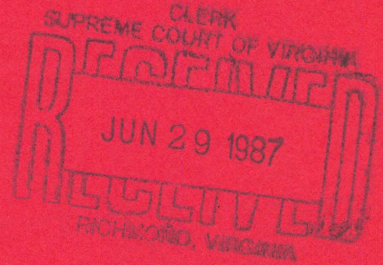


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IN THE
SUPREME COURT OF VIRGINIA



MAR 16 1988

RECORD NO. 861224

EDWARD MURRAY, DIRECTOR, etc.,

Appellant,

v.

COSME MARTINEZ,

Appellee.

APPENDIX

MARY SUE TERRY
Attorney General of Virginia

ROBERT B. CONDON
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

TABLE OF CONTENTS

	<u>PAGE</u>
Indictments returned against appellee, June 3, 1974.....	1
Final judgment orders of appellee's criminal trial, June 21, 1974.....	3
Excerpts from the transcript of appellee's criminal trial on June 21, 1974.....	7
Arraignment (Tr. 3-8).....	7
Admission of medical examiner's report and autopsy report (Tr. 14-15).....	14
Testimony of Sgt. Isaac L. Jones (Tr. 15-19).....	15
Admission of Commonwealth's Exhibit 3 (Tr. 18-19).....	18
Stipulation (Tr. 24).....	21
Findings of guilt (Tr. 26).....	23
Colloquy regarding sentencing (Tr. 27-29).....	24
Admission of Commonwealth's Exhibit 5 (Tr. 29).....	26
Sentencing (Tr. 29-30).....	26
Commonwealth's Exhibit 3.....	28
Commonwealth's Exhibit 5.....	31
Petition for a writ of habeas corpus.....	32
Final judgment order in habeas corpus proceeding, entered October 2, 1986.....	47
Notice of Appeal.....	49
Assignment of Error.....	51
Excerpts from the transcript of the habeas corpus plenary hearing on August 21, 1986.....	52
Testimony of Cosme Martinez (Tr. 5-20).....	52
Testimony of Kenneth C. Hogge, Esquire (Tr. 21-27).....	68
Ruling of the trial court (Tr. 37-40).....	75

STATE OF VIRGINIA, CITY OF HAMPTON, TO-WIT:

IN THE CIRCUIT COURT OF THE SAID CITY:

The grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Hampton and now attending the said Court, at its June term,

nineteen hundred and seventy-four, upon their oaths do present;

That COSME MARTINEZ

on the 23rd day of September, in the year one thousand

nine hundred and seventy-three, in the said City, did unlawfully and

feloniously kill and murder Thomas L. Uzzell, to-wit: by shooting and

stabbing, in violation of Section 18.1-21 of the Code of Virginia of

1950, as amended,

against the peace and dignity of the Commonwealth of Virginia. Upon the testimony of,

Det. I. L. Jones

sworn in Court, and sent to the Grand Jury to give evidence.

000001

STATE OF VIRGINIA, CITY OF HAMPTON, TO-WIT:

IN THE CIRCUIT COURT OF THE SAID CITY:

The grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Hampton and now attending the said Court, at its June term, nineteen hundred and seventy-four, upon their oaths do present; That COSME MARTINEZ on the 23rd day of September, in the year one thousand nine hundred and seventy-three, in the said City, on Thomas L. Uzzell did feloniously make an assault by the threat and presenting of deadly weapons and instrumentalities, to-wit: a gun and a knife, he the said Thomas L. Uzzell, in bodily fear feloniously did put, and money, United States currency of the value of One Hundred Fifty and 00/100 Dollars (\$150.00), the denominations of such money being to the Grand Jurors unknown, of the goods, chattels and property of the Hess Service Station, 3300 W. Mercury Boulevard, Hampton, Virginia, in the care, custody and control of the said Thomas L. Uzzell, an employee of the Hess Service Station, 3300 W. Mercury Boulevard, Hampton, Virginia, and from the person and against the will of the said Thomas L. Uzzell then and there, to-wit: on the day and year aforesaid, in the City aforesaid, feloniously and violently did steal, take, carry away and rob, in violation of Section 18.1-91 of the Code of Virginia of 1950, as amended,

against the peace and dignity of the Commonwealth of Virginia. Upon the testimony of,

Det. I. L. Jones

sworn in Court, and sent to the Grand Jury to give evidence.

000002

Commonwealth

vs.

Felony - Viol. of Section 18.1-21
(Murder)

Cosme Martinez

This day came the Assistant Attorney for the Commonwealth and Cosme Martinez (born December 19, 1945), who stands indicted of a felony, to-wit: Viol. of Section 18.1-21 (Murder) was led to the bar in the custody of the jailor of this Court.

Whereupon the accused was arraigned and after private consultation with Kenneth C. Hogge, counsel heretofore appointed by the Court, pled not guilty to the indictment, which plea was tendered by the accused in person, and thereupon the accused after having been first advised by his attorney, waived trial by jury and with the concurrence of the Assistant Attorney for the Commonwealth and the Court, here entered or record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and having heard the evidence doth find the accused guilty of Viol. of Section 18.1-21 (Murder) as charged in the indictment, and ascertains his punishment to be Fifteen (15) years in the State penitentiary.

And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the said Cosme Martinez be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for the term of Fifteen (15) years, the period by the Court ascertained as aforesaid, and that the Commonwealth of Virginia do recover against the said Cosme Martinez its costs by it about its prosecution in this behalf expended.

000003

And it is further ordered that as soon as possible after the entry of this order the prisoner be removed and safely conveyed according to law from the jail of this Court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

The Court certifies that at all times during the trial of this case the accused was personally present.

This sentence is to run concurrently with the sentence the defendant is currently serving in the state of Texas, but not with any sentence of this Court or any other Court.

And the prisoner is remanded to jail.

Commonwealth

vs.

Felony - Viol. of Section 18.1-91
(Armed Robbery)

Cosme Martinez

This day came the Assistant Attorney for the Commonwealth and Cosme Martinez (born December 19, 1945), who stands indicted of a felony, to-wit: Viol. of Section 18.1-91 (Armed Robbery), was led to the bar in the custody of the jailor of this Court.

Whereupon the accused was arraigned and after private consultation with Kenneth C. Hogge, counsel heretofore appointed by the Court, pled not guilty to the indictment, which plea was tendered by the accused in person, and thereupon the accused after having been first advised by his attorney, waived trial by jury and with the concurrence of the Assistant Attorney for the Commonwealth and the Court, here entered or record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and having heard the evidence doth find the accused guilty of Viol. of Section 18.1-91 (Armed Robbery) as charged in the indictment, and ascertains his punishment to be Fifteen (15) years in the State penitentiary.

And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the said Cosme Martinez be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for the term of Fifteen (15) years, the period by the Court ascertained as aforesaid, and that the Commonwealth of Virginia do recover against the said Cosmo Martinez its

costs by it about its prosecution in this behalf expended.

And it is further ordered that as soon as possible after the entry of this order the prisoner be removed and safely conveyed according to law from the jail of this Court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

The Court certifies that at all times during the trial of this case the accused was personally present.

This sentence is to run concurrently with the sentence the defendant is currently serving in the state of Texas, but not with any sentence of this Court or any other Court.

And the prisoner is remanded to jail.

1 (The Court Reporter
2 was duly sworn.)

3 (The Defendants were
4 present, seated at counsel
5 table.)

6 COURT: All right, gentlemen, that
7 brings us to the matter of the Commonwealth of Virginia
8 against Henri Ortiz, two indictments; the matter of the
9 Commonwealth of Virginia against Cosme Martinez. The
10 Commonwealth ready?

11 MR. DUFF: Yes sir.

12 COURT: The Defendants ready?

13 MR. HOGGE: Yes sir.

14 COURT: All right. Mr. Martinez,
15 will you stand, please?

16 (At this time, the
17 Defendant stood.)

18 COURT: You are Cosme Martinez?

19 MR. C. MARTINEZ: Yes sir.

20 COURT: How old are you, Mr. Martinez?

21 MR. C. MARTINEZ: Twenty-eight.

22 COURT: What?

23 MR. C. MARTINEZ: Twenty-eight.

24 COURT: What year or grade in school
25 did you complete?

1 MR. C. MARTINEZ: Seventh grade.

2 COURT: Where was that?

3 MR. C. MARTINEZ: In Texas.

4 COURT: Where in Texas?

5 MR. C. MARTINEZ: Beeville.

6 COURT: Beeville. All right. All
7 right, now, you have had placed against you two indictments.
8 One for murder and one for robbery. Are you familiar with
9 these indictments?

10 MR. C. MARTINEZ: Yes sir.

11 COURT: Do you understand what they
12 mean?

13 MR. C. MARTINEZ: Yes sir.

14 COURT: All right. Mr. Hogge has
15 been appointed to represent you. Have you had sufficient
16 time to confer with him and prepare yourself for trial
17 today?

