

JUN 17 2019

Case No. 20180131-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

GILBERTO MARTINEZ,
Defendant/Appellant.

Reply Brief of Appellant

*An Appeal from a Judgment and Criminal Convictions for Two Counts of
Sodomy on a Child (First Degree Felonies), Entered by the Fourth District
Court, Utah County, Before the Honorable Darold McDade*

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ARGUMENT

I. THE STATE DID NOT FILE A CROSS-APPEAL AND IT MAY NOT CHALLENGE THE TRIAL COURT’S RULING THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO SUPPRESS MARTINEZ’S STATEMENT TAKEN IN VIOLATION OF *MIRANDA*

The State asserts that under *Bailey v. Bayles*, 2002 UT 58, 52 P.3d 1158, this Court should reverse the trial court’s ruling wherein the trial court concluded that trial counsel was ineffective for failing to move to suppress the police interrogation taken in violation of Martinez’s rights per *Miranda*. Aplee.Br. at 44-45. The State asserts that the trial court’s ruling concluding that trial counsel was ineffective was “erroneous” and should be overturned. *Id.* at 45, 49-53.

The State, however, did not file a cross-appeal and *Bailey* allows appellate courts to affirm a judgment only, not reverse a trial court’s ruling. *See Bailey*, 2002 UT 58, ¶ 10. If the State wanted to challenge the trial court’s ruling, it was required to file a cross-appeal under Rule 4(d) of the Utah Rules of Appellate Procedure. The State did not file a cross-appeal and this Court lacks jurisdiction to entertain

the State's claim that the trial court erred in concluding that trial counsel was ineffective for failing to file a motion to suppress Martinez's police interrogation. *See Serrato v. Utah Transit Authority*, 2006 UT App 299, ¶7, 13 P.3d 616 ("If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal.").

Moreover, Martinez was not on notice that the State intended to challenge the trial court's ruling on the *Miranda* issue, especially given the fact that the State did not file a cross-appeal. Martinez complied with the requirements of Rule 11 of the Utah Rules of Appellate Procedure by ordering all the transcripts. At the time Martinez filed his opening brief, there was no reason for Martinez to file a motion to correct the record regarding the partial police interrogation because that portion of the record that was incomplete was not an issue before this Court.

In any event, the State's assertion that Martinez filed only a "partial translation" of the police interview with the trial court, where "the English translation is cut-off, leaving only partial sentences" is factually inaccurate. *See Aplee.Br.* at 50-51. Attached as **Addenda A** is a certified copy from the Fourth District Court of the translated police interrogation, which was filed with the trial court as Exhibit B to Martinez's Motion to Arrest Judgment, or Alternatively, Motion for New Trial (filed in the trial court on October 16, 2017).¹ This copy, filed with the trial court, did not have the English translation cut-off, and the present

¹ On May 30, 2019, Martinez filed a Motion to Correct Record due to the State's claim that Martinez provided an incomplete record in the trial court.

record consisting of pages 552-58 is not an accurate representation of the document filed below.

The trial court ruled that trial counsel was ineffective for failing to move to suppress the police interrogation and this Court lacks jurisdiction to consider the State's assertion otherwise on this issue because the State has not timely filed a cross-appeal.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL GRANDMOTHER AS A WITNESS AND THE OUTCOME WOULD HAVE BEEN DIFFERENT HAD SHE TESTIFIED

To support its assertion that Martinez “has not prove[n] trial counsel was ineffective,” the State lists a number of items testified to by trial counsel wherein trial counsel attempted to justify his decision for failing to put on a defense or call any witnesses. Aplee.Br. at 27-28. Taken in context, the reasons listed by trial counsel for not calling Grandmother as a witness are post hoc justifications to excuse his own deficient performance.

1. Trial counsel's testimony that he was concerned the jury would find Grandmother's testimony not credible is itself not credible and not supported by the record.

The State does not offer any alternative theories as to why it was reasonable trial strategy for trial counsel to refuse to call Grandmother to testify. Instead, the State parrots trial counsel's testimony where trial counsel testified that he was worried the jury would think Grandmother was a “liar”, that she did not seem credible, that she would not be beneficial to the case, and that trial counsel was not

comfortable with how Grandmother would seem in front of the jury. Aplee.Br. at 26-28.

It is important to remember that trial counsel testified that the first time he thought he would not use Grandmother's testimony was the night before the last day of trial. R.614. Trial counsel also promised the jury during opening statements that Grandmother would testify about the layout of the small home and about when Mariela returned home from being gone in California for one week (during which time Martinez allegedly abused AAO), Grandmother would testify and explain "at no point in September was anyone aware of the abuse." R.238-39,241.

Contrast this with trial counsel's subsequent testimony that when he interviewed Grandmother the night before the first day of trial and asked her his list of questions, "I remember thinking these are not answers I want coming in. ... I just recall after asking all of the questions on more than half of them I – I was uncomfortable with how that would make [Grandmother] seem in front of the jury." R.665.

If trial counsel actually believed the day before the first day of trial that Grandmother was not credible, then trial counsel would not have promised the jury that Grandmother was going to testify. Likewise, it would not have taken trial counsel until the night before the last day of trial to decide for the first time that he would not call Grandmother as a witness, if trial counsel actually did not find her credible before trial started.

It is also important to remember that trial counsel was unable to provide a single example of how Grandmother was not credible or why the jury would reasonably think she was not credible, despite numerous requests and the opportunity to review his trial notes and come up with a single example of where Grandmother changed her story or how she was inconsistent. R.645-48,662-63,665,667-68.

It is trial counsel's testimony that is not credible and his post hoc excuses are not supported by the record. It is not credible to believe that trial counsel was concerned about Grandmother's credibility the day before trial began, but then promised the jury that Grandmother would testify. It is not credible to believe that "the first time I really thought I won't be putting her on the stand" was the night before the last day of trial, when supposedly trial counsel had concerns about her credibility and changing story before trial started. It is not credible to believe that trial counsel thought Grandmother had credibility problems when he was unable to identify a single instance where Grandmother contradicted herself. The believable evidence is that trial counsel was making excuses to cover his failure to call Grandmother to testify.

The trial court did not make a finding that trial counsel's testimony was credible. R.886-92. Regarding Grandmother not testifying, the trial court merely concluded that "prior counsel acted within the reasonable standard of care for a defense attorney" and "these were strategic decisions that could depend on numerous factors." R.887,888. The trial court's conclusions are not supported by

the record because trial counsel could not identify a single instance where Grandmother's testimony would have been inconsistent or prejudicial to Martinez's case.

2. Trial counsel's testimony, that he was concerned about the age difference between Grandmother and Martinez and that Grandmother was biased, are not legitimate excuses for not allowing Grandmother to testify.

The State also parrots trial counsel's excuses that he did not want to highlight the age discrepancy between Martinez and Grandmother and that he was concerned the jury would think Grandmother was biased because she was Martinez's spouse as justifications for not calling Grandmother to testify. *See Aplee.Br. at 27-28.* Given the need for Grandmother's testimony, these excuses are not reasonable.

The jury was already aware there was a large age difference between Grandmother and Martinez because Mariela testified and the jury would have seen Mariela's apparent age and the jury heard that Grandmother married Martinez. R.248,262. Any concern for bias regarding a spouse testifying in favor of another spouse would have been minimized because Grandmother was not only Martinez's spouse, she was also Mariela's mother and AAO's Grandmother. R.543. Grandmother also would have testified that she would not have changed her testimony just because Martinez was her husband, as she would never allow anyone to abuse AAO. R.549. Thus, any alleged spousal bias would have been limited or non-existent.

