petitioner's appeal was subsequently dismissed on or about February 2, 2000. The Petitioner was not provided with his transcripts and/or files of which Mr. Pallares had in his possession and because of the lack of acknowledgement of Petitioner's transcripts and legal materials

Jose Lopez Garcia
NDOC Inmate No. # 58710
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702-7000

FILED
MAY 17 2 20 PM '07
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSE LOPEZ GARCIA,
Petitioner,
-vs-
THE STATE OF NEVADA,
Respondent.

CASE NO: C142741
DEPT NO: V

MOTION FOR APPOINTMENT OF COUNSEL
PURSUANT TO NRS 34.750 and NRS 178.397

The Petitioner, JOSE LOPEZ GARCIA, in proper person, and pursuant to the provisions of NRS 34.750 and NRS 178.397, inclusive, request this Honorable Court to appoint counsel to represent him in this Motion To Vacate Conviction For Actual Innocence, for the following reasons:

1. Petitioner is unable to afford counsel as represented in his Motion for Leave to Proceed in Forma Pauperis and Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis filed in the above-entitled Court.

2. The issues involved in this matter are very complex.

3. There are matters involved in this case that require investigation which the Petitioner cannot do-while confined to prison.

4. The Petitioner is in the mental health unit of the prison (NNCC) and takes psycotropic medications; he is a layman and has no knowledge or skill of judicial process and law thereof.

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5. The ends of justice would best be served in this case if an attorney is appointed to represent the Petitioner.

DATED: this 11 day of MAY, 2007.

Respectfully Submitted,

José López G.

JOSE LOPEZ GARCIA
Petitioner, In Proper Person

Electronically Filed
05/30/2007 01:01:06 PM

CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JOSE LOPEZ GARCIA, #0857283 Defendant.	CASE NO: C142741 DEPT NO: V

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE CONVICTION FOR ACTUAL INNOCENCE AND APPOINTMENT OF COUNSEL

DATE OF HEARING: 05/31/07
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Vacate Conviction For Actual Innocence and Appointment of Counsel.

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

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Ex. 33

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On May 12, 1997, Jose Lopez Garcia (hereinafter "Defendant") was charged by way of a five count Information with two counts of Sexual Assault on Victim Under Age 16, two counts of Lewdness with a Child Under Age 14, and one count of Abuse, Neglect or Endangerment of a Child. Defendant pled guilty to all counts on August 5, 1998, and was sentenced to twenty (20) years in the Nevada State Prison on Counts One and Two, the sentence on Count Two to run consecutive to the sentence on Count One; a minimum of forty-eight (48) and a maximum of one hundred-twenty (120) months in the Nevada State Prison on Counts Three and Four, with both sentences to run concurrent to the sentence on Count Two; and one year in the Clark County Detention Center on Count Five concurrent to the sentence on Count Two. The Judgment of Conviction was filed on August 24, 1998.

On August 18, 1998, Defendant filed a Notice of Appeal. Defendant's appeal was later dismissed on February 2, 2000 with the remittitur issued on the same day.

On May 17, 2007, Defendant filed the instant motion to vacate for actual innocence and appointment of counsel. The State responds as follows.

ARGUMENT

I. DEFENDANT'S BARE CLAIM OF ACTUAL INNOCENCE DOES NOT JUSTIFY RELIEF

Defendant's claim of actual innocence fails pursuant to Calderon v. Thompson, 523 U.S. 538 (1998). In Calderon, the United States Supreme Court held that "'[t]o be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial... If the petitioner asserts his actual innocence of the underlying crime, he must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" presented. Id. at 559.

Defendant's claim of actual innocence is bare and fails under Calderon. Further, even if this issue were cognizable, it still fails because Defendant has not brought forth any evidence not presented at trial. Defendant, in the instant motion, has clearly not met his required burden;

he has merely made a bare claim of actual innocence. Consequently, this claim warrants no relief, and the court should deny the instant motion.

A. DEFENDANT'S MOTION IS BARRED BY THE DOCTRINE OF EQUITABLE LACHES

The Defendant's claim is barred by the doctrine of equitable laches. Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000). As the Nevada Supreme Court observed in Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984) "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." The Nevada Supreme Court has held that in applying the doctrine of laches to an individual case, several factors should be considered, including, "(1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State." Hart, 116 Nev. at 563-64, 1 P.3d at 972.

The delay of close to nine (9) years is inexcusable delay in this matter, and Defendant fails to allege any reason or excuse for such delay. In this case, Defendant's unwarrantable delay constitutes a waiver of his right to bring any claim. Further, the State would be extremely prejudiced if this motion were granted, because it would be very difficult, if not impossible, to determine the truthfulness of Defendant's allegations at this late date. Therefore, the court should deny Defendant's present motion.