18 MR. C. MARTINEZ: Yes sir.

19 COURT: Were there any witnesses you
20 wanted present to testify for you who are not here?

21 MR. C. MARTINEZ: No sir.

22 COURT: Are you ready for trial now?

23 MR. C. MARTINEZ: Yes sir.

24 COURT: Remain standing for the
25 arraignment.

CLERK: Cosme Martinez, the Grand Jurors, regularly impanelled and sworn, in and for the body of the City of Hampton, have found the following indictment against you. That Cosme Martinez, on the 23rd day of September, in the year 1973, in the said City of Hampton, Virginia, on Thomas L. Uzzell did feloniously make an assault by the threat and presenting of deadly weapons and instrumentalities, to-wit: a gun and a knife, he, the said Thomas L. Uzzell, in bodily fear feloniously did put, and money, United States Currency, of the value of One Hundred Fifty Dollars, the denominations of such money being to the Grand Jurors unknown, of the goods, chattels and Property of the Hess Service Station, 3300 West Mercury Boulevard, Hampton, Virginia, in the care, custody and control of said Thomas L. Uzzell, an employee of the Hess Service Station, 3300 West Mercury Boulevard, Hampton, Virginia, and from the person and against the will of the said Thomas L. Uzzell, then and there, to-wit: on the day and year aforesaid, in the city aforesaid, feloniously and violently did steal, take, carry away and rob, in violation of Section 18.1-91 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth of Virginia.

How say you, are you guilty of the felony whereof you stand indicted, or not guilty?

1 MR. C. MARTINEZ: Not guilty.

2 CLERK: Cosme Martinez, the Grand
3 Jurors, regularly impanelled and sworn, in and for the
4 body of the City of Hampton, have found the following
5 indictment against you. That Cosme Martinez, on the 23rd
6 day of September, 1973, in the said City of Hampton,
7 Virginia, did unlawfully and feloniously kill and murder
8 Thomas L. Uzzell, to-wit: by shooting and stabbing, in
9 violation of Section 18.1-21 of the Code of Virginia of
10 1950, as amended, against the peace and dignity of the
11 Commonwealth of Virginia.

12 . How say you, are you guilty of the
13 felony whereof you stand indicted, or not guilty?

14 MR. C. MARTINEZ: Not guilty.

15 COURT: All right. The pleas of
16 not guilty as to both these indictments will be recorded.

17 Now, Mr. Martinez, in view of your
18 pleas, you have the choice or option to be tried on these
19 charges by a jury or to waive trial by jury and be tried
20 by the Court. Have you talked to Mr. Hogge about this?

21 MR. C. MARTINEZ: Yes sir.

22 COURT: Do you understand the choice
23 that you have?

24 MR. C. MARTINEZ: Yes sir.

25 COURT: All right. Do you want to

1 have a trial by jury or you wish to waive trial by jury?

2 MR. C. MARTINEZ: I wish to waive,
3 waive.

4 COURT: Has this been thoroughly
5 discussed, Mr. Hogge?

6 MR. HOGGE: Yes sir.

7 COURT: Does the Commonwealth concur
8 in the waiver?

9 MR. DUFF: We so concur.

10 COURT: As does the Court. The
11 record will so reflect.

12 , There's one other matter, Mr. Martinez.
13 You have been indicted and been arraigned and pled to
14 certain charges this morning. Henri Ortiz, who is sitting
15 next to you there, has also been indicted for the same
16 crime. Now, you are entitled, if you wish, to a separate
17 trial. If you and Mr. Ortiz both wish the charges against
18 you to be heard at the same time, and if the Commonwealth
19 does not object, we will allow that to go that way. But
20 if you want to have separate hearings, you may also do
21 that.

22 Have you talked to Mr. Hogge about
23 this, or do you want to talk to him again first?

24 MR. C. MARTINEZ: It's all right.

25 COURT: Together?

1 MR. C. MARTINEZ: Yes sir.

2 COURT: Mr. Hogge?

3 MR. HOGGE: Yes sir.

4 COURT: Is that satisfactory with
5 the Commonwealth?

6 MR. DUFF: Yes, your Honor.

7 COURT: You may have a seat, Mr.
8 Martinez.

9 (At this time, Mr.
10 Martinez took his seat.)

11 COURT: Mr. Ortiz.

12 (At this time, Mr.
13 Ortiz stood up.)

14 COURT: You are Henri Ortiz?

15 MR. H. ORTIZ: Yes sir.

16 COURT: How old are you?

17 MR. H. ORTIZ: Twenty-six, sir.

18 COURT: Twenty-six. What grade or
19 year in school did you complete?

20 MR. H. ORTIZ: Thirteenth. One year
21 in college.

22 COURT: You graduated from high
23 school?

24 MR. H. ORTIZ: No sir, Army.

25 COURT: All right. What school, what

1 Ortiz took his seat.)

2 COURT: All right, gentlemen, what
3 witnesses do you want sworn?

4 MR. DUFF: If your Honor please,
5 Mr. Williams, Sergeant Jones and Lieutenant Bailey.

6 (At this time, the
7 witnesses were called and duly
8 sworn.)

9 COURT: You want the witnesses
10 separated, gentlemen?

11 MR. HOGGE: Beg your pardon?

12 COURT: You want the witnesses
13 separated?

14 MR. HOGGE: Yes sir.

15 COURT: I'll ask the witnesses to go
16 with the Bailiff, please.

17 (At this time, the
18 witnesses were excluded from
19 the Courtroom.)

20 COURT: All right, gentlemen, do you
21 wish to conduct an opening?

22 MR. DUFF: The Commonwealth waives
23 opening argument, your Honor.

24 MR. HOGGE: I'll waive the opening.

25 COURT: All right, sir.

1 MR. DUFF: If your Honor please,
2 the Commonwealth at this time, with no objection by the
3 Defense Counsel, would ask to introduce the Commonwealth
4 Exhibits Number One and Two, Exhibit Number One, the report
5 of the examination of the medical examiner.

6 COURT: Any objection to this, Mr.
7 Hogge?

8 MR. HOGGE: No sir.

9 COURT: Commonwealth's Exhibit
10 Number One is admitted in evidence.

11 (At this time, the
12 report of the medical examiner
13 was received and marked as Com-
14 monwealth's Exhibit Number One.)

15 MR. DUFF: Exhibit Number Two, the
16 report of autopsy, chief medical examiner.

17 COURT: Mr. Hogge?

18 MR. HOGGE: No objection.

19 COURT: Commonwealth Exhibit Number
20 Two is admitted in evidence.

21 (At this time, the
22 autopsy report was received
23 and marked as Commonwealth's
24 Exhibit Number Two.)

25 COURT: Just one moment.

1 (At this time, the
2 Court perused the documents.)

3 COURT: All right, sir.

4 MR. DUFF: If your Honor please, the
5 Commonwealth would call its first witness as Sergeant Jones.

6 COURT: Sergeant Jones.

7 MR. HOGGE: If it please the Court,
8 there will be statements made by both Defendants. I would
9 like to point out they should not be used against each
10 Defendant, because they were not in the presence of each
11 of them.

12 COURT: All right, it will be so
13 considered.

14 - - -

15
16
17 SERGEANT ISAAC L. JONES, called as a
18 witness by the Commonwealth, being duly sworn, testified
19 as follows:

20
21 DIRECT EXAMINATION

22
23 BY MR. DUFF:

24 Q State your full name, please, sir.

25 A Isaac L. Jones.

1 Q And by whom are you employed, sir?
2 A Hampton Police Division.
3 Q What capacity?
4 A Patrol Sergeant.
5 Q All right. Sergeant Jones, were you
6 employed by the Hampton Police Department on September 30th
7 of last year, sir?
8 A Yes sir, I was.
9 Q On that particular day, did you
10 interrogate Cosme Martinez?
11 A Permission to refer to my notes?
12 Q Do so.
13 A Yes sir, I did.
14 Q All right. Sergeant Jones, where
15 did this interrogation take place?
16 A In Beeville, Texas.
17 Q All right, sir, and what matter were
18 you investigating at that time?
19 A I was investigating the robbery of
20 the Hess Station on West Mercury Boulevard and the murder
21 of Thomas Uzzell.
22 Q All right, sir. Sergeant Jones, I --
23 (At this time, a docu-
24 ment was exhibited to Defense
25 Counsel.)

1 BY MR. DUFF:

2 Q I show you this, and ask you whether
3 those rights (indicating) were read to Mr. Martinez?

4 A Yes sir, they were.

5 Q And did you engage in the interroga-
6 tion on the pages following so?

7 A Yes sir, I did.

8 MR. DUFF: All right. At this time,
9 if your Honor please, I would ask to introduce, for
10 identification purposes only, as Commonwealth's Exhibit
11 Number Three.

12 COURT: Mark it for identification,
13 Commonwealth's Exhibit Number Three.

14 (At this time, the
15 warning and statement were re-
16 ceived and marked as Common-
17 wealth's Exhibit Number Three,
18 for identification.)

19 MR. DUFF: Thank you, your Honor.

20 BY MR. DUFF:

21 Q Who was present at the time of the
22 interrogation, sir?

23 A The Defendant and Lieutenant G. V.
24 Bailey.

25 Q All right, sir. On the third page

1 of Commonwealth Exhibit Number Three, some questions
2 apparently were posed to the Defendant. Did Lieutenant
3 Bailey pose some of those questions, sir?

4 A Yes sir, he did.

5 Q Were you present at the time he so
6 questioned?

7 A Yes sir, I was.

8 Q All right, sir. Is this the extent
9 of the interrogation of this particular Defendant in this
10 matter?

11 A Yes sir.

12 MR. DUFF: Prior to introduction
13 into evidence, your Honor, I give Defense Counsel an
14 opportunity to cross examine.