And just as important, trial counsel already promised the jury that Grandmother was going to testify. R.238-39,241. Thus, trial counsel's testimony that he did not want Grandmother to testify because of the age difference or spousal bias is not reasonable. Trial counsel knew that Grandmother was ready and able to contradict Mariela's and AAO's testimony on a number of important factors, especially that AAO continued to wet the bed while on the trip to Costa Rica and that AAO did not change her attitude towards Martinez after the alleged abuse purportedly occurred in September. R.545,548,633,641-42. Grandmother was also ready and able to testify that AAO and Martinez were not alone in the bedroom in September when Mariela was away. R.548. Grandmother would also have been able to testify that she would have heard if AAO yelled at Martinez to stop, even if the door had been shut. R.331,641.

Grandmother's testimony would have changed the outcome of the trial because it would have refuted AAO's testimony that she was alone in the bedroom with Martinez in September and that AAO yelled at Martinez to stop. It was unreasonable for trial counsel to not call Grandmother as a witness.

3. The State's assertions that Grandmother "was sobbing loudly in the courtroom" and that Grandmother's testimony would have contradicted Martinez's testimony is without foundation.

The State's assertions that Martinez has not proven trial counsel was ineffective because it was reasonable to not call Grandmother as a witness because her testimony would have contradicted Martinez's testimony and because

Grandmother was sobbing loudly in the courtroom, are not supported by the record. See Aplee.Br. at 27-28.

The States cites the record at 657 and 659 to support its assertion that Grandmother's testimony would contradict Martinez's testimony. Aplee.Br. At 27. There is nothing on page 659 that suggests Grandmother's testimony would contradict Martinez's testimony. On page 656-57, the prosecutor asked trial counsel the following:

Q: But eventually after a little bitt of pressure or some pressing questions didn't [Martinez] eventually concede, well, maybe she was in my room but she was never – we were never in there alone together?

A: Correct.

Q: Did that ever evolve into something more?

A: Did that involve into something more?

Q: Evolve. Did he ever – did he ever go one step further and say, hey, yeah, okay, maybe she was in the room with me alone but nothing happened.?

A: I don't recall.

Q: Okay.

A: I apologize.

Q: It was that – it was that extreme stance though that she was never in my room that raised concern with – with Mr. Martinez; is that fair to say?

A: That is one of the reasons, correct.

Q: Okay. And he eventually changed that position?

A: Yes.

Q: Okay. Let's talk about [Grandmother]. Was one of your concerns the fact that [Grandmother] was telling you that the victim was never in the room alone or she was never in the room with Mr. Martinez?

A: Yeah.

Q: Okay. And so to put her on the stand and have her testify to that effect would actually be contradictory to what the defendant eventually said?

A: Correct.

R.656-57. On first blush, and reading this page to the exclusion of the rest of the record, it may appear that Grandmother's testimony would have contradicted Martinez's testimony on a single point – that Grandmother said that AAO was never in the room alone with Martinez. But Grandmother never told trial counsel that AAO was never alone in the bedroom with Martinez.

What Grandmother would have testified to was that while Mariela was away in California in September 2016, she does not believe that Martinez and AAO were alone in the bedroom because Grandmother was home the entire time and Grandmother would have noticed if AAO was alone in the bedroom with Martinez.

R.548. Grandmother would not have testified that AAO was never in the room with Martinez. R.705. Rather, Grandmother told trial counsel prior to trial that there were times that AAO was present in the bedroom with Martinez, but the door was always open and Grandmother was also in the bedroom or nearby in the kitchen.

R.705. Trial counsel even admitted that he asked Grandmother if she ever saw AAO

alone with Martinez in the bedroom when Mariela was away in California in 2016, and trial counsel testified that Grandmother said she never saw AAO and Martinez alone in the bedroom at this time. R.639.

Thus, Grandmother's testimony would not have contradicted Martinez's testimony. Moreover, per the trial court's ruling, Martinez's statements through the police interrogation should not have been introduced into evidence because of the *Miranda* violation. Accordingly, the State's assertion that Grandmother's testimony would have contradicted Martinez's testimony lacks merit.

In addition, there is no support that Grandmother was sobbing loudly in the courtroom. See Aplee.Br. at 16,27. The State cites the record at pages 634 and 660-61 to support its assertion that Grandmother was sobbing loudly at trial. On page 634, trial counsel merely states that Grandmother was very emotional and cried many times when he spoke to her. R.634. Such emotions would be understandable when it is alleged that your husband sexually abused your own granddaughter.

On pages 660-61, trial counsel stated that Grandmother was "sobbing very loud in the courtroom" during Mariela's redirect examination. R.660-61. But trial counsel's testimony is wrong. Trial counsel promised the jury that Grandmother would testify. R.238-39,241. Trial counsel invoked the exclusionary rule during Mariela's direct examination. R.273. The record shows no effort was made to excuse Grandmother from the courtroom, meaning Grandmother was already outside. The minute entry shows only that an officer was removed from the courtroom when the exclusionary rule was invoked. R.120. Grandmother stated

she did not witness any of the trial testimony. R.544. Trial counsel also admitted that he “may be mistaken” as to whether Grandmother was present during Mariella’s testimony. R.643.

The record shows Grandmother was not sobbing at trial in the courtroom and the State’s assertion otherwise is incorrect.

Grandmother’s testimony would not have contradicted Martinez’s testimony, and it was critical that Grandmother testify so the jury would know that AAO’s “symptoms” did not increase around the time Martinez allegedly abused AAO. It was also critical that Grandmother testify so the jury would know that AAO and Martinez were not alone in the bedroom when Mariela was in California and that Grandmother would have heard AAO yell at Martinez to stop. The outcome would have been different if the jury heard this critical testimony.

4. Trial counsel repeatedly admitted the overriding factor for not calling any witnesses was because he thought AAO’s new allegation that Martinez raped AAO would result in an acquittal. Trial counsel’s decision prejudiced Martinez.

Trial counsel testified that “a big part” of not calling any witnesses to testify was because AAO gave a different story at trial than she had previously disclosed, which he believed would result in an acquittal. R.631. In fact, when asked by the prosecutor, trial counsel admitted that he had “strong feelings” that at the end of the state’s case, the jury would acquit. R.654. Even the trial court concluded that trial counsel’s decision to not call any witnesses was based on trial counsel’s belief

“that the testimony from [Grandmother] ... nor the defendant was necessary in order to avoid a conviction.” R.888.

Martinez has shown that trial counsel’s decision to not call Grandmother as a witness was deficient and the outcome would have been different had Grandmother testified. While it is true that AAO testified for the first time at trial that Martinez also raped her, no reasonable attorney would conclude that AAO’s new disclosure made her an incredible witness, especially when no effort was made to impeach Mariela’s or AAO’s testimony. R.317-19,631,651-53,661-62,951-56. Nor would any reasonable attorney assert in closing arguments that a six-year old child was a liar for disclosing for the first time at trial to also being raped, when defense put on no evidence to contradict the State’s evidence. R.484-86.

AAO testified that the abuse occurred in the bedroom when Mariela was gone to California. R.317-18. AAO testified that she yelled at Martinez to stop the abuse, but he would not. R.331. Mariela testified that AAO stopped wetting the bed when AAO was potty trained at three years-old and she rarely had accidents. R.288. Mariela testified that AAO started wetting the bed again at some point but that AAO stopped wetting the bed when they went to Costa Rica, but she started again when they returned home. R.268. Mariela also testified that when AAO was five or six years old, she started “backing off” from Martinez. R.262-63. The jury never heard any evidence contradicting this testimony. Trial counsel admitted that asked Grandmother about whether the relationship ever changed between AAO and Martinez, and Grandmother would have testified that AAO’s disposition

towards Martinez did not change immediately after Mariela returned from California. R.547-48,638-39. Trial counsel admitted that Grandmother told him Martinez was not alone with AAO in the bedroom during the time Mariela was gone to California. R.639. Trial counsel admitted that Grandmother told him that AAO never stopped wetting the bed. R.636. Trial counsel also admitted that he discussed with Grandmother and conducted his own sound test that showed that a person in the kitchen would hear a slightly elevated conversation from the bedroom, even when the door is closed. R.641.

