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2 July 11, 2013, an evidentiary hearing was held on the First Petition, despite this Court's  
3 previous denial. At the hearing, Mr. Brower informed the court that "Defendant does not wish  
4 to withdraw his plea..." and that he "withdrew the appeal because we're trying to address the  
5 reconsideration of the time-bar issue, which is the whole reason we're here." See Reporter's  
6 Transcript 07/11/13, p. 3-4. The State called the Court's attention to the letter written by  
7 Petitioner in July of 2010, in which he admits he knew the Nevada Supreme Court denied his  
8 appeal, as evidence that Petitioner became aware that remittitur issued within the one year time  
9 period in which to properly file a petition for post-conviction relief. Id. at p. 15. Petitioner  
10 testified and admitted that he learned his appeal was denied before the one year time period  
11 had expired. Id. at p. 21. This Court found Petitioner had actual knowledge of the denial in  
12 July of 2010, before the one year period had run, and there was no good cause to overcome  
13 the time bar. Accordingly, this Court denied the First Petition for the second time, and entered  
14 its Findings of Fact, Conclusions of Law & Order on November 12, 2013. On December 10,  
15 2013, Petitioner again appealed the denial of his First Petition to the Nevada Supreme Court,  
16 and once again voluntarily withdrew the appeal on May 12, 2014.

17 On August 19, 2014, Mr. Brower withdrew as counsel. On September 4, 2014, Matthew  
18 Carling, Esq., was confirmed as counsel. On February 9, 2015, Mr. Carling filed the instant  
19 "Supplemental" Petition for Writ of Habeas Corpus (Post-Conviction)("Petition"). The State  
20 filed its Response and Motion to Dismiss on March 6, 2015. Petitioner filed a Reply on April  
21 20, 2015. This Court heard argument on the matter on May 6, 2015, and hereby denies the  
22 "Supplemental" Petition for the following reasons.

23 The instant Petition is not a "Supplemental" Petition, but is in fact simply a second,  
24 untimely petition for post-conviction relief. While counsel for a petitioner for a writ of habeas  
25 corpus may serve "supplemental" pleadings after being appointed, this is true only where the  
26 petitioner has filed a Proper Person Petition for Writ of Habeas Corpus necessitating counsel's  
27 appointment. See NRS 34.750. Here, Petitioner's only prior attempt at post-conviction relief  
28 was filed by previous counsel over three years ago. Accordingly, there is nothing

1 "supplemental" in nature about the instant Petition.

2 Like Petitioner's first attempt at post-conviction relief, the instant Petition is  
3 procedurally barred without good cause. The mandatory provisions of NRS 34.726(1) state  
4 that "[u]nless there is good cause shown for delay, a petition that challenges the validity of a  
5 judgment or sentence must be filed within 1 year...after the Supreme Court issues its  
6 remittitur." As Remittitur issued from Petitioner's Direct Appeal on August 4, 2009, the instant  
7 Petition was filed more than four years too late. Therefore, absent a showing of good cause,  
8 Petitioner's Petition must be dismissed as time-barred pursuant to NRS 34.726(1).

9 Petitioner has failed to demonstrate good cause to overcome the procedural bar. To do  
10 so, a defendant has the burden of pleading and proving specific facts that demonstrate good  
11 cause for his failure to present his claim in earlier proceedings or comply with the statutory  
12 requirements. See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993);  
13 Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "To  
14 establish good cause, appellants must show that an impediment external to the defense  
15 prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615,  
16 621, 81 P.3d 521, 525 (2003); see also Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503,  
17 506 (2003); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

18 Just as he failed to demonstrate good cause to overcome the procedural bar when this  
19 Court twice considered Petitioner's first untimely petition, Petitioner has again failed to  
20 demonstrate good cause to overcome the time bar four years later. To the extent Petitioner  
21 alleges trial counsel's failure to keep him apprised of the status of his direct appeal and provide  
22 him a copy of his case file constitutes good cause, the Nevada Supreme Court has clarified  
23 that generally, excuses such as the lack of assistance of counsel when preparing a petition, as  
24 well as the failure of trial counsel to forward a copy of the file to a petitioner do not constitute  
25 good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other  
26 grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood  
27 v. State, 111 Nev. 335, 890 P.2d 797 (1995). Moreover, Petitioner admitted that he became  
28 aware of the denial of his appeal within the one year time period for appropriately filing a

1 petition for post-conviction relief. Petitioner also fails to demonstrate good cause based on Mr.  
2 Brower's alleged ineffectiveness, as Petitioner enjoys no constitutional right to post-  
3 conviction counsel and therefore such counsel's performance cannot constitute good cause to  
4 overcome the procedural bar. Brown v. McDaniel, 130 Nev. \_\_\_, \_\_\_, 331 P.3d 867, 869  
5 (2014). Accordingly, Petitioner has not demonstrated an impediment external to the defense  
6 that would excuse the significant delay in filing, and his Petition is therefore procedurally  
7 barred pursuant to NRS 34.726.