15 MR. HOGGE: I don't have any ques-
16 tions to ask the Officer.

17 COURT: All right, sir.

18 MR. DUFF: I ask to introduce Com-
19 monwealth's Exhibit Number Three into evidence at this
20 time.

21 COURT: Is there objection?

22 MR. HOGGE: No sir. I have read
23 it with the Defendant, and it is what was said.

24 COURT: All right, sir. Common-
25 wealth's Exhibit Number Three, consisting of page entitled

1 warnings, a page entitled voluntary statement, and a page
2 of questions and answers will be admitted in evidence,
3 there being no objection.

4 (At this time, the
5 warning and statement were re-
6 ceived and marked as Common-
7 wealth's Exhibit Number Three.)

8 BY MR. DUFF:

9 Q Officer Jones, on September 30,
10 1973, in Beeville, Texas, did you have occasion to speak
11 with the Defendant, Ortiz?

12 A Yes sir, I did.

13 Q And did you interrogate him, sir?

14 A Yes sir, I did.

15 Q All right. Did he give you a state-
16 ment, sir?

17 A Yes sir, he did.

18 Q And are these -- I ask you to take
19 a look. Are these the rights that were read to him, sir?

20 A Yes sir.

21 Q And the next two pages, are those
22 the statements which he gave?

23 A Yes sir, they are.

24 Q All right, sir. Who was present at
25 this time?

1 used on the old man at the station. The only other knives
2 in the car were a butter knife and a small knife that you
3 use on your fingernails."

4 MR. DUFF: I ask to introduce the
5 written statement in evidence at this time, if your Honor
6 please.

7 MR. HOGGE: I have no objection to
8 that.

9 COURT: Commonwealth Exhibit Number
10 Four, consisting of page entitled warnings, page entitled --
11 two pages entitled voluntary statement, admitted in evidence,
12 there being no objection.

13 (At this time, the
14 warning and statement were re-
15 ceived and marked as Common-
16 wealth Exhibit Number Four.)

17 COURT: All right.

18 MR. DUFF: At this time, as far as
19 this witness is concerned, your Honor, the Commonwealth
20 has no further questions.

21 COURT: May Sergeant Jones be
22 excused?

23 MR. HOGGE: I have no questions
24 from him.

25 MR. DUFF: I would ask that he remain,

1 if your Honor please.

2 COURT: All right. I'll ask you to
3 go back to the witness room, if you will, please.

4 Next witness.

5 MR. DUFF: If your Honor please, the
6 next witness will, in effect, be a stipulation with the
7 statements contained therein in Commonwealth's Exhibits
8 Numbers Three and Four would be corroborative by witnesses
9 in the witness room at present.

10 COURT: Do the Defendants, both of
11 them, so stipulate?

12 MR. HOGGE: Yes sir.

13 COURT: All right.

14 MR. DUFF: If your Honor please,
15 the Commonwealth rests.

16 MR. HOGGE: If it please the Court,
17 at this point, on behalf of the Defendant, Henri Ortiz,
18 on his statements, which do not implicate him in any manner,
19 other than being present. Of course, mere presence does
20 not constitute a violation of the law. I would ask the
21 Court to strike the evidence on both the charges against
22 Henri Ortiz at this point.

23 MR. DUFF: If your Honor please,
24 at this time the Commonwealth would merely state the
25 evidence presented to the Court is everything we possibly

1 can have, and I think it certainly shows the position that
2 the accident -- I'm sorry, at the murder scene was certainly
3 in close proximity thereto, and ask the Court to take that
4 into consideration.

5 COURT: All right, anything further,
6 Mr. Hogge?

7 MR. HOGGE: No sir, I don't believe
8 so. The Court has had an opportunity to hear the statement.

9 COURT: All right. Mr. Ortiz, if
10 you will please stand.

11 (At this time, Mr.
12 Ortiz stood.)

13 COURT: On motion of your counsel,
14 consideration of the evidence thus far adduced by the
15 Commonwealth against you, the Court strikes the evidence
16 of the Commonwealth as to the charges against you, and the
17 charges are dismissed.

18 You may have a seat over there by
19 Mr. Cross.

20 MR. HOGGE: If it please the Court,
21 we do not desire to put on any evidence on behalf of Mr.
22 Martinez.

23 COURT: I understand the Defendant,
24 Martinez, rests. Consequently, there will be no rebuttal.
25 The witnesses in the witness room may be excused.

1 All right, gentlemen, you wish to
2 comment?

3 MR. DUFF: The only thing the Com-
4 monwealth can say, your Honor, certainly by the -- state-
5 ment of the Defendant, Martinez, you heard the stipulation,
6 that said statement would be corroborated, as well as the
7 causes of death and the like shown in the autopsy and
8 medical examiner's report, I believe that the Defendant
9 ought to be found guilty on both counts.

10 MR. HOGGE: If it please the Court,
11 I decline to say anything in opposition to that in light of
12 his statement.

13 COURT: Well, all right, Mr.
14 Martinez, if you will stand, please.

15 (At this time, Mr.

16 Martinez stood.)

17 COURT: Cosme Martinez, on the basis
18 of the evidence adduced concerning the charges against you,
19 the Court finds you guilty of the offense of robbery, as
20 set forth in the indictment, upon which you have been tried
21 today. The Court finds you guilty of the offense of murder,
22 as set forth in the indictment, upon which you have been
23 tried today.

24 Is there anything you want to say
25 before sentence is imposed?

1 MR. C. MARTINEZ: No sir.

2 COURT: You may have a seat.

3 Do either of you gentlemen wish to
4 comment any further as to -- proper disposition, or does
5 this man wish to have a presentence investigation report
6 ordered and considered before sentence is imposed? He
7 has that right, if he wants to.

8 MR. HOGGE: We will waive the pre-
9 sentence report.

10 COURT: All right. Has -- there is
11 some information I would like to have concerning this
12 before imposing sentence. Let me inquire of counsel, and
13 if the Defendant does not wish to disclose, I suppose I'll
14 accede to that. I'd like to know what other charges are
15 now pending against him here or at other states. If the
16 answer to that, none, I'd like to know what other sentences
17 or convictions he now labors under in other states.

18 MR. HOGGE: He has nothing pending.

19 COURT: Nothing pending. Has he
20 been convicted or sentenced for something he has not yet
21 served?

22 MR. HOGGE: He is convicted in the
23 State of Texas of robbery and sentenced to thirty years.

24 COURT: Thirty years?

25 MR. HOGGE: Yes sir.

1 COURT: Is there any portion of that
2 sentence been served?

3 MR. HOGGE: I imagine he's getting
4 credit for time he's spending up here.

5 COURT: Other than that?

6 MR. HOGGE: I don't believe so.

7 COURT: All right, gentlemen, any-
8 thing -- anything else either of you gentlemen wish to say
9 about the matter?

10 MR. DUFF: No, the only thing the
11 Commonwealth would say, because of the crimes involved,
12 certainly we would request a heavy imposition in the
13 number of years.

14 MR. HOGGE: If it please the Court,
15 I would -- like to ask the Court, in light of the fact
16 that he does have thirty years to serve in the State of
17 Texas, it is my understanding you do serve three-quarters
18 of it down there, that any sentencing imposed upon this
19 man today in this Court be allowed to run concurrently
20 with any previously imposed sentence.

21 COURT: All right, sir. If that
22 information is correct, it will be sometime after the year
23 1990 before this man can look for any --

24 MR. HOGGE: That's my understanding.
25 I think the Commonwealth Attorney will corroborate that with

1 a letter.

2 MR. DUFF: Yes, your Honor, we ask,
3 for purposes of what sentencing, that this particular letter
4 be introduced to the Court.

5 COURT: Mr. Hogge, are you familiar
6 with the document?

7 MR. HOGGE: Yes sir, I looked at it.

8 COURT: Is there any objection to
9 the Court considering this in connection with the sentence?

10 MR. HOGGE: No sir, I would like for
11 you to.

12 (At this time, the
13 Court read the letter.)

14 COURT: It's a record -- a letter
15 from Texas Department of Correction, dated December 7, 1973,
16 which indicates the minimum discharge for Mr. Martinez on
17 the sentence in Texas is September 28, 1991.

18 All right, Mr. Martinez, if you will
19 stand, please.

20 (At this time, Mr.
21 Martinez stood.)

22 COURT: On your conviction for the
23 crime of murder, the Court sentences you to serve a term
24 of fifteen years in the State Penitentiary of this State.
25 For your conviction of the crime of robbery, the Court

1 sentences you to serve a term of fifteen years in the State
2 Penitentiary of this State.

3 These sentences are not to run
4 concurrently with each other, but are to run concurrently
5 with the sentence already imposed upon you in the State of
6 Texas.

7 All right, gentlemen.

8 The prisoner is remanded to the
9 custody of the Sheriff for return to the Texas authority.

10 Mr. Ortiz is also in that situation,
11 is he not, for the sentence and execution already in
12 Texas? All right. .

13 (At this time, the
14 Court was adjourned.)