II. – DEFENDANT IS NOT ENTITLED TO HAVE AN ATTORNEY APPOINTED

There is no federal constitutional right under the Sixth Amendment and no state constitutional right to counsel in post-conviction relief proceedings. Coleman v. Thompson, 501 U.S. 722, 725, 111 S.Ct. 2546, 2552 (1991); McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996).

The Nevada Supreme Court has observed that a Defendant "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v.

Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)). If this court were to exercise its discretion to appoint counsel, Defendant does not have a right to choose who it should be. See Junior v. State, 91 Nev. 439, 537 P.2d 1204 (1975).

Here, Defendant makes no allegation that he can present non-frivolous issues which would entitle him to appointment of counsel for further proceedings. Defendant had counsel throughout his trial and subsequent direct appeal. Thus, he already has expended substantial public resources and the appointment of counsel would be both unnecessary and a waste of public funds. Defendant has failed to bring forth any claims that would entitle him to post-conviction relief. Defendant simply brings forth a bare request. Thus, Defendant's motion for appointment of counsel should be denied.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Defendant's motion to vacate conviction for actual innocence and appointment of counsel be denied.

DATED this 30th day of May, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 30th day of May, 2007, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOSE LOPEZ GARCIA, #58710
NNCC
P.O. BOX 7000
CARSON CITY, NEVADA 89702

BY M. Warner
Secretary for the District Attorney's Office

mmw/SVU

Jose Garcia
NDOC #58710
N.N.C.C.
P.O. Box 7000
Carson City, Nv. 89702-7000

FILED
JUN 11 2 32 PM '07
CLERK OF THE COURT

District Court
Clark County, Nevada

The State of Nevada,
Plaintiff,

-VS-

Jose Garcia,
Defendant.

Case #C142741
Dept. #V

Notice to the Court

My case was scheduled to be heard on May 31, 2007. On June 4, 2007 I received the State's opposition; dated May 30, 2007 and postmarked May 31, 2007.

The State is aware that I am without counsel and did not give me an opportunity to respond to its opposition.

Conclusion

Therefore I request that this court disregard the State's opposition and appoint counsel to supplement and represent my motion to vacate conviction for actual innocence.

Dated this seventh day of June, 2007.

Respectfully Submitted By

Jose Garcia

Jose Garcia

Ex. 34

Certificate of Mailing

I hereby certify that service of the above and foregoing was made this seventh day of June, 2007.
By depositing a copy in the U.S. mail.
Postage pre-paid, addressed to:

David Roger
Clark County District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, Nv. 89155

By José Garcia.
Jose Garcia

CRIMINAL COURT MINUTES

97-C-142741-C STATE OF NEVADA vs Garcia, Jose L

CONTINUED FROM PAGE: 012

10/11/05 08:30 AM 00 DEFT'S PRO PER MTN TO SHOW CAUSE /24

HEARD BY: Jackie Glass, Judge; Dept. 5

OFFICERS: Sandra Jeter/sj, Court Clerk
Cynthia Georgilas, Relief Clerk
Carlaya Lewis, Reporter/Recorder

PARTIES:		
	STATE OF NEVADA	Y
006237	Brierly, Tracey J.	Y

Court NOTED on January 19 it granted the defendant's motion for transcripts; therefore, ORDERED, instant motion DENIED as it is MOOT. Defendant is to contact the Court Recorder, Carlaya Lewis, to request the transcripts.

NDC

05/31/07 08:30 AM 00 ALL PENDING MOTIONS 5/31/07

HEARD BY: Jackie Glass, Judge; Dept. 5

OFFICERS: Sandra Jeter, Court Clerk
Rachelle Hamilton, Reporter/Recorder

PARTIES:		
	STATE OF NEVADA	Y
008610	Pieper, Danielle K.	Y
0001 D1	Garcia, Jose L	N
PRO SE	Pro Se	Y

Deft. not present and in custody at the Nevada Department of Corrections.

DEFT.'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS: COURT ORDERED, motion GRANTED.

DEFT.'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL...DEFT.'S PRO PER MOTION TO VACATE CONVICTION FOR ACTUAL INNOCENCE: Court stated its findings and ORDERED, motions DENIED. State to prepare the Order.

NDC

CONTINUED ON PAGE: 014

Ex. 35

CRIMINAL COURT MINUTES

97-C-142741-C STATE OF NEVADA vs Garcia, Jose L

CONTINUED FROM PAGE: 013

01/22/08 08:30 AM 00 DEFT'S PRO PER RQST FOR STATUS CHECK/29

HEARD BY: Jackie Glass, Judge; Dept. 5

OFFICERS: Sandra Jeter, Court Clerk
Nora Pena/np, Relief Clerk
Rachelle Hamilton, Reporter/Recorder

PARTIES:

	STATE OF NEVADA	Y
006639	Fattig, John T	Y
0001 D1	Garcia, Jose L	N
PRO SE	Pro Se	Y

COURT ORDERED, Deft's pro per motion is DENIED.

NDC