8 Furthermore, the instant Petition is barred by the doctrine of laches. NRS 34.800 creates  
9 a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses]  
10 between the filing of a judgment of conviction, an order imposing a sentence of imprisonment  
11 or a decision on direct appeal of a judgment of conviction and the filing of a petition  
12 challenging the validity of a judgment of conviction..." As more than five years have elapsed  
13 between the issuance of remittitur and the filing of the instant Petition, NRS 34.800 directly  
14 applies in this case. Accordingly, the instant Petition is summarily denied.

15 **ORDER**

16 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction  
17 Relief shall be, and is, hereby denied.

18 DATED this 31<sup>st</sup> day of July, 2015.

19  
20   
21 DAVID BARKER

DISTRICT JUDGE

for Hon. Jennifer Tagliatti

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

24  
25 BY  for

26 SARAH OVERLY  
27 Deputy District Attorney  
28 Nevada Bar #012842

CERTIFICATE OF SERVICE

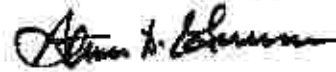
I hereby certify that service of the above and foregoing was made this 15TH day of  
JULY 2015, to:

MATTHEW CARLING, ESQ.  
cedarlegal@gmail.com

BY /s/ HOWARD CONRAD  
Secretary for the District Attorney's Office  
Special Victims Unit

hjc/SVU

NEO



CLERK OF THE COURT

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

DELARIAN K. WILSON,

Petitioner,

Case No. 07C232494-1

Dept No. IX

vs.

THE STATE OF NEVADA,

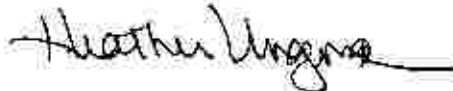
Respondent.

**NOTICE OF ENTRY OF FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
ORDER**

PLEASE TAKE NOTICE that on July 22, 2015, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on July 24, 2015.

STEVEN D. GRIERSON, CLERK OF THE COURT

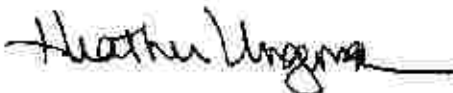


Heather Ungermann, Deputy Clerk

**CERTIFICATE OF MAILING**

I hereby certify that on this 24 day of July 2015, I placed a copy of this Notice of Entry in:

- ☒ The bints) located in the Regional Justice Center of:  
Clark County District Attorney's Office  
Attorney General's Office - Appellate Division-
- ☒ The United States mail addressed as follows:  
Delarian Wilson # 1022177      Matthew D. Carling  
P.O. Box 208      51 East 400 North, Bldg. #1  
Indian Springs, NV 89070      Cedar City, UT 84721



Heather Ungermann, Deputy Clerk

ORIGINAL

1 FCL  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 JAMES R. SWEETIN  
6 Chief Deputy District Attorney  
7 Nevada Bar #005144  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

Electronically Filed  
07/22/2015 02:41:51 PM



CLERK OF THE COURT

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

12 DELARIAN WILSON,  
13 #1966773

14 Defendant.

CASE NO: 07C232494-2

DEPT NO: IX

15 FINDINGS OF FACT, CONCLUSIONS OF

16 LAW AND ORDER

17 DATE OF HEARING: MAY 6, 2015  
18 TIME OF HEARING: 9:00 AM

19 THIS CAUSE having come on for hearing before the Honorable JENNIFER  
20 TOGLIATTI, District Judge, on the 6th day of May, 2015, the Petitioner not being present,  
21 represented by MATTHEW D. CARLING, ESQ., the Respondent being represented by  
22 STEVEN B. WOLFSON, Clark County District Attorney, by and through SARAH OVERLY,  
23 Deputy District Attorney, and the Court having considered the matter, including briefs,  
24 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court  
25 makes the following findings of fact and conclusions of law:

26 //

27 //

28 //

002305



1 FINDINGS OF FACT

2 CONCLUSIONS OF LAW

3 This is Petitioner Delarian Wilson's "Supplemental" Petition for Writ of Habeas Corpus  
4 (Post-Conviction). On March 28, 2008, the State charged Petitioner by way of Amended  
5 Information with two counts of Robbery with Use of a Deadly Weapon and one count of  
6 Sexual Assault. Petitioner pled guilty to the charges the same day. On July 3, 2008, Petitioner  
7 was sentenced to 72 to 180 months plus an equal and consecutive term of 72 to 180 months  
8 for the use of a deadly weapon on each of Counts 1 and 2, respectively, and life imprisonment  
9 with a minimum parole eligibility of 10 years with respect to Count 3. Counts 1, 2, and 3 were  
10 to run consecutive to one another. The Court further imposed a special sentence of lifetime  
11 supervision and mandatory registration as a sex offender should Petitioner ever be released.  
12 Petitioner received 500 days credit for time served. The Judgment of Conviction was entered  
13 on July 18, 2008. On July 7, 2009, the Nevada Supreme Court affirmed Petitioner's conviction,  
14 and Remittitur issued on August 4, 2009.

15 On July 10, 2010, within one year after remittitur issued, Petitioner sent his counsel a  
16 letter stating that Petitioner had "learned via [Petitioner's] mother that [Petitioner] was denied  
17 relief on [Petitioner's] direct appeal as of April 2010," and requesting a copy of Petitioner's  
18 case file. See Motion for Order filed 08/05/2010, p. 7. On July 29, 2010, also within one year  
19 of the issuance of remittitur, Petitioner sent a Proper Person letter to the Nevada Supreme  
20 Court regarding "counsel and time for filing an appeal in the matter." See Nevada Supreme  
21 Court Case No. 52104.