15
16 - - - oOo - - -
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25

WARNINGS TO BE GIVEN BEFORE COMMENCEMENT OF INTERROGATION INCIDENT TO THE
TAKING OF EITHER AN ORAL OR WRITTEN CONFESSION BY PEACE OFFICER OR ATTORNEY
REPRESENTING STATE

You are being held in custody on an accusation that you committed
the offense of Murder of Thomas Uzzell in Hampton, Virginia

Under the law we have the right to ask you for your permission to
question you but before we do so it is our duty to give you the follow-
ing warnings about your rights:

You have the right to remain silent and not make any
statement at all and anything you say and any statement
you make can and will be used in evidence against you
at your trial in court. You have the right to talk to
a lawyer for advice before we ask you any questions
and to have him with you during questioning. If you are
financially unable to employ a lawyer you have the right
to have one appointed free of charge to represent you
and counsel with you before and during any questioning.
If you decide to permit us to question you and obtain
a statement from you without your first consulting a
lawyer and without your having a lawyer present dur-
ing questioning, you will still have the right to
refuse to answer any question you do not wish to
answer and also you will still have the right to
stop answering questions altogether any time you
wish to do so.

QUESTIONS TO BE ASKED AFTER FOREGOING WARNINGS HAVE BEEN GIVEN AND BEFORE
COMMENCEMENT OF INTERROGATION:

Do you fully understand what you have just been told? yes

Bearing in mind the warnings that I have just read to you, are you
willing for me to question you and obtain a statement from you? yes

Casme Martinez

Witnesses:

J. L. Jones
L. V. Bailey

6/21/74
Cam Ex #3
MO
Tucker

000028

VOLUNTARY STATEMENT

NAME OF ACCUSED: Cosme Martinez
OFFENSE CHARGED AGAINST ACCUSED: Murder
NAME OF OFFICER WHO GAVE WARNINGS: I.L. Jones
PLACE WARNINGS GIVEN: CITY OF Beeville, Bee County, Texas
DATE WARNINGS GIVEN: THE 30th DAY OF September 19 73
TIME WARNINGS GIVEN: AT 1:00 o'clock, P.M.

At the above mentioned date, time and place the above mentioned officer, after telling me I was being held in custody on an accusation that I committed the above mentioned offense, called to my attention the Miranda WARNING copied on the back of this page and read to me the warnings set forth in that warning about my rights and then asked me the two questions printed below that warning and I answered "Yes" to each of those questions, doing so of my own free will and accord without being induced to do so by any compulsion, persuasion, threats or promises and fully understanding that by doing so I was giving up the rights of mine mentioned in those warnings and that anything I might thereafter say to me could and would be used in evidence against me in court at my trial. He then asked me more questions and caused the following statement to be prepared to show various answers I gave him. In making those answers I acted of my own free will and accord without being induced to do so by any compulsion, persuasion, threats or promises. We were driving around town, so I pulled into this filling station. I had about 4 or 5 dollars in my pocket. I tell him I put in \$1.50 of gas. So Henry gets out of the car and goes to the rest room. He come back out and tell me to get the gun. As soon as I got the gun it went off by itself. He told me to pull it on that old man. So Henry told me to take him behind the station. That old man started giving me the money. That old man sat down on that floor or concrete or something. Henry told me to shoot him between the eyes and the ear. So I don't know the gun went off by itself. I had it pointed at him. I cut him on the neck or his head or face. Henry and I tried to drive off and I jumped in the car through the window. We drove off and dropped Henry about a block from his apartment.

Cosme Martinez

Witnesses;

I. L. Jones
G. D. Bailey

000029

Q. Lt. Bailey I show you this yellow handled knife and ask you is this the knife
you cut the man with?
A. ...C.M.... Thats the knife, because thats the only one straight like that.

Q. Lt. Bailey Where was Henry when you shot the man?
A. ...C.M.... He was standing right next to me.

Q. Lt. Bailey What is Henry's last name?
A. ...C.M.... Ortiz.

Q. I.L. Jones Who else was with you and Henry Ortiz?
A. ...C.M.... Just Diaz.

Q. I.L. Jones Did Diaz see you take the man around back at gunpoint?
A. ...C.M.... Yes he was sitting in the front seat of the car on the right hand side.

Q. I.L. Jones Who was driving the car when you left the service station ?
A. ...C.M.... Henry Ortiz

Q. I.L. Jones Did Diaz make any statements after the robbery?
A. ...C.M.... He told us to drop him off he didn't want anything to do with it.

Q. Lt. Bailey Do you remember how much money you got?
A. ...C.M.... It was about \$110 or \$115 .

Q. I.L. Jones Who was the money handed to?
A. ...C.M.... As soon as I got out of the car and the gun went off the man handed
me the money. Then Henry told me to take him in back of the station.

Q. I.L. Jones After you got in trouble in Texas what did you do with the gun?
A. ...C.M.... I hid the gun; my brother found it and threw it in the trash. The
trash was picked up and taken to the dump.

Q. I.L. Jones What day or date did this happen?
A. ...C.M.... It was early on the 23rd of September 1973.

Q. I.L. Jones Have you been promised any special favors, immunity , or rewards
for having made these statements?
A. ...C.M.... No, I am doing this to get it off of my mind.

Q. Lt. Bailey Are the statements you gave true to the best of your knowledge?
A. ...C.M.... Yes, sir.

Q. Lt. Bailey Has the above statement been read back to you?
A. ...C.M.... Yes.

Casme Martinez

Witnesses;

I. L. Jones
A. V. Bailey



TEXAS DEPARTMENT OF CORRECTIONS

HUNTSVILLE, TEXAS 77340

December 7, 1973

Sheriff's Office
Hampton, Virginia

Dear Sir:

Notations have been made on our records showing that Our
MARTINEZ, Cosme
No. 236582

will be wanted by your office upon his release from this institution.

You will be notified thrity days prior to the release of this subject
so that you may have an officer here to take him into custody.
Minimum discharge date is 9/28/91.

Yours very truly,

Bureau of Records & Identification

By clh , Deputy

cc— Board of Pardons and Paroles
Austin, Texas
Warden, Huntsville Unit
Huntsville, Texas
Machine Accounting
Huntsville, Texas
Unit Warden
Inmate Diagnostic
File

RO - 7

Handwritten notes:
c/21/74
Car #1
MP
Tulsa

000031

Cause No. Indictment - Violation of Sect. 18.1-21 (MURDER)
Indictment - Violation of Sect. 18.1-91 (ARMED ROBBERY)

Ex Parte

Eighth Circuit Court

Cosme Martinez

of the City of Hampton,

Hampton, Virginia (I)

POST CONVICTION APPLICATION FOR
WRIT OF HABEAS CORPUS

Law 20500

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Cosme Martinez,
hereinafter referred as APPLICANT in the
above-styled and numbered cases and
presents this application for Post-Conviction
Writ of Habeas Corpus under the directions
of the Virginia Code of Criminal Procedure.
APPLICANT would respectfully show and
swears to the Courts as follows:

I:

CONFINEMENT AND RESTRAINT

000032

APPLICANT is unlawfully confined and restrained of his liberty by Allyn R Sielaff, acting in his official capacity as Director of the Virginia Department of Corrections pursuant to a judgement and conviction in the Commonwealth of Virginia Vs Cosme Martinez, in the Eighth Circuit Court of the City of Hampton, Hampton, Virginia, for the offenses of Murder and Armed Robbery. (Although APPLICANT is currently confined in the Texas Department of Corrections, Mr. Allyn R Sielaff, maintains jurisdiction and custody by way of a "non-detainer" hold which he caused to be placed in my Texas Department of Corrections file) The Court assessed sentences at fifteen (15) years for each offense for a total sentence of thirty (30) years. The aforementioned sentence was to run concurrently with the thirty (30) year sentence APPLICANT was then serving in the State of Texas, Department of Corrections. No copy of indictment, judgement and sentence or trial statement of facts are attached hereto as said documents are unavailable to APPLICANT, however, the originals are available to the COURT through the files of the Clerk.

II.

GROUND FOR RELIEF

APPLICANT's conviction under his plea(s) of "Not Guilty" are invalid in that: 000033

- (1) APPLICANT was denied effective assistance of court-appointed counsel.
- (2) APPLICANT's election and decision to be tried by the COURT rather than a jury was based on COUNSEL'S instruction that APPLICANT would receive the same thirty (30) year sentence he (APPLICANT) was then serving in the Texas Department of Corrections, and, furthermore, the APPLICANT would not be returned to the jurisdiction of Virginia upon completion of his Texas sentence.

III

STATEMENT OF THE CASE

On or about June 21, 1974, upon extradition from the province of Texas, Applicant was charged with the offenses of Murder and Armed Robbery by the authorities representing the Commonwealth of Virginia. Thus, two indictments were returned by the Grand Jurors of the City of Hampton, Virginia charging APPLICANT with the offenses of Murder and Armed Robbery.