Grandmother's testimony would have contradicted Mariela's testimony on key points and it would have given the jury a reasonable explanation that the symptoms AAO was experiencing was not caused by Martinez sexually abusing AAO. Grandmother's testimony would have specifically contradicted AAO's testimony and it would have shown the jury that Martinez was never alone with AAO when Mariela was gone to California and that Grandmother would have heard AAO if she had yelled at Martinez to stop. R.548,641.

And by contradicting Mariela's testimony, the jury would have reason to believe that Mariela coached AAO and that is how AAO learned about male genitalia, since AAO repeatedly testified that her mother, Mariela, told her that "white stuff" would come out. R.332-33,410-11,959.

Grandmother's testimony also was not consistent with AAO being abused. Grandmother would have testified that when AAO had a rash, there was no suggestion by the doctor that AAO was being sexually abused. R.547. And AAO's

rash was not evidence of penetration. A child that is clingy, has headaches, a picky eater, and consistently pees in the bed is not proof of abuse.

Given the lack of physical evidence and the failure by trial counsel to let the jury hear Grandmother's critical testimony that would contradict and undermine the key points supporting the jury verdict, Martinez has shown that the outcome would likely be different if trial counsel had allowed Grandmother to testify.

III. THE OUTCOME WOULD HAVE BEEN DIFFERENT HAD MARTINEZ'S STATEMENTS MADE TO THE POLICE NOT BEEN ADMITTED

The State asserts that Martinez's changed story in the police interrogation "was not so significant that it necessarily demonstrated that [Martinez] was not credible." *Aplee.Br.* at 47. The State further asserts that trial counsel chose not to suppress Martinez's statements because he was able to use Martinez's statements during the interrogation to tell Martinez's story, all without subjecting Martinez to cross-examination. *Id.* at 53. Based on the trial court's findings that AAO was a credible witness, and that Martinez was able to tell his story through the officer's testimony of the interrogation, the State asserts the trial court properly concluded Martinez was not prejudiced by the admission of the statements in the police interrogation because the "police interview added little to the State's already compelling case." *Id.* at 44-54. The State's assertions lack merit.

The State had a "compelling case" only because trial counsel refused to let Grandmother testify and because trial counsel did not realize he could have suppressed the police interrogation. Likewise, AAO was "credible" only because

trial counsel refused to let Grandmother testify and trial counsel allowed the State to damage Martinez's credibility with the police interrogation.

Contrary to the State's assertion otherwise, trial counsel did not want Martinez's statements to be used at trial. In fact, trial counsel testified that if he had a way to exclude Martinez's police interrogation, he would have filed a motion to suppress the interrogation. R.649.

Trial counsel also was not able to use the interrogation to tell Martinez's story at trial. Martinez's story was that he was "innocent of the charges against" him. R.708. Officer Lee, who interrogated Martinez, never testified that Martinez said he was innocent. Rather, Officer Lee gave damning testimony that when he first asked Martinez about the abuse, Martinez's "first response was, trying to disengage from the household and the people that live at the house. He said, 'well, she's never been to my room, before.'" R.347. Officer Lee then testified that at that point, he had not mentioned anything to Martinez about the abuse occurring in the bedroom. R.347-48. Officer Lee also repeatedly testified that Martinez changed his story about AAO never being in his room. R.351,357,359,370.

Trial counsel attempted to impeach Officer Lee's testimony with an uncertified transcript of the interrogation. R.360-62. But Officer Lee testified that he had never seen trial counsel's transcript, and Officer Lee further testified that he was relying on his own typed report based off of the recording he made of Martinez's interrogation. R.366. Thus, Officer Lee's repeated testimony that

Martinez changed his story was not properly rebutted or clarified by trial counsel, and the jury was left to believe that Martinez lacked credibility.

While trial counsel elicited from another police officer that Martinez was informed about the allegations of abuse prior to Officer Lee's interrogation, trial counsel did not clarify what Martinez had been told about where the allegations occurred, nor did trial counsel explain this fact to the jury, which would have helped the jury understand why Martinez told Officer Lee that AAO had not been in his bedroom, even though Officer Lee had not yet explained where the abuse allegedly occurred. R.441.

And contrary to the State's assertion, trial counsel did not present Martinez's story in closing argument through the police interrogation. All trial counsel argued was that when Martinez first told Officer Lee that AAO had never been in his room, Martinez quickly clarified that she had been in his room. R.478-79. Trial counsel then argued that of course AAO had been in the bedroom over the course of four to five years and that Martinez "wasn't trying to be evasive" and that Martinez "wasn't lying about things as he went through key facts that place him at the crime scene." R.479. Trial counsel further argued that "Anybody being interviewed by an officer would be scared". R.479. In no way was trial counsel able to use the police interrogation to let the jury know that Martinez maintained his innocence.

The State's assertion that the police interrogation was not "significant" to the State's case simply lacks merit. The State effectively used Martinez's statements against him to show that Martinez stated that AAO had not even been in his room,

making it appear that no one had told Martinez that it was alleged the abuse occurred in the bedroom. The State also effectively used Martinez's statements against him to show that he repeatedly changed his story.

The testimony from Officer Lee regarding Martinez's interrogation was the only time the jury heard Martinez's response to the allegations of abuse. And based on trial counsel's inability to impeach Officer Lee, the jury was left to believe that Martinez lacked credibility.

Martinez has shown that trial counsel's failure to exclude the police interrogation was prejudicial. Due to the lack of physical evidence supporting AAO's testimony, it was necessary for the State to destroy Martinez's credibility, and the outcome would have been different had trial counsel moved to suppress the police interrogation.

IV. ALTERNATIVELY, TRIAL COUNSEL WAS INEFFECTIVE FOR NOW ALLOWING MARTINEZ TO TESTIFY

The State asserts that Martinez "does not acknowledge or challenge the trial court's findings below" related to trial counsel not allowing Martinez to testify. Aplee.Br. at 37. The State also asserts that Martinez "offers no evidence as to what he would have testified to and how that testimony would have changed the evidentiary picture." *Id.* The State is incorrect.

The trial court did not make factual findings as it relates to why trial counsel was not ineffective to for choosing not to call Martinez as a witness. Instead, the trial court made the following conclusions: "Mr. Hakes decided that it would be

better not to call the defendant and [Grandmother] to testify at trial. These were strategic decisions that could depend on numerous factors.... [C]ounsel indicated ... he did not believe that the testimony from [Grandmother] or the defendant – nor the defendant was necessary in order to avoid a conviction. In addition, any testimony by either would have been subject to cross-examination, which could have potentially harmed the defendant’s case.” R.888.

The trial court lumped Martinez and Grandmother together when it concluded that trial counsel had strategic reasons for not calling Martinez to testify. And the trial court only gave two reasons why trial counsel was not ineffective for not having Martinez testify: (1) trial counsel “did not believe that the testimony ... was necessary in order to avoid a conviction” and (2) the testimony would have been subject to cross-examination and may have been harmful. R.888.

These are conclusions and not findings as it relates to Martinez because the trial court did not explain what factors trial counsel considered when he chose to not have Martinez testify, other than trial counsel believed the testimony was unnecessary to obtain an acquittal. And that was trial counsel’s stated reason for not having Martinez testify. R.631,652,888.

The trial court also did not explain how Martinez’s testimony would have been harmful when facing cross-examination. Accordingly, there was no finding on this point for Martinez to challenge.

In any event, as to the first conclusion, trial counsel did testify that the reason he did not call any witnesses was because he thought it was unnecessary

since trial counsel thought that AAO's knew disclosure that Martinez also raped her was sufficient to obtain an acquittal. R.622,623,631,652. But just because trial counsel believed he would prevail is not a basis to find that trial counsel's strategy was reasonable and did not constitute ineffective assistance of counsel. If all it took to defeat an ineffective assistance of counsel claim is to have trial counsel testify that he believes his course of conduct would have won the case, then there would never be an ineffective assistance of counsel claim.