22 On October 27, 2010, Petitioner filed a Motion to Appoint Post-Conviction Counsel,  
23 and on December 14, 2010, this court granted the request and Keith Brower, Esq., was  
24 confirmed as counsel. On October 10, 2011, over two years after remittitur issued from  
25 Petitioner's direct appeal, Mr. Brower filed a Petition for Writ of Habeas Corpus (Post-  
26 Conviction) ("First Petition") on Petitioner's behalf. Mr. Brower alleged trial counsel had  
27 provided ineffective assistance of counsel on appeal in part by failing to provide Petitioner  
28 with a copy of his case file. At that time, Mr. Brower was apparently under the impression that

1 this Court's granting Petitioner's motion to appoint post-conviction counsel indicated that the  
2 Court had found good cause to overcome the one-year procedural bar applicable to Petitioner's  
3 First Petition pursuant to NRS 34.726. However, no such finding had in fact been made. The  
4 State filed its Response and Motion to Dismiss Defendant's Petition on November 1, 2011,  
5 arguing that the Petition was procedurally time-barred. On December 13, 2011, this Court  
6 agreed and denied the Petition, finding it had been procedurally barred even before Mr. Brower  
7 was appointed.

8 On January 6, 2012, the court filed its Findings of Fact, Conclusions of Law & Order,  
9 stating Petitioner had failed to establish good cause to overcome the procedural bar. On  
10 January 30, 2012, Petitioner filed a "Motion for Clarification and/or Reconsideration of Denial  
11 of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)," requesting that the  
12 court clarify its reasoning for the denial of Defendant's First Petition in the presence of  
13 Petitioner. Petitioner also challenged the court's finding that his Petition was time-barred,  
14 arguing that his appellate counsel, Mr. Oronoz, neglected to inform Petitioner of the status of  
15 his appeal such that Petitioner "could not be aware of the need to file a petition to avoid the  
16 procedural time-bar." See Motion to Reconsider, 1/30/2012, p. 2.

17 On February 21, 2012, before the Court could hear Petitioner's Motion to Reconsider,  
18 Petitioner appealed the denial of the First Petition to the Nevada Supreme Court. The same  
19 day, this Court entered an Order staying its Findings of Fact, Conclusions of Law & Order  
20 until such time as Petitioner's Motion for Reconsideration could be heard. The matter  
21 convened for hearing on March 13, 2012, and this Court ordered the matter be taken off  
22 calendar until an order from the Nevada Supreme Court regarding Petitioner's appeal had  
23 issued. See District Court Minutes, 03/13/2012. However, on January 18, 2013, before such  
24 order could issue, Petitioner filed a Notice of Voluntary Withdrawal of Appeal. See Nevada  
25 Supreme Court Case No. 60309. Petitioner has represented that this withdrawal was a result  
26 of his wish to withdraw his guilty plea, rather than continue to pursue an appeal from the denial  
27 of his First Petition.

28 //



1 On May 23, 2013, Petitioner filed a motion to place the matter back on calendar. On  
2 July 11, 2013, an evidentiary hearing was held on the First Petition, despite this Court's  
3 previous denial. At the hearing, Mr. Brower informed the court that "Defendant does not wish  
4 to withdraw his plea..." and that he "withdrew the appeal because we're trying to address the  
5 reconsideration of the time-bar issue, which is the whole reason we're here." See Reporter's  
6 Transcript 07/11/13, p. 3-4. The State called the Court's attention to the letter written by  
7 Petitioner in July of 2010, in which he admits he knew the Nevada Supreme Court denied his  
8 appeal, as evidence that Petitioner became aware that remittitur issued within the one year time  
9 period in which to properly file a petition for post-conviction relief. *Id.* at p. 15. Petitioner  
10 testified and admitted that he learned his appeal was denied before the one year time period  
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19 "Supplemental" Petition for Writ of Habeas Corpus (Post-Conviction)("Petition"). The State  
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21 20, 2015. This Court heard argument on the matter on May 6, 2015, and hereby denies the  
22 "Supplemental" Petition for the following reasons.

23 The instant Petition is not a "Supplemental" Petition, but is in fact simply a second,  
24 untimely petition for post-conviction relief. While counsel for a petitioner for a writ of habeas  
25 corpus may serve "supplemental" pleadings after being appointed, this is true only where the  
26 petitioner has filed a Proper Person Petition for Writ of Habeas Corpus necessitating counsel's  
27 appointment. See NRS 34.750. Here, Petitioner's only prior attempt at post-conviction relief  
28 was filed by previous counsel over three years ago. Accordingly, there is nothing

1 "supplemental" in nature about the instant Petition.

2 Like Petitioner's first attempt at post-conviction relief, the instant Petition is  
3 procedurally barred without good cause. The mandatory provisions of NRS 34.726(1) state  
4 that "[u]nless there is good cause shown for delay, a petition that challenges the validity of a  
5 judgment or sentence must be filed within 1 year...after the Supreme Court issues its  
6 remittitur." As Remittitur issued from Petitioner's Direct Appeal on August 4, 2009, the instant  
7 Petition was filed more than four years too late. Therefore, absent a showing of good cause,  
8 Petitioner's Petition must be dismissed as time-barred pursuant to NRS 34.726(1).