Hence APPLICANT, an indigent layman, was appointed an attorney, Mr. Kenneth C. Hogge, to undertake APPLICANT's defense representation. APPLICANT conferred twice with Mr. Hogge regarding

the case. It was Counsel's position from the outset, that there wasn't much he could do in way of a defense. Mr Hugge informed APPLICANT that he (COUNSEL) had conferred with the Judge (Hon Nelson T. Overton) Presiding over the cause, and the judge had communicated a plea-agreement with him (COUNSEL) That, APPLICANT could plead "Not Guilty" to the charges in both indictments, however, he (APPLICANT) ~~would~~ be found "Guilty" by the COURT, and would be assessed punishment at thirty (30) years, however, said sentence would run concurrent with the thirty (30) year sentence APPLICANT was serving in the State of Texas. Moreover, COUNSEL informed APPLICANT that when his sentence ends in the State of Texas, so the Virginia sentence would end as well insofar as the State of Virginia would agree to any release stipulations initiated by the authorities in the State of Texas. Evenso, the Judge (Hon Nelson T. Overton) Presiding over my cause ordered my appearance within his chamber and thereby confirmed the agreement. The Hon Nelson T. Overton duly admonished applicant that he (APPLICANT) was never to set foot within the province of the Commonwealth of Virginia.

Consequently, APPLICANT was found "guilty" and was imposed a thirty (30) year sentence,

and APPLICANT was returned to the State of Texas Department of Corrections to serve both sentences concurrently with his (APPLICANT) Texas sentence.

Subsequently, and as the procedure is, regarding all incoming inmates at the Texas Department of Corrections, after APPLICANT had served calander time amounting to nearly ten (10) years, he (APPLICANT) was granted release on Parole in the year 1983, and again in 1984. However, the Virginia Parole Board

objected to APPLICANT's release under the Texas authorities. Now, APPLICANT has served enough calander time to accrue good time totalling thirty (30) years and his "Mandatory" release is soon upcoming. In view of these factors, the Commonwealth of Virginia Department of Correction has

lodged against APPLICANT a "NON-detainer hold" which will prevent APPLICANT's release on Mandatory Supervision under the State of Texas Parole laws.

This, the said actions of the Commonwealth

of Virginia acting as a unity, is contrary to the agreement between COUNSEL and the Hon. Nelson T. Overton, as interpreted by APPLICANT, which was represented to APPLICANT by both COUNSEL and the Judge Presiding.

IV

ARGUMENTS AND AUTHORITIES

APPLICANT maintains that the assistance provided by his COURT-APPOINTED COUNSEL fell far below the minimum standard required by the Sixth Amendment's RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. APPLICANT asserts that his conviction in said cause is therefore invalid, in that his COURT-APPOINTED COUNSEL AND Judge Presiding induced him into accepting a COURT TRIAL by grossly misinforming APPLICANT as to the law in relation to the facts of the case.

APPLICANT will point out, COURT-APPOINTED COUNSEL misinformed APPLICANT that because APPLICANT's sentence would run concurrently with his Texas sentence, that upon completion of his (APPLICANT) Texas sentence, APPLICANT

would have no need of returning to the Commonwealth of Virginia because the latter authority would agree to any release stipulations initiated by the State of Texas authorities. Furthermore, the Judge Presiding (Nelson T Overton) confirmed COUNSEL's statements when he admonished APPLICANT that he must "Never set foot in the Commonwealth of Virginia."

In accord Lawyer must actually assist client in deciding whether to proceed before a Court-trial or a Jury-trial by providing him with an understanding of the law, in relation to the facts, so that any such decision is entered voluntarily and knowingly; and, advice which does not permit accused to make an informed choice, falls below minimum level and the resulting decision cannot be considered to be voluntarily.

When APPLICANT was grossly misinformed about not being returned to the Commonwealth of Virginia, and APPLICANT relied upon that misinformation given by COUNSEL and Judge Presiding over his (APPLICANT) cause, to the extent that it induced applicant to proceed with a Court-trial rather than a Jury-trial,

said decision can not be said to have been entered voluntarily and intelligently. Said plea is invalid and can not stand.

In effect, when COUNSEL did not disclose information to APPLICANT regarding the law in relation to the facts of the case, (to the extent that APPLICANT, after being convicted and transported to designated penitentiary, then found out that upon completion of his Texas sentence, he would be required to return to the Commonwealth of Virginia to satisfy any overlap of time owed them), essential in order for Applicant to make a voluntarily and intelligent decision as to whether he (APPLICANT) should proceed with his cause before the COURT or the JURY.

(2)

MOREOVER, APPLICANT asserts, his decision to proceed before the COURT was involuntarily entered, in that, said decision was the product of an induced bargain and agreement which was later breached by the Commonwealth of Virginia authorities.

APPLICANT maintains that he is not in error in his interpretation of the agreement. COURT-APPOINTED COUNSEL informed APPLICANT,

that in his exchange and decision to proceed with his cause before the COURT, rather than before a jury, the Commonwealth of Virginia would impose a sentence of thirty (30) years to run concurrently with his Texas sentence of thirty (30) years, and upon satisfying his Texas sentence, APPLICANT would, in effect, have satisfied his Virginia sentence. In that APPLICANT had come face to face with a life-threatening situation while being transported to the Commonwealth of Virginia, and upon his confinement in the Hampton City Jail, Hampton, Virginia, the APPLICANT related and explained said facts to his COURT-APPOINTED COUNSEL, and readily accepted the agreement upon learning that his return to the Commonwealth of Virginia would not be required.

Consequently, on the date of trial, COURT-APPOINTED COUNSEL represented to APPLICANT that COUNSEL had discussed with Judge Presiding (Nelson T. Overton): COUNSEL reassured APPLICANT that he had nothing to worry about, because he would not be returned to the Commonwealth of Virginia once surrendered to the Texas State authorities.

Hence, following COUNSEL's advice, the APPLICANT proceeded with his cause before the COURT. The COURT failed to admonish APPLICANT as to whether he fully understood the COURT PROCEEDINGS. APPLICANT entered a plea of "Not Guilty," however, was found "guilty" by the COURT, and sentence was imposed whereby APPLICANT was immediately transported to the State of Texas, Department of Corrections.

APPLICANT asserts, that whether for lack of communications, negligence or deception, the Commonwealth of Virginia did not fulfill the agreement as interpreted by APPLICANT when COURT-APPOINTED COUNSEL represented said plea-agreement to him. APPLICANT was astounded to learn from the records at the Texas Department of Corrections that by way of a "non-detainer hold" the Commonwealth of Virginia surely require his person to satisfy any overlap of the Virginia sentence upon APPLICANT's completion of his Texas sentence. When, prior to trial, he (APPLICANT) had been assured that he had nothing to worry about, and that APPLICANT's return to the Commonwealth of Virginia would not be required.

The United States District Court has held: " In determining the scope of a plea-bargain it is improper to use a subjective standard, the test is, whether the circumstances when viewed objectively would lead one in the position of the defendant to reasonably conclude that the bargain was as he interpreted it." U.S. vs. Thomas, 593 F.2d 615, 623.

APPLICANT maintains, the plea-bargain agreement as interpreted by him and as represented to him by COUNSEL, was precisely as APPLICANT understood it to be. That in exchange for his agreement to proceed before the COURT, a thirty (30) year sentence would be imposed - to run concurrently with sentence APPLICANT was then serving in the State of Texas - and that APPLICANT's return to the Commonwealth of Virginia would not be required, either then, nor upon his release⁶ from the custody of the

Texas Department of Corrections. There is no question that after APPLICANT fulfilled his promise to proceed with his cause before the COURT rather than before a Jury, the Commonwealth of Virginia disregarded, and therefore, breached their part of the agreement.

APPLICANT contends, when he proceeded with his cause before the COURT, pursuant to the agreement, the Commonwealth of Virginia was bound to carry out its side of the agreement. Accord: DE RUSSE VS STATE, 379 SW 2d 741; therein citing SANTABELLO VS NEW YORK, 404 U.S. 257. MOREOVER, the Commonwealth of Virginia failure to specifically enforce said agreement renders APPLICANT conviction and judgement void. Gallegos vs U.S., 466 F.2d 740 (5th Cir. 1972).

PRAYER

WHEREFORE, APPLICANT prays this honorable COURT, after expiration of the time which the Attorney representing the Commonwealth of Virginia may file his answer, to conduct an evidentiary hearing, make findings of fact, and thereafter direct the Clerk to transmit the records thus developed to the Commonwealth of Virginia Court of Criminal Appeals, as directed by law, for further action by that COURT granting the relief to which APPLICANT is entitled.

SO moved and prayed that this Application For Writ of Habeas Corpus be above all granted.

Respectfully submitted,

Cosme Martinez

Cosme Martinez, # 120449

APPLICANT (PRO SE)

Texas Dept. of Corrections

000044

Ramsey III Unit
Route 4, Box 1300
Rosharon, Texas 77583

AFFIDAVIT IN FORMA PAUPERIS

That I, Cosme Martinez, applicant in the above and foregoing application for Writ of Habeas Corpus, upon my oath state that I am unable to pay the costs incident to this proceeding or give security therefore.

Cosme Martinez

Cosme Martinez (Pro-Se)

THE STATE OF TEXAS

COUNTY OF BRAZORIA

BEFORE ME, the undersigned authority, on this date personally appeared Cosme Martinez, who being by me duly sworn, upon his oath says he is the applicant in the above and foregoing application, and that the factual allegations of the same are true and correct.

Cosme Martinez

Cosme Mortinez (Pro-Se)

SUBSCRIBED AND SWORN to before me by the
said Cosme Martinez, this the 4th day of
July A.D. 1985, to certify which
witness my hand and Seal.