As to the second conclusion, it is always true that a witness' testimony may be subject to cross-examination and it may be harmful. However, Martinez showed in his opening brief that he at least would have testified that he was innocent, thereby placing in evidence an actual refutation of AAO's allegations. *See* Aplt.Br. at 53 (citing R.708). And given the fact that trial counsel already allowed the State to discuss Martinez's statements and trial counsel failed to properly impeach Officer Lee's incorrect testimony, there would have been no more damage to Martinez's credibility had Martinez testified. And at a minimum, trial counsel could have played the interrogation to the jury to correct Officer's Lees damaging testimony, since Officer Lee testified that he recorded the interrogation. R.366.

Accordingly, Martinez challenged the trial court's limited conclusions to the extent he could.

Next, the State incorrectly asserts that Martinez "offers no evidence as to what he would have testified to and how that testimony would have changed the evidentiary picture." Aplee.Br. at 37. Martinez set forth in his declaration that he

wanted to testify and that he would have testified “and let everyone know that I am innocent of the charges against me.” R.708. This was not a case of whether or not there was consent. This was a case of either Martinez sexually abused AAO or he did not.

The question posed to Martinez would have been simple and straight forward: Did you ever sexually abuse AAO? That his answer likewise would have been simple and straightforward is does not mean that Martinez has not offered what he would have testified to. He would have testified that he was innocent.

The State concedes that Martinez would have testified that he was “innocent”, but the State asserts this “is mere speculation” Aplee.Br. at 39. This assertion lacks merit. Martinez signed a declaration and that declaration was filed with the court. R.708-09. Even trial counsel admitted that Martinez maintained his innocence and that trial counsel would have no ethical problem having Martinez testify. R.622,623.

As set forth in the opening brief, Martinez’s testimony would have at least placed AAO’s credibility in question. *See* Aplt.Br. at 53. Because there was no physical evidence, and because AAO alleged Martinez raped her, even though Mariela never found AAO’s underwear to have blood in them, Martinez would have cast doubt on AAO’s credibility, resulting in a different outcome.

The State also misstates Martinez’s declaration, by asserting, “Defendant’s affidavit states he disagreed with his counsel’s advice, not that his counsel prevented him from exercising his right to testify.” Aplee.Br. at 42. Actually,

Martinez was clear that “I was willing and ready to testify, and I told my attorney that I wanted to testify and that I wanted my wife to testify. He would not listen to me.” R.709.

In conclusion, considering that trial counsel already allowed the State to ask Officer Lee about Martinez’s statements during the interrogation, there was no legitimate strategy to not let Martinez testify, and trial counsel was ineffective for not allowing Martinez to testify. For the reasons set forth above, the outcome would have been different had Martinez been allowed to testify.

V. THE STATE MAKES A NUMBER OF MISSTATEMENTS REGARDING THE RECORD

The following are additional times the State takes the record out of context or misstates the record in its statement of the case.

On page 8 of the State’s brief, the State asserts AAO stated during the CJC interview that Martinez’s private part “felt ‘soft’ in her mouth. R.958.” Aplee.Br. at

8. What AAO stated actually stated in the CJC interview was:

A: So like, so like, so like, you know that a lot of boys have like this and like gets longer than us females, I guess like a thing, yeah, like that has the hole there and that makes them go but a lot of us females don’t have it.

Q: Yeah. Okay. So when your uncle did that and he put it in your mouth, what did you see when he did that?

A: I can’t see in my mouth.

Q: Okay, good point.

A: I mean (inaudible).

Q: Yeah, okay. What did it feel like when he did that?

A: So, like you know, that sometimes when you, when people do this it’s like soft.

Q: It’s soft?

A: Yeah.

R.958.

And again, on page 8, the state erroneously stated, “A few minutes later, Child clarified that when Defendant’s penis was in her mouth that ‘white stuff comed out [sic].’ R.963.” In fact, during the CJC interview, the interviewer attempted to clarify the two different instances of alleged sodomy, and she asked:

Q: You told me the two different time that your uncle put his private part in your mouth, was it ever different than that?

A: Okay, so the first when my mom left, like the first time that my mom left, that happened, the same story, and then the second day my mom didn’t come back, she was going to stay there for like a week, I can’t remember but the second day, white stuff comed out.

R.963.

The State takes further liberties with the record on page 8 of its Brief, alleging “Child explained that she did not yell for help during the abuse because she ‘can’t talk without [her] mouth.’ R.966.” This is not what AAO stated. The CJC interviewer asked AAO if Martinez “said anything when those things happened” and AAO said that Martinez “said something once” and that was “I’m going back to sleep.” R.966. Then the following colloquy occurred:

Q: Oh. He said I’m going back to sleep?

A: Yeah, but I was about to close the door and I heard something and then I was like I need to go to sleep.

Q: Okay.

A: And then I escaped just I like I said so.

Q: Did he say anything when you were escaping?

A: No.

Q: No?

A: ‘Cause I didn’t talk to him while that because, you know that I can’t talk without my mouth? I couldn’t (makes noise).

Q: After that happened, after it was all done –

A: Uh-hu (affirmative).

Q: - did he talk to you –

A: No.

Q: - about what happened.

A: No.

Q: No? Okay. Have you ever talked to him about what happened?

A: No.

Q: Has he ever talked to you about what happened?

A: 'Cause my mom said not to tell anybody, just her.

R.966-67. In fact, AAO testified that she yelled at Martinez and told him to stop but it did not work. R.331.

And on page 14 of its brief, the State asserts “Counsel testified that he researched potential *Miranda* issues and determined that any *Miranda* issue was not worth pursuing. R.604.” Aplee.Br. at 14. In fact, trial counsel testified that he “didn’t find an [*Miranda*] issue there” and that he “didn’t find any other issues within it that would cause me to want to file or see a need to file a motion to suppress.” R.604. Moreover, and as previously stated, trial counsel testified that if he had a way to exclude Martinez’s police interrogation, he would have filed a motion to suppress the interrogation. R.649.

CONCLUSION

Martinez did not receive a fair trial due to trial counsel’s refusal to allow Grandmother to testify. Had Grandmother testified, Mariela’s and AAO’s testimony would have been refuted on key points and the outcome would have been different. For the reasons set forth above and the reasons in the opening brief, Martinez respectfully requests the Court reverse his convictions and grant him a new trial.

Respectfully submitted on June 17, 2019.

FILLMORE SPENCER, LLC

/s/ Aaron P. Dodd

AARON P. DODD

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

This brief is in compliance rule 24(g)(1), Utah R. App. P., as it contains 5,972 words, excluding the table of contents, table of authorities, certificates of counsel, and addendum. I certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Georgia 13 point.

/s/ Aaron P. Dodd

AARON P. DODD

Fillmore Spencer LLC

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on June 17, 2019, two copies of the Brief of Appellant will be

mailed hand-delivered, within the timeframes of the rule, to:

Christopher D. Ballard (8497)
Assistant Solicitor General
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Counsel for Appellee

I certify that on June 17, 2019, this copy of this brief was emailed to:

lwheeler@agutah.gov

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy
brief on CD in searchable portable document format (pdf):

- was filed with the Court and served on appellant.
- will be filed and served within 14 days.

/s/ Aaron P Dodd

Addenda A

**Certified Copy of translation of interrogation
filed with District Court**

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which this certificate is attached is a
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original filed in the Utah State Courts.
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2019.
DISTRICT/JUVENILE COURT
Drumh



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EXHIBIT B

I hereby certify that this is a full, true and correct copy of the original filed in the Utah State Courts.



GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH TRANSLATION

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
1	8:31:45	OF 1	así que de, de, de este momento no estás arrestado
2	8:31:50	OF 2	real quick, let's download the pictures, let me take the phone just for now...do you have anything in your pockets?
3	8:31:59	OF 1	No tiene algo en las bolsas....o nada así?
4	8:32:08	OF 2	Ok. So just explain to him that we got uh... did you already tell him we have a detective coming through that will speak fluent spanish... so I think we'll have to...
5	8:32:20	OF 1	Está hablando de un detective que, que va a venir...
6	8:32:23	Gilberto	mmm
7	8:32:25	OF 2	...explain to him...
8	8:32:26	OF 1	...en unos 10 minutos o algo así
9	8:32:30	OF 2	just to explain to him the reason why is to, to give him his opportunity if he choses to, but make sure he does understand his rights, that now he, he is in our custody here, not to be spoken to...
10	8:32:41	OF 1	he, he is not arrested, he is detained, I understand, so...
11	8:32:46	OF 2	Ok...but with him been detained, we're still about to interview him...
12	8:32:49	OF 1	Yeah
13	8:32:50	OF 2	...we...can you advise him of his full Miranda rights?
14	8:32:52	OF 1	Oh, yeah...
15	8:32:54	OF 2	Can you do that?
16	8:32:55	OF 1	We'll have Miguel do the same thing
17	8:32:57	OF 2	That's right
18	8:32:58	OF 1	Yo voy a a explicar algunas cosas ahorita y el detective que viene va a hacer lo mismo
19	8:33:07	Gilberto	mmm
20	8:32:09	OF 1	Asi que, como le pedí, no estás arrestado de este momento, estás detendido, ok?... y con eso tienes sus derechos de hablar o no hablar con nosotros, solamente tienes que saber que lo que digas puede ser usado contra tigo entre la corte. Así que tienes un derecho a tener un abogado presente pero de entre cuestiones o de cualquier momento, si quieres que vengas un, un abogado puedes ser aquí. O si no quieres hablar con nosotros, es un derecho tuyo, a, hacerlo igual, ok?
21	8:33:59	Gilberto	mmm
22	8:34:00	OF 1	y yo,yo, la verdad, no, no voy a...
23	8:34:02		(TN: Gilberto and OF 1 speaking at the same time)
24	8:34:03	Gilberto	Disculpe...yo quiero saber....Cuál es el motivo por el que estoy aquí?
25	8:34:08	OF 1	ok...yo puedo explicar esto
26	8:34:10	Gilberto	mmm
27	8:34:10	OF 1	porque ...lo que pasa es que...como yo no soy detective y yo no tengo la reporte yo no sé, no...

LINE	TIME CODE	SPEAKER	ENGLISH TRANSLATION
1	8:31:45	OF 1	so, so, of (?) this time you're not arrested
2	8:31:50	OF 2	real quick, let's download the pictures, let me take the phone just for now...do you have anything in your pockets?
3	8:31:59	OF 1	You don't have anything in the pockets...or anything like that?
4	8:32:08	OF 2	Ok. So just explain to him that we got uh... did you already tell him we have a detective coming through that will speak fluent spanish... so I think we'll have to...
5	8:32:20	OF 1	he is talking about a detective (?) who, who is going to come...
6	8:32:23	Gilberto	mmm
7	8:32:25	OF 2	...explain to him...
8	8:32:26	OF 1	...in like 10 minutes or something like that...
9	8:32:30	OF 2	just to explain to him the reason why is to, to give him his opportunity if he choses to, but make sure he does understand his rights, that now he, he is in our custody here, not to be spoken to...
10	8:32:41	OF 1	he, he is not arrested, he is detained, I understand, so...
11	8:32:46	OF 2	Ok...but with him been detained, we're still about to interview him...
12	8:32:49	OF 1	Yeah
13	8:32:50	OF 2	...we...can you advise him of his full Miranda rights?
14	8:32:52	OF 1	Oh, yeah...
15	8:32:54	OF 2	Can you do that?
16	8:32:55	OF 1	We'll have Miguel do the same thing
17	8:32:57	OF 2	That's right
18	8:32:58	OF 1	I'm going to explain some things right now and the detective (?) who is coming will do the same
19	8:33:07	Gilberto	mmm
20	8:32:09	OF 1	So, as I asked (?) you, of (?) this time you're not arrested, you are detained, ok?...and with that you have your rights to talk or to not talk with us, you only have to know that what you say can be used against yourself (?) between (?) the court. So you have a right to have an attorney present but between questions (?) or of any time, if you want an, an attorney to come it could be here. Or if you don't want to talk with us, it is your right, to do the same...ok?
21	8:33:59	Gilberto	mmm
22	8:34:00	OF 1	and I, I, the truth is, I'm not, I'm not going to...
23	8:34:02		(TN: Gilberto and OF 1 speaking at the same time)
24	8:34:03	Gilberto	I'm sorry...I want to know...What's the reason I'm here?
25	8:34:08	OF 1	ok...I can explain this...
26	8:34:10	Gilberto	mmm
27	8:34:10	OF 1	because...what happens is that...because I'm not a detective (?) and I don't have the report I don't know, no...

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GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH TRANSLATION

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
28	8:34:20	Gilberto	...Pero...
29	8:34:20	OF 1	...No sé mucho de lo que esta pasando...
30	8:34:23	Gilberto	(TN: unintelligible)
31	8:34:23	OF 1	por eso, pero lo que pasó es que había un reporte, que está acusando que, que tú estabas tocando al... daughter or grand-daughter?
32	8:34:42	OF 2	His grand-daughter, step grand-daughter
33	8:34:47	OF 1	ok...Do you understand that?...
34	8:34:47	OF 2	(TN: unintelligible)
35	8:34:50	OF 1	Step grand-daughter, estabas tocando...
36	8:34:50	Gilberto	...estaba tocando, sí...
37	8:34:54	OF 1	...y en una forma sexual...
38	8:34:56	Gilberto	... oh!, en una forma sexual...mmm,
39	8:34:58	OF 1	por eso estamos aquí... (silencio)...y es...
40	8:35:12	OF 2	...it's probably...
41	8:35:12	OF 1	...por eso que...
42	8:35:14	OF 2	...10 or 15 minutes before he gets here
43	8:35:15	OF 1	ok
44	8:35:17	OF 2	Do you wish to speak with us? With the other detective? And me?
45	8:35:20	OF 1	dice que que el otro detective va a llegar en como 10, 15 minutos y queremos fijar si, si quieres hablar con nosotros como policías
46	8:35:33	Gilberto	no, voy a esperar que llegue el otro detective...
47	8:35:35	OF 1	ok...
48	8:35:36	Gilberto	...porque...
49	8:35:37	OF 1	pero si quieres hablar un poco mejor sobre eso para saber un poco mejor lo que esta pasando en el caso...
50	8:35:45	Gilberto	...pues es que me sorprende...
51	8:35:46	OF 1	...y hablar sobre...
52	8:35:47	Gilberto	...yo también estoy sorprendido...
53	8:35:48	OF 1	sí
54	8:35:49	Gilberto	me entiende?
55	8:35:49	OF 1	si
56	8:35:53	Gilberto	que...es un acusación muy grave, es algo muy peligroso...
57	8:35:55	OF 1	sí...
58	8:35:57	Gilberto	por eso, me entiende?...como le digo yo, yo me sujeto a las manos de ustedes...(TN:unintelligible)...que ustedes son los que tienen el reporte y todo eso, no?, pero pues, qué puedo hacer?, no puedo hacer nada, me entiende?...mejor esteeee...pueees, que pase lo que tenga que pasar y luego así que, que sea Dios el que decida que, que me, que me tiene para mí, me entiende?