9 Petitioner has failed to demonstrate good cause to overcome the procedural bar. To do  
10 so, a defendant has the burden of pleading and proving specific facts that demonstrate good  
11 cause for his failure to present his claim in earlier proceedings or comply with the statutory  
12 requirements. See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993);  
13 Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "To  
14 establish good cause, appellants must show that an impediment external to the defense  
15 prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615,  
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18 Just as he failed to demonstrate good cause to overcome the procedural bar when this  
19 Court twice considered Petitioner's first untimely petition, Petitioner has again failed to  
20 demonstrate good cause to overcome the time bar four years later. To the extent Petitioner  
21 alleges trial counsel's failure to keep him apprised of the status of his direct appeal and provide  
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23 that generally, excuses such as the lack of assistance of counsel when preparing a petition, as  
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27 v. State, 111 Nev. 335, 890 P.2d 797 (1995). Moreover, Petitioner admitted that he became  
28 aware of the denial of his appeal within the one year time period for appropriately filing a

1 petition for post-conviction relief. Petitioner also fails to demonstrate good cause based on Mr.  
2 Brower's alleged ineffectiveness, as Petitioner enjoys no constitutional right to post-  
3 conviction counsel and therefore such counsel's performance cannot constitute good cause to  
4 overcome the procedural bar. Brown v. McDaniel, 130 Nev. \_\_\_, \_\_\_, 331 P.3d 867, 869  
5 (2014). Accordingly, Petitioner has not demonstrated an impediment external to the defense  
6 that would excuse the significant delay in filing, and his Petition is therefore procedurally  
7 barred pursuant to NRS 34.726.

8 Furthermore, the instant Petition is barred by the doctrine of laches. NRS 34.800 creates  
9 a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses]  
10 between the filing of a judgment of conviction, an order imposing a sentence of imprisonment  
11 or a decision on direct appeal of a judgment of conviction and the filing of a petition  
12 challenging the validity of a judgment of conviction..." As more than five years have elapsed  
13 between the issuance of remittitur and the filing of the instant Petition, NRS 34.800 directly  
14 applies in this case. Accordingly, the instant Petition is summarily denied.

15 **ORDER**

16 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction  
17 Relief shall be, and is, hereby denied.

18 DATED this 21<sup>st</sup> day of July, 2015.


19  
20   
21 DAVID BARKER

DISTRICT JUDGE

for Hon. Jennifer Tagliatti

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

25 BY

  
26 SARAH OVERLY  
27 Deputy District Attorney  
28 Nevada Bar #012842

**CERTIFICATE OF SERVICE**

I hereby certify that service of the above and foregoing was made this 15TH day of  
JULY 2015, to:

MATTHEW CARLING, ESQ.  
cedarlegal@gmail.com

BY /s/ HOWARD CONRAD  
Secretary for the District Attorney's Office  
Special Victims Unit

hje/SVU

  
CLERK OF THE COURT

NOASC  
MATTHEW D. CARLING, ESQ.  
Nevada Bar No.: 007302  
1100 S. Tenth Street  
Las Vegas, NV 89101  
(702) 419-7330 (Office)  
(702) 446-8065 (Fax)  
[CedarLegal@gmail.com](mailto:CedarLegal@gmail.com)  
*Attorneys for Petitioner,*  
DELARIAN K. WILSON

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

STATE OF NEVADA,  
Plaintiff,

-vs-

DELARIAN K. WILSON,  
Defendant.

Case No. 07C232494-1

Dept. No. IX

NOTICE OF APPEAL

TO: THE STATE OF NEVADA

TO: STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and  
DEPARTMENT 9 OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE  
OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that DELARIAN K. WILSON, presently incarcerated at the  
Southern Desert Correctional Center, appeals to the Supreme Court of the State of Nevada from  
the an Order denying his Petition for a Writ of Habeas Corpus (Post-Conviction) entered on or  
about July 22, 2015.

DATED this 4<sup>th</sup> day of August, 2015.

002312



1 CARLING LAW OFFICE, PC

2  
3 /s/ Matthew D. Carling

4 Nevada Bar No.: 007302

5 Attorneys for Petitioner.

6 DELARIAN K. WILSON  
7

8 **DECLARATION OF MAILING**

9 MATTHEW D. CARLING, ESQ., hereby declares that he is, and was when the herein  
10 described mailing took place, a citizen of the United States, over 21 years of age; that on the 4<sup>th</sup>  
11 day of August, 2015, Declarant deposited in the United States mail at Cedar City, Utah, a copy  
12 of the Notice of Appeal in the above-mention case, enclosed in a sealed envelope upon which  
13 first class postage was fully prepaid, addressed to the following:

Delarian K. Wilson (#1022177)  
Southern Desert Corrections Center  
P.O. Box 208  
Indian Springs, Nevada 89070

STEVEN B. WOLFSON, ESQ.  
Clark County District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89101