Mark Clark MARK CLARK

My Comm. Expires:

13 October 1987

Notary Public In And For The

State of Texas, County of Brazoria

Bc

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON, PART I
COSME MARTINEZ,

Petitioner

v.
EDWARD MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS

AT LAW NO. 20500

Defendant

THIS DAY came Cosme Martinez, by counsel, and presented to the Court a petition praying for a writ of habeas corpus and subjiciendum, and, it appearing to the Court, upon reading the petition of Cosme Martinez, which has been duly signed and verified, upon the presentation of testimony by the petitioner and Kenneth C. Hogge, who was the Court-appointed counsel at the original trial on June 21, 1974, that

1. The claim by petitioner that there was ineffective assistance of counsel has not been substantiated; and

2. Because of the petitioner's understanding, derived from statements made by his counsel and the Commonwealth Attorney, that what would happen if the Court accepted their recommendation was that petitioner would return to Texas and, when he satisfied the terms of his Texas sentence, he would not be allowed to return to Virginia, and that his understanding, although demonstrably erroneous, was reasonable, and, because of his understanding, no real defense was presented to the charge, and Cosme Martinez was effectively denied his right to a voluntary election and decision to be tried by the Court rather than a jury.

The Court finds probable cause to believe that Cosme Martinez is illegally detained without lawful authority by Edward Murray, and

000047

It is, therefore, ORDERED that a writ of habeas corpus and subjiciendum be, and the same hereby is, issued out of this Court, directed to the said Edward Murray, commanding him to produce the body of Cosme Martinez, unless the Commonwealth Attorney expresses a desire to try the man again, then Petitioner is to be released. Within sixty (60) days of the entry of this order, the Commonwealth of Virginia is either to initiate proceedings to retry petitioner or to release him from incarceration. Said release is to become effective within sixty (60) days of the entry of this Order, providing that Cosme Martinez has in hand means to return to Texas.

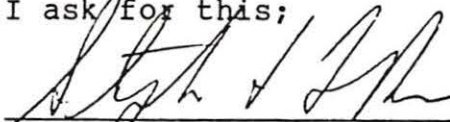
In the event of an appeal herein, execution of this judgment is stayed until the Supreme Court of Virginia renders an opinion therein and its mandate issues.

ENTER this 2d day of October 1986.



Judge

I ask for this;



Counsel for Petitioner

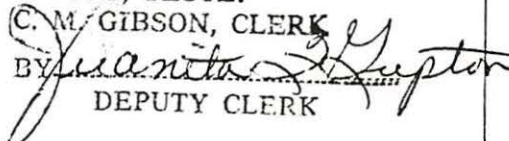
have seen and object to.



Assistant Attorney General

A COPY, TESTE:

C. M. GIBSON, CLERK

BY 
DEPUTY CLERK

000048

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON, PART I

COSME MARTINEZ,

Petitioner,

v.

AT LAW NO. 20500

EDWARD MURRAY, Director of
the Virginia Department of
Corrections,

Respondent.

NOTICE OF APPEAL

The respondent, Edward Murray, Director of the Virginia Department of Corrections, hereby gives notice of appeal from the judgment of this Court entered on October 2, 1986, and further gives notice that the transcript covering the testimony and other incidents of the plenary hearing is enclosed along with this Notice of Appeal, all in compliance with Rules 5:9 and 5:11 of the Rules of the Supreme Court of Virginia.

Respectfully submitted,

EDWARD MURRAY, Director of the
Virginia Department of Corrections,
Respondent herein.

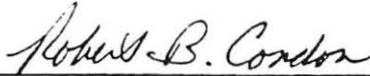
By: Robert B. Condon
Of Counsel

Robert B. Condon
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

000049

CERTIFICATE OF SERVICE

This is to certify that on this 28th day of October, 1986, a copy of the foregoing Notice of Appeal was mailed to Stephen F. Forbes, Esquire, 2013 Cunningham Drive, Suite 230, Hampton, Virginia 23666, counsel for petitioner.



Robert B. Condon
Assistant Attorney General

Assignments of Error

The trial court erred in granting the writ of habeas corpus because:

1. The trial court's finding that no real defense to the charges was presented at Martinez' criminal trial was unsupported by any evidence at the plenary hearing that Martinez had any viable defense to the charges.

2. The trial court's finding that Martinez was effectively denied his right to a voluntary election to be tried by the court rather than a jury at his criminal trial was plainly wrong.

MR. FORBES: No objection, Your Honor.

THE COURT: All right. So ordered.

Mr. Forbes.

MR. FORBES: Mr. Martinez, take the stand, please.

COSME MARTINEZ,

the Petitioner, having been
first duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MR. FORBES:

Q. State your name, please, sir.

A. Cosme Martinez.

Q. I'll have to ask you to speak as loudly as you possibly can so the court reporter can take down your testimony accurately and so the Court can hear you.

A. Yes.

Q. Mr. Martinez, you have been in this courtroom once previously, have you not?

A. Yes, sir.

Q. Do you recall when that was?

000052

1 A. Back in '74.

2 Q. Might it have been June the 21st,
3 1974?

4 A. Yes, sir.

5 Q. Do you know a gentleman whose name is
6 Kenneth Hogge?

7 A. Yes, sir.

8 Q. Who is he?

9 A. My attorney. That was my attorney
10 back in '74.

11 Q. What advice, if any, did Mr. Hogge
12 give you with respect to your plea of guilty or not
13 guilty during your trial in 1974?

14 A. I was told by him and the
15 Commonwealth attorney that if I was to plead not
16 guilty and be tried by a judge, that the sentence
17 that I was going to get here in Virginia would be
18 running concurrently with my Texas sentence. That
19 was a 30-year sentence. And that for me to do all
20 of my time in Texas and that I would -- Texas would
21 decide what to do with me after I did my time, that
22 was satisfied.

23 Q. Did he explain to you why it was that
24 he wanted you to plead not guilty as opposed to
25 guilty?

000053

1 A. That's all they told me. I could do
2 all my time down there in Texas.

3 Q. It's your testimony here today that
4 it was -- the Commonwealth attorney was present when
5 Mr. Hogge explained this to you?

6 A. Yes, sir.

7 Q. Did Mr. Hogge ever explain this to
8 you or anything different than that?

9 THE COURT: What was the name of the
10 Commonwealth's attorney?

11
12 BY MR. FORBES:

13 Q. Do you know the name of the
14 Commonwealth attorney at that particular time?

15 A. No, sir.

16 MR. FORBES: For the record, the
17 transcript would indicate it was Mr. Duff, Charles
18 H. Duff.

19 THE COURT: Was it Mr. Duff, the man
20 who tried the case, or somebody else?

21 THE WITNESS: He tried my case.

22 THE COURT: Okay. Go ahead.

23
24 BY MR. FORBES:

25 Q. The gentleman that you were speaking --

000054

1 who was speaking with you jointly with Mr. Hogge was
2 the same gentleman that tried the case?

3 A. He wasn't a judge. He was a
4 Commonwealth's --

5 Q. I understand that, but listen to me
6 carefully. Was it the same gentleman that tried --
7 was it the same gentleman that tried the case, the
8 man who spoke with you and Mr. Hogge together?

9 A. Yes, sir.

10 Q. It was the same gentleman?

11 A. Yes, sir.

12 Q. Did Mr. Hogge or Mr. Duff indicate to
13 you that the agreement that they had reached was
14 subject to approval by the Court?

15 A. Yes, sir.

16 Q. Did they tell you that it had to be
17 approved by the Court?

18 A. Yes, sir.

19 Q. What sanctions did they indicate
20 would be placed against you if you came back here to
21 Virginia? Did they tell you how that was supposed
22 to be imposed?

23 A. Well, they told me I wouldn't have to
24 come back to Virginia. If I were to plead not
25 guilty, I could do my time in Texas and never to

000055

1 come back to this state again. That was --

2 Q. Did they tell you how much time you
3 would have to do in Texas?

4 A. No, sir.

5 Q. Did those representations make any
6 difference to you as to whether you decided to
7 request that you have a jury trial as opposed to a
8 bench trial, or a trial by the judge?

9 A. Told me it would be better for me if
10 I would go in front of a judge.

11 Q. You accepted that recommendation?

12 A. Yes, sir.

13 Q. Mr. Martinez, should the Judge decide
14 that you should be granted habeas release and
15 release you, what would you then do?

16 A. Go back to Texas and start working.

17 Q. Who is in Texas?

18 A. My mother and father and my brother,
19 sisters. Already got a place to go to, and I got a
20 job in my father's business.

21 Q. What kind of business is your father
22 in?

23 A. Plumbing.

24 Q. Do you have money available to
25 provide transportation for you back to Texas?

000056

1 A. All I got to do is make a phone call,
2 and they'll send me the ticket.

3 Q. Have they sent you money in the past?

4 A. Yes, sir.

5 Q. They have?

6 A. Yes, sir.

7 Q. Have they sent money here to Virginia?

8 A. Yes, sir. Back in December.

9 Q. Do you know how you made parole in
10 Texas?

11 A. Well, it was I think by the record I
12 had in Texas, never getting in no kind of fights or
13 trouble down there.

14 Q. Your testimony is that you had a good
15 prison record?

16 A. Yes, sir.

17 Q. You've not had any problem with the
18 authorities there in Texas?

19 A. Not ever.

20 Q. Have you had any problems with the
21 authorities since you've been here in Virginia?

22 A. No, sir.

23 Q. How long have you been here in
24 Virginia?

25 A. Back in September the 5th, '85.

000057

1 Q. You were fairly recently turned down
2 for parole in Virginia, were you not?

3 A. Yes, sir.

4 Q. When did you make parole in Texas?

5 A. I made parole twice back in '84 and
6 '85.

7 THE COURT: At the original trial,
8 the letter from the Department of Corrections in
9 Texas said that Mr. Martinez's minimum parole was
10 sometime in 1991.