LINE	TIME CODE	SPEAKER	ENGLISH TRANSLATION
28	8:34:20	Gilberto	...but...
29	8:34:20	OF 1	...I don't know much of what's going on...
30	8:34:23	Gilberto	(TN: unintelligible)
31	8:34:23	OF 1	...that's why, but what happened is that there was a report, that is accusing that, that you were touching the...daughter or grand-daughter?
32	8:34:42	OF 2	His grand daughter, step grand-daughter
33	8:34:47	OF 1	ok...Do you understand that?...
34	8:34:47	OF 2	(TN: unintelligible)
35	8:34:50	OF 1	Step grand daughter, you were touching...
36	8:34:50	Gilberto	...was touching, yes...
37	8:34:54	OF 1	...in a sexual way...
38	8:34:56	Gilberto	...oh!, in a sexual way...mmm...
39	8:34:58	OF 1	that's why we are here...(silence)...an that's...
40	8:35:12	OF 2	it's probably...
41	8:35:12	OF 1	...why that...
42	8:35:14	OF 2	...10 or 15 minutes before he gets here
43	8:35:15	OF 1	ok
44	8:35:17	OF 2	Do you wish to speak with us? With the other detective? And me?
45	8:35:20	OF 1	he says that the other detective (?) will arrive in like 10, 15 minutes and want to see if, if you want to speak with us as police officers
46	8:35:33	Gilberto	no, I'm going to wait until the other detective arrives...
47	8:35:35	OF 1	ok...
48	8:35:36	Gilberto	...because...
49	8:35:37	OF 1	but if you want to talk a little more about it to know a little more about what is going on with the case...
50	8:35:45	Gilberto	...well, I am shocked...
51	8:35:46	OF 1	...and talk about...
52	8:35:47	Gilberto	...and I'm shocked...
53	8:35:48	OF 1	yes
54	8:35:49	Gilberto	...do you understand me?
55	8:35:49	OF 1	yes
56	8:35:53	Gilberto	that...it a very serious accusation, it is something very dangerous...
57	8:35:55	OF 1	yes...
58	8:35:57	Gilberto	that's why, do you understand me? As I said I, I put myself in your hands...(TN:unintelligible)...because you are the ones that have the report and all that, right?, but well, what can I do?, there's nothing I can do, do you understand me?...so I better...well...let the chips fall where they may and then, let the...let God decide what he, what he has in store for me, do you understand me?

STATE OF UTAH
 COUNTY OF Allen
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GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH TRANSLATION

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
59	8:36:21	OF 1	si, si...
60	8:36:23	Gilberto	como le digo es algo muy, muy serio...
61	8:36:25	OF 1	si, es algo muy grave.
62	8:36:26	Gilberto	muy muy grave y...y ya ha pasado en otros casos de mis amigos que han pasado...que han tenido eso...que...hace poco, creo que fue hace casi un año un amigo mío, igual, para ese caso, no sé como estuvo muy el caso...ejem...que dice que abusó de sus hijas, tambien que las tocó ahí por eso...
63	8:36:49	OF 1	ah sí?
64	8:36:49	Gilberto	el señor estuvo arrestado y...creo que...que...seeee...hasta se mató, se asesinó...
65	8:36:58	OF 1	en serio?
66	8:36:59	Gilberto	aha...para mí que no es cierto
67	8:37:03	OF 2	I'm gonna hold this...so you just can't, can't use it...(TN:unintelligible)...
68	8:37:05	OF 1	(TN:unintelligible)... que no llamas a alguien más de este momento...
69	8:37:10	Gilberto	si
70	8:37:11	OF 1	no va a estar buscándolo (?), o algo así...I just told him you're not going to be looking at it or anything...
71	8:37:15	OF 2	ok...does he have a password on it?
72	8:37:20	OF 1	tiene un código?
73	8:37:21	Gilberto	no
74	8:37:22	OF 1	no
75	8:37:23	OF 2	no password, ok...I'll leave it right here for now...so it just slides and it's open?
76	8:37:28	OF 1	yea
77	8:37:30	OF 2	ok
78	8:37:32	OF 1	he was just telling me about a friend that was accused of kind of the same thing a while ago
79	8:37:38	OF 2	so he's concerned about something
80	8:37:41	OF 1	yea... he committed suicide...over all of it...he doesn't know all of the details but...
81	8:37:48	Gilberto	y según el reporte...
82	8:37:49	OF 1	(TN:unintelligible)
83	8:37:50	Gilberto	el reporte, qué tiempo fue?, hace cuánto fue eso?...qué paso...
84	8:37:56	OF 1	so, when? He just wants to know when that happened. So, it was over a course of the last year
85	8:38:04	OF 2	specifically September of last year

LINE	TIME CODE	SPEAKER	ENGLISH TRANSLATION
59	8:36:21	OF 1	yes, yes...
60	8:36:23	Gilberto	as I said it's something very, very serious...
61	8:36:25	OF 1	yes, it's something very serious...
62	8:36:26	Gilberto	very, very serious and...and it has already happened in other cases to friends of mine that have...that have had that...that...not long ago, almost a year ago I think, a friend of mine, the same, in that case, I don't know how the case went...ejem...that said he abused his daughters, also that he touched them there XXX
63	8:36:49	OF 1	is that so?
64	8:36:49	Gilberto	the man was arrested and...I think that...that...heeee...he killed himself, he murdered himself (?)...
65	8:36:58	OF 1	really?
66	8:36:59	Gilberto	aha...I don't think that is true
67	8:37:03	OF 2	I'm gonna hold this...so you just can't, can't use it...(TN:unintelligible)...
68	8:37:05	OF 1	(TN:unintelligible)...that you don't call someone else at this time...
69	8:37:10	Gilberto	yes
70	8:37:11	OF 1	he's not going to search it, or something like that...I just told him you're not going to be looking at it or anything...
71	8:37:15	OF 2	ok...does he have a password on it?
72	8:37:20	OF 1	does it have a code?
73	8:37:21	Gilberto	no
74	8:37:22	OF 1	no
75	8:37:23	OF 2	no password, ok...I'll leave it right here for now...so it just slides and it's open?
76	8:37:28	OF 1	yea
77	8:37:30	OF 2	ok
78	8:37:32	OF 1	he was just telling me about a friend that was accused of kind of the same thing a while ago
79	8:37:38	OF 2	so he's concerned about something
80	8:37:41	OF 1	yea... he committed suicide...over all of it...he doesn't know all of the details but...
81	8:37:48	Gilberto	and based on the report...
82	8:37:49	OF 1	(TN:unintelligible)
83	8:37:50	Gilberto	...the report, when was it? How long ago did that happen?...that it happened...
84	8:37:56	OF 1	so, when? He just wants to know when that happened. So, it was over a course of the last year
85	8:38:04	OF 2	specifically September of last year

STATE OF UTAH
 COUNTY OF Utah
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 which this certificate is attached is a
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 original filed in the Utah State Courts.
 WITNESS my hand and seal
 this 15 day of July
 2020
 DISTRICT JUVENILE COURT



GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH TRANSLATION

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
86	8:38:07	OF 1	dice que específicamente es algo que pasó en Setiembre...
87	8:38:12	Gilberto	del año que pasó...
88	8:38:13	OF 1	del año pasado, si...
89	8:38:18	OF 2	and we'll get into that, we'll explain it to him (TN:unintelligible)
90	8:38:22	OF 1	el va, mejor cuando llegue el otro detective, porque el ya sabe todo los detalles del caso, y, y, va a ser mucho mejor para tí...(lengthy silence)...quieres agua?
91	8:38:48	Gilberto	no, estoy bien, gracias...lo único que quiero es pasar al baño...
92	8:38:51	OF 1	all right, si...hay un baño aquí...
93	8:40:07		(TN:defendant returns alone)
94	8:40:32	OF 2	un momento, OK
95	8:41:27	OF 2	Gilberto, is this correct? ...Social security,
96	8:41:33	Gilberto	mmm
97	8:41:36	OF 2	not that one...address here...do you have a middle name?
98	8:41:51	Gilberto	no
99	8:41:53	OF 2	just Gilberto Martinez?
100	8:41:54	Gilberto	si
101	BREAK IN TRANSCRIPTION AND TRANSLATION		
102	8:47:39	Detective	Gilberto?
103	8:47:41	Gilberto	Si, soy yo
104	8:47:42	Detective	Gilberto, qué tal?
105	8:47:43	Gilberto	muy bien
106	8:47:44	Detective	Yo soy el Detective Lee del Departamento de Springville y me pidieron que viniera y ayudara con la situación
107	8:47:50	Gilberto	mhm
108	8:47:52	Detective	como yo hablo español, está bien si hablamos un ratito?
109	8:47:52	Gilberto	sí, claro
110	8:47:53	Detective	ok, me voy a sentar aquí, ok?
111	8:47:54	Gilberto	Ok
112	8:47:57	Detective	Are you going to give me a copy of that o do you want to record it?
113	8:48:00	OF 2	A copy of...
114	8:48:02	Detective	Yeah
115	8:48:02	OF 2	Yeah