14 I declare under penalty of perjury that the foregoing is true and correct.

15 Executed on the 4<sup>th</sup> day of August, 2015.

16  
17 CARLING LAW OFFICE, PC

18  
19 /s/ Matthew D. Carling

20 Nevada Bar No.: 007302

21 Attorneys for Petitioner.

22 DELARIAN K. WILSON  
23  
24

  
CLERK OF THE COURT

1 **ASTA**  
2 **MATTHEW D. CARLING, ESQ.**  
3 Nevada Bar No.: 007302  
4 1100 S. Tenth Street  
5 Las Vegas, NV 89101  
6 (702) 419-7330 (Office)  
7 (702) 446-8065 (Fax)  
8 [CedarLegal@gmail.com](mailto:CedarLegal@gmail.com)  
9 *Attorneys for Petitioner.*  
10 **DELARIAN K. WILSON**

11  
12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 \* \* \* \* \*

15 **STATE OF NEVADA,**

Plaintiff,

Case No. 07C232494-1

Dept. No. LX

-vs-

**DELARIAN K. WILSON,**

Defendant.

17  
18 **CASE APPEAL STATEMENT**  
19 **(NRAP 3(d)(4))**

20  
21 **1. Name of appellant filing this case appeal statement:**

22 DeLarian K. Wilson

23  
24  
25 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

26 Judge Jennifer Togliatti.

27  
28  
29 **3. Identify all parties to the proceedings in the district court:**

30 DeLarian K. Wilson

31 The State of Nevada

32  
33  
34  
35 **4. Identify all parties involved in this appeal:**  
36

002314

DeLarian K. Wilson

The State of Nevada

5. **Name, law firm, address, and telephone number of all counsel on appeal and party or parties whom they represent:**

MATTHEW D. CARLING  
Nevada Bar #007302  
1100 S. Tenth Street  
Las Vegas, NV 89101  
(702) 419-7330  
*Counsel for Appellant,*  
DeLarian K. Wilson

RYAN J. MACDONALD  
Deputy District Attorney  
Nevada Bar #0012615  
P.O. Box 552212  
Las Vegas, NV 89101-2212  
*Counsel for Appellee,*  
State of Nevada

6. **Indicate whether appellant was represented by appointed or retained counsel in the district court:** Appointed
7. **Indicate whether appellant is represented by appointed or retained counsel on appeal:** Appointed
8. **Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:** N/A
9. **Indicate the date the proceedings commenced in the district court:**

Information filed April 20, 2007.

Dated this 4<sup>th</sup> day of August, 2015.

CARLING LAW OFFICE, PC

/s/ Matthew D. Carling

MATTHEW D. CARLING, ESQ.  
Nevada Bar No.: 007302  
*Court-Appointed Attorney for Defendant,*  
DELARIAN K. WILSON

1 **CERTIFICATE OF SERVICE**

2  
3 I hereby certify that, on this 4<sup>th</sup> day of August, 2015, I sent a true and correct copy of the  
4 above CASE APPEAL STATEMENT to the following parties:

5 Steven B. Wolfson, Esq.  
6 Clark County District Attorney  
7 Post Conviction Unit  
8 Jennifer.Garcia@clarkcountynvda.com  
9

10 CARLING LAW OFFICE, PC

11 /s/ Matthew D. Carling  
12 MATTHEW D. CARLING, ESQ.  
13 Court-Appointed Attorney for Defendant,  
14 DELARIAN K. WILSON  
15  
16

17 **CERTIFICATE OF MAILING**

18 I hereby certify that on August 4, 2015, I served a copy of the REQUEST FOR  
19 ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS to Dept. 9 Court  
20 Reporter by mailing a copy via first class mail, postage thereon fully prepaid, to the following:

Court Reporter  
Dept. 9  
200 Lewis Avenue  
Las Vegas, Nevada 89101

Delarian K. Wilson (#1022177)  
Southern Desert Corrections Center  
P.O. Box 208  
Indian Springs, Nevada 89070

21 CARLING LAW OFFICE, PC

22  
23 /s/ Matthew D. Carling  
24 MATTHEW D. CARLING, ESQ.  
25 Court-Appointed Attorney for Defendant,  
26 DELARIAN K. WILSON  
27

  
CLERK OF THE COURT

1 **REQT**

2 **MATTHEW D. CARLING, ESQ.**

3 Nevada Bar No.: 007302

4 1100 S. Tenth Street

5 Las Vegas, NV 89101

6 (702) 419-7330 (Office)

7 (702) 446-8065 (Fax)

8 CedarLegal@gmail.com

9 *Attorneys for Petitioner,*

10 **DELARIAN K. WILSON**

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 \* \* \* \* \*

14 STATE OF NEVADA,

Plaintiff,

Case No. 07C232494-1

Dept. No. 1X

-VS-

DELARIAN WILSON,

Defendant.

16  
17 TO: COURT REPORTER - DEPARTMENT NO. 9

18 DELARIAN K. WILSON, Defendant named above, requests preparation of a rough  
19 draft transcript of certain portions of the proceedings before the district court, as follows:

DATE	JUDGE	PORTION	ORIGINAL PLUS <sup>1</sup>
05/06/15	Togliatti, Jennifer	All	2

20 This notice requests a transcript of only those portions of the District Court proceedings  
21 which counsel reasonably and in good faith believes are necessary to determine whether  
22 appellate issues are present. Voir dire examination of jurors, opening statements and closing  
23

<sup>1</sup> Original Rough Draft to be filed with the District Court, two certified copies to be served on Mr. Carling, and original certificate of service to be filed with the Nevada Supreme Court. NRAP 3C(3)(E).