11 MR. FORBES: 1991. I saw that in the
12 transcript. I was trying to ascertain as to whether
13 or not Mr. Martinez had any personal knowledge as to
14 why he made parole earlier than apparently what the
15 letter indicated by reading that.

16 Judge, may I inquire as to whether or
17 not the letter is in the court file?

18 THE COURT: Not in this file.
19 Presumably it would be in the -- it would be in the
20 record of the trial of this case. It's not in the
21 habeas corpus file before me.

22 MR. FORBES: Yes, sir.

23 THE COURT: All we have in that file
24 is the transcript.
25

000058

1 BY MR. FORBES:

2 Q. Mr. Martinez, did you receive any
3 good time in Texas?

4 A. Yes, sir.

5 Q. How was that computed, if you know?

6 A. Three days for one in Texas for being
7 on good behavior.

8 Q. Were you ever made aware that there
9 were changes in the parole conditions with respect
10 to good time or in any other way for which you are
11 aware of that applied to you or that became
12 applicable to you?

13 A. No, sir.

14 Q. You're not aware of any changes?

15 A. No, sir.

16 Q. The basis for when you pled not
17 guilty back on June the 21st of 1974, did you know
18 beforehand that you were going to be found guilty?
19 Did you have any reason to believe that you were
20 going to be found guilty?

21 A. Yes, sir.

22 Q. How and why is that?

23 A. My counselor and the Commonwealth's,
24 they told me the Court was going to find me guilty.

25 THE COURT: Based on the evidence.

000059

1 What was the question?

2
3 BY MR. FORBES:

4 Q. Mr. Martinez, are you aware of any
5 evidence that counsel might have presented on your
6 behalf had you requested a jury trial?

7 A. No, sir.

8 Q. Okay. How much time did you serve in
9 Texas before you first made parole?

10 A. Eleven years.

11 Q. How much time have you served now in
12 total?

13 A. It will be twelve years, eleven
14 months and days.

15 MR. FORBES: Judge, that's all I have.

16 THE COURT: Mr. Condon.

17
18 CROSS-EXAMINATION

19
20 BY MR. CONDON:

21 Q. Mr. Martinez, you, in fact, gave a
22 full confession to the police, and that was offered
23 at the trial?

24 A. Yes, sir.

25 Q. On page 4 of your petition, you make

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1 the statement: Even so, the Judge presiding over my
2 cause ordered my appearance within his chamber and
3 thereby confirmed the agreement.

4 What agreement are you talking about?

5 A. I thought it was the judge at first,
6 but he wasn't.

7 Q. Okay. So you're withdrawing that
8 statement, that claim?

9 A. Yes, sir.

10 Q. You never had a meeting with this
11 judge?

12 A. No, sir.

13 Q. All right. Counsel asked you about
14 this so-called agreement or bargain, as you've
15 characterized it in your petition, and I think he
16 asked you whether or not you realized it was subject
17 to approval by the judge, and you said yes; isn't
18 that correct?

19 A. Yes, sir.

20 Q. Now, did you ever hear the judge in
21 your trial tell you that you wouldn't have to come
22 back to Virginia?

23 A. No, sir.

24 Q. Who assured you or who told you that
25 you would never have to come back to Virginia? Was

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1 it Mr. Hogge?

2 A. Yes, sir.

3 Q. Was it the Commonwealth attorney, Mr.
4 Duff?

5 A. I think so.

6 Q. You don't remember?

7 A. Well, it was Duff. It was my
8 counselor and that -- call him that Commonwealth of
9 Virginia attorney. I don't know what you call him
10 down here.

11 Q. You're saying that when you had this
12 meeting with your attorney and the Commonwealth
13 attorney, that they both told you that you wouldn't
14 have to come back to Virginia?

15 A. Yes.

16 Q. But weren't you also told it was up
17 to the judge?

18 A. No, sir.

19 Q. Isn't that what you said earlier,
20 that everything was subject to the judge's approval
21 on sentencing?

22 A. No, sir.

23 THE COURT: That's what he said.
24 What you're asking is whether they told him that.
25

000062

1 BY MR. CONDON:

2 Q. Let me ask you this. You had 30
3 years to serve in Texas; isn't that right?

4 A. Yes, sir.

5 Q. And you'd just been sentenced when
6 you came up to Virginia?

7 A. Yes, sir.

8 Q. You got 30 years in Virginia to serve
9 concurrent with your Texas time?

10 A. Yes, sir.

11 Q. Back in 1974, did you consider that
12 that was a good deal?

13 A. Yes, sir.

14 Q. And you're unhappy with it now
15 because you feel like you should have been released
16 when you finished your time in Texas; is that
17 correct?

18 A. Yes, sir.

19 Q. All right. At trial the judge asked
20 you at the very beginning of your trial whether or
21 not you had talked to Mr. Hogge, your attorney,
22 about whether or not to have a bench trial, a judge
23 trial, or a jury trial -- and this is on page 6 of
24 the transcript -- and the judge asked you if you
25 talked about whether or not to have a judge or a

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1 jury, and you said, Yes, sir.

2 The judge asked you do you
3 understand the choice that you have. You said, Yes,
4 sir.

5 And then he asked you what your
6 decision was, and you said you wanted a judge trial.

7 Why did you decide to go with the
8 judge trial?

9 A. Because they already told me that
10 they were going to run my time concurrently with my
11 Texas sentence and that I would not have to come
12 down here and do no time. I could do all my time in
13 Texas.

14 Q. Was that the only reason for taking a
15 judge trial?

16 A. Yes, sir.

17 THE COURT: Pretty good reason really,
18 without getting any extra time to serve. Didn't
19 sound like a bad deal from this standpoint.

20 MR. CONDON: I think that's all the
21 questions I have, Judge.

22 MR. FORBES: Just one or two, and I
23 think it's a little different.
24
25

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REDIRECT EXAMINATION

BY MR. FORBES:

Q. Mr. Martinez, just to make sure that we're absolutely clear as to what transpired here. In your petition you indicated that you were in chambers with your attorney and who else?

A. That Commonwealth.

Q. In your petition -- I understand we have a little bit of a language problem or a language barrier.

In your petition that was filed -- first of all, did you have some help in filing this petition?

A. A friend of mine helped me.

Q. You helped him find the information?

A. Yes.

Q. He actually wrote it down?

A. Yes.

Q. Do you know basically what the petition says?

A. Yes.

Q. In your petition you indicated that the defense attorney, court-appointed defense attorney, and someone else met with you prior to

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trial.

A. Yes, sir.

Q. Who did you indicate that person was?

A. DA or, what, Commonwealth's.

Q. So it's your testimony that in your petition --

A. I put it was the judge.

Q. Thank you. Listen very carefully. Do you now believe that to be the case? Do you think that you made a mistake?

A. I made a mistake when I wrote it.

Q. You feel certain about that?

A. Yes, sir.

Q. Who do you think it was that you met with?

A. That Commonwealth's.

Q. Attorney?

A. Attorney.

Q. Now, are you certain of that?

A. Yes, sir.

Q. Based on counsel's question that the Commonwealth attorney and Mr. Hogge indicated to you that you would not have to come back here to Virginia?

A. Yes, sir.

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1 MR. FORBES: That's all I have.

2 MR. CONDON: I have one more.

3
4 RECROSS-EXAMINATION

5
6 BY MR. CONDON:

7 Q. Are you saying, then, that they told
8 you it was a certainty, an absolute certainty, or
9 did they tell you that it was a good possibility or
10 a good chance that you wouldn't have to come back?

11 A. They told me I would not have to come
12 back.

13 Q. You're saying they guaranteed it?

14 A. Yes, sir. I could do my time in
15 Texas, and whatever Texas did with me, the State of
16 Virginia would be satisfied.

17 MR. CONDON: Okay.

18 THE COURT: Mr. Forbes.

19 MR. FORBES: Judge, that's all the
20 questions I have of this witness. I would like to
21 put Mr. Hogge on the stand when he's available.

22 THE COURT: Do you have other
23 witnesses?

24 MR. FORBES: No, sir.

25 THE COURT: Well, then, Mr. Martinez,

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1 go back in that witness room back there and wait
2 until Mr. Hogge gets back. It should be five or ten
3 minutes.

4 We'll be in recess.

5
6 (Whereupon, a recess was taken.)
7

8 THE COURT: Let the record show that
9 both attorneys are now present in court, and Mr.
10 Martinez is also present in court.