LINE	TIME CODE	SPEAKER	ENGLISH TRANSLATION
86	8:38:07	OF 1	he says that it's specifically something that happened in September...
87	8:38:12	Gilberto	of last year...
88	8:38:13	OF 1	of last year, yes
89	8:38:18	OF 2	and we'll get into that, we'll explain it to him (TN:unintelligible)
90	8:38:22	OF 1	he's going to, it'll be better when the other detective (?) arrives, because he knows all the details of the case and, and, it's going to be much better for you...(lengthy silence)...do you want water?
91	8:38:48	Gilberto	no, I'm OK thank you...the only thing I want is to use the bathroom...
92	8:38:51	OF 1	all right, yes...there's a bathroom here...
93	8:40:07		(TN:defendant returns alone)
94	8:40:32	OF 2	just a moment, OK
95	8:41:27	OF 2	Gilberto, is this correct? ...Social security,
96	8:41:33	Gilberto	mmm
97	8:41:36	OF 2	not that one...address here...do you have a middle name?
98	8:41:51	Gilberto	no
99	8:41:53	OF 2	just Gilberto Martinez?
100	8:41:54	Gilberto	yes
101	BREAK IN TRANSCRIPTION AND TRANSLATION		
102	8:47:39	Detective	Gilberto?
103	8:47:41	Gilberto	yes, it's me
104	8:47:42	Detective	Gilberto, how you doing?
105	8:47:43	Gilberto	very well
106	8:47:44	Detective	My name is Detective Lee od the Spanish Fork Police Department and I will help you with the situation...
107	8:47:50	Gilberto	mhm
108	8:47:52	Detective	...because I speak spanish. Is it OK if we spoke for a while?
109	8:47:52	Gilberto	yes, of course
110	8:47:53	Detective	ok, I'm going to sit down here, ok?
111	8:47:54	Gilberto	ok
112	8:47:57	Detective	Are you going to give me a copy of that o do you want to record it?
113	8:48:00	OF 2	A copy of...
114	8:48:02	Detective	Yeah
115	8:48:02	OF 2	Yeah

STATE OF UTAH
 COUNTY OF Utah
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 which this certificate is attached is a
 full, true and correct copy of the
 original filed in the Utah State Courts.
 WITNESS my hand and seal
 this 13th day of July, 2019
 DISTRICT JUVENILE COURT
[Signature]



GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH TRANSLATION

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
116	8:48:04	Detective	Yep...ok...entonces Gilberto..ah...este muchacho que habló contigo, el te leyó tus derechos, ok?...ah...pero como que te los voy a leer otra vez, como para que...cualquier cosa que quieras preguntar, me preguntes. Tienes el derecho de estar callado, cualquier pregunta que tengas ah,...cualquier cosa que digas puede ser usada en tu contra tuya en la corte de la ley, vas a tener derecho a un abogado presente mientras hacemos preguntas, uhm... si no tienes uno el estado te puede proveer uno para que te represente, ok? Terminados tus derechos presentes, Quieres hablar con nosotros ahora?
117	8:48:40	Gilberto	Pues, como digo yo no sé si estoy bien o estoy mal, pero me dijeron que voy a hablar con ustedes...
118	8:48:48	Detective	ok...la razón por la que estamos aquí, uhm, estamos investigando un, un caso y queremos saber cual es tu relación uhm...con Ailyn..
119	8:49:00	Gilberto	Con [redacted]?
120	8:49:00	Detective	aha
121	8:49:02	Gilberto	No, no mucho con ella
122	8:42:04	Detective	no mucho?
123	8:49:05	Gilberto	no, no, no, no tengo mucho contacto con ella
124	8:49:07	Detective	no tienes mucho contacto?
125	8:49:08	Gilberto	No
126	8:49:09	Detective	ok, tú eres el tío, no?
127	8:49:11	Gilberto	No, soy el...como se puede decir?...mmm...yo estoy casado con la abuela de ella
128	8:49:17	Detective	Estás casado con la abuela de ella?
129	8:49:18	Gilberto	ah, sí
130	8:49:19	Detective	ok, es como si fueras el sustituto a un abuelo
131	8:49:22	Gilberto	Exactamente
132	8:49:23	Detective	ok, Cuánto tiempo tienen casados ustedes?
133	BREAK IN TRANSCRIPTION AND TRANSLATION		
134	9:11:32	Detective	ok, entonces esto es que, que estás haciendo es que nos estás dando permiso sólo para buscar en tu teléfono, y entonces uhm... como te estaba diciendo, la niña incluso dijeron que tu le habías enseñado a ellos...uhm cosas en el teléfono
135	9:11:43	Gilberto	que yo les enseñé?
136	9:11:44	Detective	sí
137	9:11:45	Gilberto	no, jamás, como te dije jamás
138	9:11:48	Detective	entonces esto es lo que...

LINE	TIME CODE	SPEAKER	ENGLISH TRANSLATION
116	8:48:04	Detective	Yep...ok...then Gilberto...ah...this man that spoke with you, he read your rights to you, right?...ah...but I will read them to you again, just in case...anything you want to ask, you ask me. You have the right to remain silent, any question that you have, ah...anything you say can be used against you in a court of law, you will have the right to have an attorney present while we ask questions, um...if you don't have one the state can provide you one to represent you, ok? After having finished with your present rights, do you want to speak with us now?
117	8:48:40	Gilberto	well, as I said I don't know if I'm OK or in trouble, but they said to me that I was going to speak with you guys
118	8:48:48	Detective	ok...the reason why we're here, um, we're investigating a, a case and we want to know what your relationship is, um...with Avi
119	8:49:00	Gilberto	with [redacted]?
120	8:49:00	Detective	mmm
121	8:49:02	Gilberto	no, not much with her
122	8:42:04	Detective	not much?
123	8:49:05	Gilberto	no, no, no, I don't have much contact with her
124	8:49:07	Detective	you don't have much contact?
125	8:49:08	Gilberto	no
126	8:49:09	Detective	ok, you are the uncle, right?
127	8:49:11	Gilberto	no, I am the...how can it be said?...mmm...I am married to her grandmother
128	8:49:17	Detective	you're married to her grandmother?
129	8:49:18	Gilberto	ah, yes
130	8:49:19	Detective	ok, it's like you a substitute grandfather
131	8:49:22	Gilberto	exactly
132	8:49:23	Detective	ok, for how long have you been married?
133	BREAK IN TRANSCRIPTION AND TRANSLATION		
134	9:11:32	Detective	ok, then, this is so, so you are giving us authorization to only search your phone, and then, uhm...as I was saying, the girls, they even said that you had showed them...uhm...things in the phone
135	9:11:43	Gilberto	that I showed them?
136	9:11:44	Detective	yes
137	9:11:45	Gilberto	no, never, as I told you, never
138	9:11:48	Detective	then, this is what the...