002317



1 arguments of trial counsel, and the reading of jury instructions shall not be transcribed unless  
2 specifically requested above.

3 I recognize that I must personally serve a copy of this form on the above named court  
4 reporter and opposing counsel, and that the above named court reporter shall have twenty (20)  
5 days from the receipt of this notice to prepare and submit to the district court the transcript  
6 requested herein. I further certify that the defendant is indigent and therefore exempt from  
7 paying a deposit.

8 DATED this 4<sup>th</sup> day of August, 2015.

9  
10 CARLING LAW OFFICE, PC

11  
12 /s/ Matthew D. Carling

13 MATTHEW D. CARLING, ESQ.

14 Nevada Bar No.: 007302

15 Court-Appointed Attorney for Defendant,

16 DELARIAN K. WILSON

17  
18 **CERTIFICATE OF SERVICE**

19  
20 I hereby certify that, on this 4<sup>th</sup> day of August, 2015, I sent a true and correct copy of the  
21 above REQUEST FOR ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT  
22 PROCEEDINGS to the following parties:

23 Steven B. Wolfson, Esq.  
24 Clark County District Attorney  
25 Post Conviction Unit  
26 [Jennifer.Garcia@clarkcountynvda.com](mailto:Jennifer.Garcia@clarkcountynvda.com)

27  
28 CARLING LAW OFFICE, PC

29  
30 /s/ Matthew D. Carling

31 MATTHEW D. CARLING, ESQ.

32 Court-Appointed Attorney for Defendant,

33 DELARIAN K. WILSON

**CERTIFICATE OF MAILING**

I hereby certify that on August 4, 2015, I served a copy of the REQUEST FOR  
ROUGH DRAFT TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS to Dept. 9 Court  
Reporter by mailing a copy *via* first class mail, postage thereon fully prepaid, to the following:

Court Reporter  
Dept. 9  
200 Lewis Avenue  
Las Vegas, Nevada 89101

Delarian K. Wilson (#1022177)  
Southern Desert Corrections Center  
P.O. Box 208  
Indian Springs, Nevada 89070

CARLING LAW OFFICE, PC

/s/ Matthew D. Carling

MATTHEW D. CARLING, ESQ.

*Court-Appointed Attorney for Defendant,*

DELARIAN K. WILSON

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

2  
3       **DELARIAN K. WILSON,**  
4                   **Appellant,**  
5       **vs.**  
6       **THE STATE OF NEVADA**  
                  **Respondent.**

**Supreme Court No.:**  
**District Court Case No. C232494**

Electronically Filed  
Nov 12 2015 10:30 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

7                   **APPELLANT'S APPENDIX - VOLUME X - PAGES 2250-2319**

8       **MATTHEW D. CARLING**  
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12      *Attorney for Appellant*

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13                   **CATHERINE CORTEZ MASTO**  
14                   Attorney General  
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16                   Carson City, Nevada 89701-4717  
17                   *Counsel for Respondent*

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1 *Hathaway, supra*, continued as follows:

2  
3 A claim of ineffective assistance of counsel may also excuse a procedural  
4 default if counsel was so ineffective as to violate the Sixth Amendment.  
5 However, in order to constitute adequate cause, the ineffective assistance of  
6 counsel claim itself must not be procedurally defaulted. In other words, a  
7 petitioner must demonstrate cause for raising the ineffective assistance of  
8 counsel claim in an untimely fashion. In terms of a procedural time-bar, an  
9 adequate allegation of good cause would sufficiently explain why a petition  
10 was filed beyond the statutory time period. Thus, a claim or allegation that was  
11 reasonably available to the petitioner during the statutory time period would  
12 not constitute good cause to excuse the delay.

13  
14 *Ibid.* at 506.

15  
16 In the instant case, Wilson was represented by Mr. Oronoz during the criminal  
17 proceeding and on direct appeal from the sentencing. The direct appeal was affirmed on July  
18 15, 2009 and the Remittitur entered on August 4, 2009. During the interim of the Nevada  
19 Supreme Court's decision thereon, Wilson made repeated attempts to obtain a copy of his  
20 case file from Mr. Oronoz.

21 Before the appellate decision was rendered, on March 23, 2009 Wilson wrote to Mr.  
22 Oronoz requesting a copy of his brief and appendix in the appeal as well as copies of the  
23 sentencing documents. Having not received a response, Wilson again wrote to Mr. Oronoz  
24 On December 13, 2009, stating that all of his appellate materials had been mistakenly  
25 destroyed and requesting all copies of documents relating to the pending appeal—he  
26 believed the matter was still pending having not heard otherwise. Wilson also requested  
27 specific transcripts from hearings earlier in the case, which he had requested from Mr.  
28 Oronoz almost a year previously. Wilson noted that these materials would likely be valuable  
29 for future appeals.