11 Who do you want next, Mr. Forbes?

12 MR. FORBES: Call Mr. Kenneth Hogge.

13 THE COURT: Mr. Hogge, take the oath.
14

15 (Whereupon, the witness was sworn.)
16

17 THE COURT: All right, sir.
18

19 KENNETH HOGGE,
20 a Witness, having been first
21 duly sworn, was examined and
22 testified as follows:
23
24
25

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DIRECT EXAMINATION

BY MR. FORBES:

Q. State your name, please, sir.

A. Kenneth Hogge.

Q. Mr. Hogge, are you at all familiar with the gentleman seated to my left?

A. Yes.

Q. His name is Cosme Martinez, is it not?

A. That's right.

Q. You were court appointed to represent him on some offenses which took place and were tried back on June 21st of 1974?

A. That's right.

Q. Mr. Hogge, I want you to explain to the Court, if you can recall, the nature of your handling of that case. Ultimately, how was that case disposed of?

A. It was actually tried.

Q. And what, if anything, took place between you and the Commonwealth attorney prior to the trial?

A. We discussed what the penalty would be and agreed that it would be the same as he had in Texas but would run concurrently with the Texas time.

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1 Q. Do you remember who the Commonwealth
2 attorney was at that time?

3 A. I think Charles H. Duff.

4 Q. That being consistent with what the
5 transcript would show?

6 A. Yes.

7 Q. Do you remember whether Mr. Duff was
8 the Commonwealth attorney or the assistant
9 Commonwealth?

10 A. He was assistant.

11 Q. Do you recall how it was that the
12 plea came to be a not guilty plea as opposed to a
13 guilty plea?

14 A. Yes, sir. That was to preserve his
15 right of appeal.

16 Q. Why was that done that way?

17 A. Well, we weren't sure the Court would
18 go along with what we talked about as far as
19 sentencing.

20 Q. So you and the Commonwealth attorney
21 had reached an agreement, but that was going to be
22 subject to the Court's approval?

23 A. Definitely.

24 Q. For that reason, you had him plead
25 not guilty?

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1 A. Right.

2 Q. Was Mr. Duff in accordance with that?

3 A. I don't recall.

4 Q. Do you recall whether or not you and
5 Mr. Duff met with Mr. Martinez prior to the hearing
6 that day?

7 A. I know I did. I'm not sure about Mr.
8 Duff.

9 Q. You're not sure whether he did or not?

10 A. Uh-uh.

11 Q. Can you tell us today whether you had
12 any expectation then that Mr. Martinez would serve
13 his time in Texas and still have to come up here and
14 serve time?

15 A. I thought he would never come back to
16 Virginia.

17 Q. And do you recall whether or not you
18 told him that he would not have to come back to
19 Virginia?

20 A. I didn't tell him that, I know. I
21 didn't make any promises to him.

22 Q. But you're telling us today that you
23 had no expectation that he would be coming back?

24 A. I don't think anybody did.

25 Q. You do not recall whether or not Mr.

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1 Duff was present when you had your meeting?

2 A. No, I don't. It wouldn't be normal
3 for him to be present.

4 Q. You don't recall?

5 A. No, I don't recall.

6 MR. FORBES: Judge, that's all I have.

7 THE COURT: Mr. Condon.

8
9 CROSS-EXAMINATION

10
11 BY MR. CONDON:

12 Q. Mr. Hogge, at the time of this trial
13 in June of 1974, how long had you been a member of
14 the Virginia Bar?

15 A. Since 1955.

16 Q. If you can estimate for us today, in
17 1974, if you can recall, what percentage of your
18 practice would you say was involved in criminal law?

19 A. Probably 80 to 90 percent.

20 Q. In all your discussions with your
21 client before and during trial, are you saying, then,
22 that you never guaranteed or never told him that it
23 was an absolute certainty that he wouldn't be returning
24 to Virginia?

25 A. No. I'd been practicing law for

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1 about 20 years at the time, and there was no way I
2 could guarantee anything to the defendant or even
3 tell them there was a guarantee.

4 Q. Also, there was no guarantee that the
5 Court would approve your sentence?

6 A. That's right. In fact, the Court was
7 reluctant to take it.

8 Q. Were you aware in 1974 that it was
9 really up to the Virginia Parole Board and not
10 really up to the Court to decide?

11 A. Probably.

12 MR. FORBES: I didn't get that.

13 THE COURT: He said probably.
14

15 BY MR. CONDON:

16 Q. Would it be fair, then, to say that
17 what you told your client in 1974 was that it was a
18 good possibility that he wouldn't return but no
19 guarantee?

20 A. I'm sure I didn't use the word
21 guarantee. I said it's a possibility that he
22 wouldn't come back. I may have even said
23 probability.

24 MR. FORBES: Judge, I'm going to
25 object to this unless Mr. Hogge can remember what he

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1 said.

2 THE COURT: He said he can't really
3 remember. He's trying to reconstruct it as far as
4 he can.

5 MR. CONDON: That's all the questions
6 I have, Your Honor.

7 THE COURT: Mr. Forbes, do you have
8 any further questions?

9 MR. FORBES: No, sir.

10 THE COURT: Thank you, Mr. Hogge.
11 Anything further by way of evidence?

12 MR. FORBES: No, Your Honor.

13 MR. CONDON: No, Your Honor.

14 THE COURT: What does counsel want to
15 say?

16 MR. FORBES: Your Honor, please, Mr.
17 Martinez has filed this habeas petition based on two
18 grounds, and they're not altogether different
19 grounds.

20 His first issue with regard to relief
21 would be whether or not he had, in fact, received
22 effective assistance of court-appointed counsel.
23 And with respect to that issue, I'm saying on one
24 hand that most assuredly his end result, as
25 everybody would have expected it to be or would have

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1 THE COURT: I don't put much weight
2 on the idea that had he taken a jury trial he would
3 have done better. I don't think he would have.

4 MR. FORBES: Judge, I don't think he
5 would have either. My point is I don't think you
6 have to go into that.

7 I don't think you have to speculate
8 which would have been the better choice. I think
9 you have to recognize he had the right to election,
10 and this influenced his decision.

11 I'm not implying that this Court or
12 any Court should necessarily believe that he could
13 have done better. All I'm saying, the right was
14 there and his decision -- voluntariness of his
15 decision was, without question, prejudiced by the
16 facts as presented to him.

17 Again, that's not to imply that Mr.
18 Hogge intentionally did anything wrong or even did
19 anything that 99.9 percent of the people wouldn't
20 have done, because I know if I were in that
21 situation, I would not have had the wherewithal to
22 have guessed that this situation could have
23 transpired.

24 THE COURT: All right. There's no
25 substance to the claim of ineffectiveness of counsel.

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1 The record will show that has not been established.

2 Mr. Martinez has said certain
3 portions of his petition were incorrect because
4 somebody wrote the petition for him, and they were
5 wrong.

6 Well, after the somebody, whoever it
7 was, wrote it for him, Mr. Martinez signed it. And
8 I don't think it sounds very much as though it's
9 required to assume he didn't read it. Of course, it
10 was notarized and sworn to.

11 What happened in this case,
12 apparently, based on the evidence, is that the
13 defendant, now the petitioner, his attorney, and the
14 assistant Commonwealth's attorney looked at 30 years,
15 The 30-year sentence in Texas, and determined that
16 they would try to get this Court to give Mr.
17 Martinez a 30-year sentence to serve concurrently
18 with the one in Texas. And they figured, all of
19 them, it was going to be if you serve 30 years in
20 Texas, you serve 30 years' prison time in Virginia.
21 That may even have been correct.

22 It may even have been that Mr.
23 Martinez would have been serving his concurrent
24 sentence in the Virginia Correctional System and
25 Texas wouldn't be getting him back on a current

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1 basis.

2 It's at least arguable that he might
3 have been paroled here sooner than he was in Texas
4 and Texas would have faced the same problem Virginia
5 faced when Texas paroled six, seven years prior to
6 the stated earliest possible release date.

7 In that letter in evidence back in
8 1974, no substantial defense was raised. He pled
9 not guilty but no other real evidence to derail the
10 approximation he made, presumably because now the
11 petitioner, his attorney at that time, and the
12 Commonwealth's attorney had made the transposition.
13 Thirty years in Texas must equal 30 years in
14 Virginia. If you run them concurrently, he'll get
15 through down there, he won't come back. Nobody said
16 that in the hearing.

17 I think -- I don't think there's a
18 technical matter, that Mr. Martinez would have any
19 way to enforce that.

20 He brought this proceeding. Mr.
21 Martinez is -- unless he's changed a great deal in
22 the last eleven or twelve years, he's not an
23 outstanding citizen. But in this case, I think that
24 the actions he took and the actions his attorney
25 took and the actions that the Commonwealth's

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1 attorney took were all based on the same
2 misconception of what was going to happen, or
3 presumption. And in the view of this Court, this
4 man might will be entitled to be treated in that
5 special circumstance of this case. This man is
6 entitled to be treated as he and counsel,
7 respectfully, shall be treated.

8 I don't have any independent
9 recollection of what the Court thought at the point,
10 if it was discussed at all. I think it was.

11 The petition is granted. The
12 prisoner is to be released.

13 You have indicated in testimony, Mr.
14 Martinez, that you have access to someone who will
15 provide you tickets and transportation means back to
16 Texas; is that correct?

17 MR. MARTINEZ: Yes, sir.

18 THE COURT: How long will it take you
19 to arrange that once you leave here?

20 MR. MARTINEZ: My people be working
21 right now. Different time down there.

22 THE COURT: I'll ask Mr. Forbes to
23 prepare the order and submit it to Mr. Condon for
24 endorsement. The order will grant the writ and
25 release to become effective when Mr. Martinez has at

000078

