

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

JOSEPH HENDERSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed  
Dec 16 2013 12:49 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

CASE NO: 62629

**MOTION TO DISMISS APPEAL AND REQUEST FOR STAY OF  
BRIEFING SCHEDULE**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this Motion to Dismiss Appeal and Request for Stay of Briefing Schedule.

This Motion is based on the following memorandum, declaration, and all papers and pleadings on file herein.

Dated this 16<sup>th</sup> day of December, 2013.

Respectfully submitted,

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565

BY */s/ Steven S. Owens*

STEVEN S. OWENS  
Chief Deputy District Attorney  
Nevada Bar #004352  
Office of the Clark County District Attorney

## MEMORANDUM

NRAP 4(b)(1)(A) provides that “the notice of appeal by a defendant or petitioner in a criminal case shall be filed with the district court clerk within 30 days after the entry of the judgment or order being appealed.” In Lemmond v. State this court held that under NRS 34.575(1) and NRS 34.830, the time to file a notice of appeal from an order denying a post-conviction habeas petition does not commence to run until notice of entry of an order denying the petition has been separately served by the district court on both the petitioner and the petitioner's counsel, if any. Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998).

The timely filing of a notice of appeal is jurisdictional and is an essential prerequisite to the perfection of an appeal. Scherer v. State, 89 Nev. 372, 374, 513 P.2d 1232, 1233 (1973) (citations omitted). See also Jordon v. Director, Dep't of Prisons, 101 Nev. 146, 696 P.2d 998 (1985) (The timely filing of a notice of appeal is mandatory and jurisdictional). This Court has consistently held that an untimely notice of appeal fails to vest jurisdiction in this court. Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994) (citing Jordon, *supra*, 101 Nev. 146, 696 P.2d 998). See also Washington v. State, 104 Nev. 309, 756 P.2d 1191 (1988); Klein v. Warden, 118 Nev. 305, 308-11, 43 P.3d 1029, 1032-33 (2002).

In this case, the Findings of Fact and Conclusions of Law was filed on November 21, 2012. 2 AA 130. Notice of Entry of Decision and Order was filed

and served on both defendant and his appointed post-conviction counsel by mail on December 3, 2012. 2 AA 153. Defendant's pro per notice of appeal was not received and filed until February 12, 2013, well outside the thirty (30) day time limit prescribed by NRAP 4(b). 2 AA 146. The State further notes that the Notice of Appeal was not even signed by the Defendant until January 29, 2013. Id. Thus, mailing time cannot be to blame for Defendant's untimely appeal. Defendant even admits that an earlier informal pro per notice of appeal was sent to the Nevada Supreme Court directly, in contrast to NRAP 4(b)(1)(A)'s clear and specific requirement to file the Notice of Appeal with the district court. 2 AA 146-147.

Accordingly, this Court lacks jurisdiction over this appeal. On this basis, Defendant's appeal should be dismissed. Inasmuch as the State's Answering Brief is currently due on December 18, 2013, the State requests a stay of the briefing schedule pending the resolution of this motion.

Dated this 16<sup>th</sup> day of December, 2013.

Respectfully submitted,

**STEVEN B. WOLFSON**  
Clark County District Attorney

BY */s/ Steven S. Owens*

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## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 16, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO  
Nevada Attorney General

JULIAN GREGORY, ESQ.  
Counsel for Appellant

STEVEN S. OWENS  
Chief Deputy District Attorney

BY /s/ j.garcia  
Employee, District Attorney's Office

SSO/Sarah Killer/jg