1 Wilson's mother discovered the appeal had been closed on July 19, 2010, when she  
2 received a copy of the Order of Affirmance from Mr. Oronoz's office. Wilson's mother  
3 called Mr. Oronoz's office to determine the status of the case on July 14, 2010, and was told  
4 by the receptionist the appeal had closed in July. Wilson's mother left messages for Mr.  
5 Oronoz—which he never returned—on July 19, 21, and 22, 2010. Wilson's mother informed  
6 Wilson of her discovery of the appeal decision or about July 22, 2010.

7 At hearing, Wilson testified he called Mr. Oronoz's office twice per month to inquire  
8 about the status of the appeal. 7/11/2013 Tr. at p. 18. When he was told by his mother the  
9 appeal had been denied in 2009, Wilson then called Mr. Oronoz directly, who told Wilson he  
10 would take care of it. *Id.* Wilson then filed a motion for an extension of time on post-appeal  
11 and post-conviction proceedings with the Nevada Supreme Court. *Id.* at p. 20. Wilson  
12 continued to attempt to contact Mr. Oronoz but was not receiving any contact from him or  
13 his office. *Id.*

14 Wilson ultimately wrote and filed a 68-page complaint with the Nevada Bar  
15 Association because he felt Mr. Oronoz had tried to sabotage his post-conviction relief. *Id.* A  
16 few weeks later, Wilson was contacted by telephone by Mr. Oronoz, who apologized and  
17 told Wilson he would fix things and get Wilson a new attorney to fight the appeal. *Id.* Mr.  
18 Oronoz confirmed to Wilson that he had made a mistake and apologized. *Id.* at p. 21. Wilson  
19 also filed a motion with the trial court requesting that Mr. Oronoz hand over all of his court  
20 documents because he never received the *Remittitur* from the Nevada Supreme Court. *Id.*

21 Mr. Oronoz told Wilson he was going to come to court, appoint a new attorney, and  
22 Wilson would be able to continue to pursue his post-conviction relief. *Id.* Wilson testified he

1 received a letter thereafter showing him the motion for the appointment of a new attorney,  
2 which resulted in Mr. Brower being appointed to represent Wilson in post-conviction  
3 proceedings. *Id.*

4 As a criminal defendant, prior to any post-conviction proceedings, Wilson was  
5 entitled to the right to appear and defend himself in person with counsel, Mr. Oronoz. NRS  
6 CONST. ART. 1, § 8 (1). As a criminal defendant, Wilson was entitled to Due Process of law.  
7 NRS CONST. ART. 1, § 8(5). As an indigent defendant, Wilson was entitled to the court-  
8 appointment of effective assistance of counsel from his initial appearance through his direct  
9 appeal, NRS 178.397. Thus, Wilson was entitled to effective assistance from Mr. Oronoz.  
10 *See, McKague* at 257-258.

11 Thus, as court-appointed attorney to a criminal defendant in direct appellate  
12 proceedings, Mr. Oronoz was required to act with reasonable diligence and promptness in  
13 representing Wilson in the appeal. NEV. R. PROF. CON. 1.3. Mr. Oronoz ignored repeated  
14 attempts by Wilson to collect his entire case file in order for Wilson to pursue post-  
15 conviction proceedings, which Wilson was required to undertake pro se initially. This failure  
16 prevented Wilson from discovering that the time for post-conviction relief was passing.

17 Mr. Oronoz was required, upon demand from Wilson, to immediately deliver to  
18 Wilson all papers, documents, pleadings and items of tangible personal property which  
19 belong to or were prepared for Wilson, NRS 7.055(1). This responsibility is of such  
20 importance that an attorney who fails to do so may be subject to contempt and  
21 imprisonment until the contempt is purged, NRS 7.055(2). An attorney who fails to release a



1 client's file may further be liable for costs and attorney's fees. *See id.* Mr. Oronoz did not  
2 make any attempt to comply until a bar complaint was filed against him by Wilson.

3 Mr. Oronoz was required to release Wilson's client file to him when Wilson asked in  
4 March of 2009, prior to the entry of the Order of Affirmance. Oronoz was further required  
5 to do so when Wilson again made attempts in December of 2009, and again in July and  
6 August of 2010. This failure was in contravention to the RULES OF PROFESSIONAL  
7 CONDUCT and Nevada law.

8 Mr. Oronoz's ineffectiveness was sufficient "good cause" to excuse the procedural  
9 bar in this case. Brower failed to argue this fact as "good cause" in the First Petition. The  
10 ineffectiveness upon ineffectiveness sufficiently explains why the First Petition was filed  
11 beyond the statutory time period. *Hathaway* at 506. Brower's ineffectiveness is discussed both  
12 *supra* and *post*; however, Mr. Oronoz's failure to provide Wilson with his case file until  
13 August 19, 2010, was past the time in which Wilson could file for post-conviction  
14 proceedings within a year of the entry of the Remittitur on August 4, 2009. This presents a  
15 substantial reason that affords a legal excuse. *Hathaway* at 506. Mr. Oronoz's failure was  
16 external to Wilson's ability to comply with the state procedural default rules. *Id.*

17 Wilson was prejudiced because Mr. Oronoz's error worked to Wilson's actual and  
18 substantial disadvantage, which infected his post-conviction proceedings with error of  
19 constitutional dimensions and has prevented him from Due Process. *Bejarano* at 270.  
20 Accordingly, the delay in this matter was not Wilson's fault and the dismissal of the First  
21 Petition as untimely unduly prejudices Wilson because the merits of the First Petition were

1 never reached. Thus, Wilson's conviction remains unchallenged and his freedom curtailed.  
2 As such, the requirements of NRS 34.726 (1) have been met herein.