STATE OF UTAH
 COUNTY OF Utah
 I hereby certify that the document to
 which this certificate is attached is a
 full, true and correct copy of the
 original filed in the Utah State Courts.
 Witness my hand and seal
 this 19 day of July, 2020
 District 1



GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH TRANSLATION

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
139	9:11:49	Gilberto	te voy, te voy a decir lo que pasó una vez con el niño
140	9:11:52	Detective	con la niña? <u>CLERK</u>
141	9:11:53	Gilberto	el niño, que dice que, que estaba viendo mujeres encueradas pero, no, no estaba yo viendo
142	9:11:56	Detective	Ok
143	9:11:57	Gilberto	porque, tu sabes que pasan en youtube videos que a veces están nada más en trajes de baño y todo eso y, y cosas chistosas, es lo único que estaba yo viendo, pero ni ya exageró que estaba yo viendo mujeres encueradas y todo eso...me entiendes?
144	9:12:13	Detective	ok...he said that the only ocaion was that he was watching youtube videos and there were girls wearing bikinies and boys watching those kind of videos
145	9:12:22	OF 2	Which boys?
146	9:12:25	Detective	mmm...the brother
147	9:12:25	OF 2	a, a brother?
148	9:12:26	Detective	mhm
149	9:12:27	OF 2	ok
150	9:12:27	Detective	and he said they weren't naked but they were wearing a swimmsuite and and the boy said something about that
151	9:12:32	OF 2	That's not what we are here for
152	9:12:35	Detective	no, no he said that was the only ocaion...
153	9:12:37	OF 2	...ok
154	9:12:43	Detective	...that something big happened...am...entonces esto es que nos está diciendo que nos está dando permiso a nosotros para buscar en su teléfono, es solamente un día, dos días y luego nosotros lo devolvemos para atrás porque nosotros no nos quedamos con la propiedad
155	9:12:48	Gilberto	ok...antes de todo...
156	9:12:51	Detective	mhm
157	9:12:51	Gilberto	...que dices que se va a quedar con mi telefono...
158	9:12:53	Detective	aha
159	9:12:54	Gilberto	aha...yo tengo la (TN:unintelligible) de mi trabajo y tengo que llevarlas a mi trabajo...no sé si me a soltar hoy...me entiende?...y necesito hacer una llamada a mi esposa pasándole los números de teléfono de la persona con la que voy a ir a trabajar...aja...para que pueda el ir por ella
160	9:13:12	Detective	ok, eso no hay problema...el número lo podemos sacar y, y puedes llamar de ahí o de otro teléfono, podemos buscar la manera...

LINE	TIME CODE	SPEAKER	ENGLISH TRANSLATION
139	9:11:49	Gilberto	I'm going, I'm going to tell you what happened once with the boy
140	9:11:52	Detective	with the girl?
141	9:11:53	Gilberto	the boy, who says that, that I was watching naked women but no, no, I wasn't watching...
142	9:11:56	Detective	ok
143	9:11:57	Gilberto	...because, you know that in youtube they show videos in which sometimes they wear only swimsuits and all that and, and funny things, that's the only thing I was watching, but the boy exaggerated saying that I was watching naked women and all that...do you understand me?
144	9:12:13	Detective	ok...he said that the only ocaion was that he was watching youtube videos and there were girls wearing bikinies and boys watching those kind of videos
145	9:12:22	OF 2	Which boys?
146	9:12:25	Detective	mmm...a brother
147	9:12:25	OF 2	a, a brother?
148	9:12:26	Detective	mhm
149	9:12:27	OF 2	ok
150	9:12:27	Detective	and he said they weren't naked but they were wearing a swimmsuite and and the boy said something about that
151	9:12:32	OF 2	That's not what we are here for
152	9:12:35	Detective	no, no he said that was the only ocaion...
153	9:12:37	OF 2	...ok
154	9:12:43	Detective	...that something big happened...uhm..then this is saying that you have given us permission to search your phone, is just for one day, two days and then we return it because we don't keep the property
155	9:12:48	Gilberto	ok...before we start...
156	9:12:51	Detective	uhm
157	9:12:51	Gilberto	you're saying he's going to keep my phone...
158	9:12:53	Detective	aha
159	9:12:54	Gilberto	aha...I have half my (TN:unintelligible) there and I have to take them to work...I don't know if I'm going to be released today...do you understand me?...and I need to make a phone call to my wife to give the phone numbers of the person with whom I'm going to work...aja...so he can go pick her up
160	9:13:12	Detective	ok, that's not a problem...we can pull the number and, and you can call from that phone or from another phone, we can find the way...

I hereby certify that the document to which this certificate is attached is a full, true and correct copy of the original filed in the Utah State Courts.



GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH TRANSLATION

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
161	9:13:20	Gilberto	no, yo solamente quiere conversar con mi esposa que, que, que ella es la madre...
162	9:13:21	Detective	está bien, tú vas a tener la oportunidad de hacer esa llamada
163	9:13:23	Gilberto	como te digo mañana yo trabajo y ella tiene que trabajar mañana
164	9:13:25	Detective	aja...no, que...
165	9:13:29	Gilberto	como te digo
166	9:13:30	Detective	no es que no queramos...
167	9:13:32	Gilberto	aquí, aquí...yo no sé si voy a salir, o si no voy a salir...
168	9:13:33	Detective	no es que no queramos dejarte hacer la llamada...esto es lo que hace que nos das permiso de buscar en este teléfono específicamente por eso es que pusimos que el modelo y número, de, de, dar permiso a el departamento de Spanish Fork para buscar en tu teléfono y dice que este consentimiento es de tu libre voluntad, que tu das autorizacion a nosotros para buscar en el teléfono, ok?
169	9:13:58	Gilberto	mmm...
170	9:13:59	Detective	entonces si quieres darnos autorizacion, solo tienes que firmar aquí abajo
171	9:14:03	Gilberto	no, no voy a firmar nada
172	9:14:05	Detective	no va a firmar nada?
173	9:14:05	Gilberto	no
174	9:14:06	Detective	no? ok
175	9:14:06	Gilberto	no
176	9:14:07	Detective	he says he's not going to sign anything

LINE	TIME CODE	SPEAKER	ENGLISH TRANSLATION
161	9:13:20	Gilberto	no, I just want to speak with my wife because, because she is the mother...
162	9:13:21	Detective	it's ok, you will have the chance to make that call...
163	9:13:23	Gilberto	as I told you I work tomorrow and she has to work tomorrow
164	9:13:25	Detective	aja...no, that...
165	9:13:29	Gilberto	as I told you...
166	9:13:30	Detective	not that we don't want...
167	9:13:32	Gilberto	here, here...I don't know if I'm going to be released, or if I'm not going to be released...
168	9:13:33	Detective	not that we don't want to let you make the call...what this does is that you give us permission to search this phone specifically, that's why we wrote that the Department, of, of, giving the Spanish Fork Department authorization to search your phone and it says that this consent is given on your own will and that you give us authorization to search your phone, ok?
169	9:13:58	Gilberto	mmm...
170	9:13:59	Detective	then, you do want to give us authorization, you just need to sign here at the bottom
171	9:14:03	Gilberto	no, I am not going to sign anything
172	9:14:05	Detective	you're not going to sign anything?
173	9:14:05	Gilberto	no
174	9:14:06	Detective	no? ok
175	9:14:06	Gilberto	no
176	9:14:07	Detective	he says he's not going to sign anything

TRANSLATOR CERTIFICATION: I, PABLO SILVEIRA, UTAH STATE CERTIFIED INTERPRETER, HAVE TRANSCRIBED AND TRANSLATED THIS DOCUMENT AND CERTIFY THAT IT IS AN ACCURATE TRANSCRIPTION AND TRANSLATION FROM THE ORIGINAL DOCUMENT WHICH I HAD BEFORE ME. BEGINNING AT 8:49:23 INTO THE INTERVIEW RECORDING, I DID NOT TRANSCRIBE/TRANSLATE THE INTERVIEW FROM THAT TIME UNTIL 9:11:32 DUE TO TIME CONSTRAINTS OF DEFENSE COUNSEL. I DID LISTEN TO THE ENTIRE INTERVIEW. DURING THIS TIME PERIOD THAT I DID NOT TRANSCRIBE, THERE WERE NOT DISCUSSIONS OR QUESTIONS REGARDING WAIVER OF MIRANDA RIGHTS.

Date 10/13/2017 Signature [Signature]
PABLO SILVEIRA - Cell 801-687-4116

State of Utah
ss:
County of Utah

On the 13th day of October 2017, personally appeared before me, the signer of this instrument who duly acknowledged to me that he executed the same.

[Signature]
Notary Public