3           (2) Upon Discovery of the Entry of the Remittitur, Wilson Made Diligent  
4           Efforts to Pursue Post-Conviction Relief.  
5

6           Pro se litigants are entitled to procedural protections and the policy that a pro se  
7 litigant may amend pleadings is applied more liberally. *Eldridge v. Block*, 832 F.2d 1132 (9th  
8 Cir. 1987) *citing* *Armstrong v. Rushing*, 352 F.2d 836, 837 (9th Cir.1965). "Moreover, 'strict time  
9 limits ... ought not to be insisted upon' where restraints resulting from a pro se prisoner  
10 plaintiff's incarceration prevent timely compliance with court deadlines." *Id.* *citing* *Tarantino v.*  
11 *Eggers*, 380 F.2d 465, 468 (9th Cir.1967); *see Veit v. Heckler*, 746 F.2d 508, 512 (9th Cir.1984)  
12 (holding that extension of time was proper where evidence established just cause). *Eldridge*  
13 continues as follows:

14           The Supreme Court has instructed the federal courts to liberally construe the  
15 "inartful pleading" of pro se litigants. *Boag v. MacDougall*, 434 U.S. 364, 365,  
16 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982) (per curiam). "It is settled law that  
17 the allegations of [a pro se litigant's complaint] 'however inartfully pleaded' are  
18 held 'to less stringent standards than formal pleadings drafted by lawyers....'"  
19 *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 175, 66 L.Ed.2d 163 (1980) (*quoting*  
20 *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972));  
21 *see also Noll*, 809 F.2d at 1448 ("Presumably unskilled in the law, the pro se  
22 litigant is far more prone to making errors in pleading than the person who  
23 benefits from the representation of counsel."); *Askelman v. Pope*, 793 F.2d  
24 1072, 1078 (9th Cir.1986) ("we hold [plaintiff's] pro se pleadings to a less  
25 stringent standard than formal pleadings prepared by lawyers.").

26  
27 *Id.* at 1137.

28           "Inmates have a fundamental constitutional right of access to the courts through  
29 reasonably adequate law libraries or assistance from persons trained in the law." *Miller v.*  
30 *Evans*, 108 Nev. 372, 832 P.2d 786, 787 (1992) *citing* *Bounds v. Smith*, 430 U.S. 817, 828, 97

1 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977) (main concern is protecting ability of an inmate to  
2 prepare a petition or complaint). "This court recognizes that it has a duty to ensure that pro  
3 se litigants do not lose their right to a hearing on the merits of their claim due to ignorance  
4 of technical procedural requirements." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th  
5 Cir. 1990) *citing Borzeck v. Heckler*, 739 F.2d 444, 447 n. 2 (9th Cir.1984) (defective service of  
6 complaint by pro se litigant does not warrant dismissal); *Carraux v. Pulley*, 739 F.2d 437, 439  
7 (9th Cir.1984).

8 In the instant case, Wilson discovered the entry of the Order of Affirmance from his  
9 mother on or about July 22, 2010. Wilson immediately tendered another request—having  
10 already made several to which he received no response—for his case file and further  
11 information from Oronoz in order to move forward with post-conviction proceedings. On  
12 August 5, 2010, only one day past the deadline for his filing of a petition for writ of habeas  
13 corpus, Wilson filed a request in this Court for his case file and transcripts, and argued Mr.  
14 Oronoz had failed to inform him of the Order of Affirmance.

15 On August 27, 2010, Wilson filed *Application for Extension of Time* in the Nevada  
16 Supreme Court, which requested the extension of the remittitur in order to file a petition for  
17 writ of habeas corpus based on Mr. Oronoz's failure to alert Wilson to the Order of  
18 Affirmance in a timely manner. Wilson requested this continuance *pro se*. A copy of this  
19 request was sent to the State. Wilson requested that the time be extended from August 4,  
20 2010, to August 4, 2011, within which to file a petition for writ of habeas corpus, a post-  
21 conviction appeal, and all other petitions in state or federal court. On September 7, 2010, the  
22 Nevada Supreme Court issued its *Order* regarding the extension of time, in which it directed

1 the clerk to file the motion, despite the fact the appeal was closed and the remittitur had  
2 been issued on August 4, 2009. The Order stated Wilson had not asserted any grounds in  
3 which to recall the issuance of the remittitur and it was without authority to extend the time  
4 for the filing of a petition for a writ of habeas corpus. The court instructed Wilson to file the  
5 petition in the district court and, if such petition was untimely, to prove good cause and  
6 prejudice to overcome any procedural bar. Accordingly, Wilson's motion was denied.

7 Wilson continued to file pleadings in this case. Mr. Oronoz filed a certificate of  
8 mailing evidencing that Wilson had finally been mailed a copy of his entire case file on  
9 August 19, 2010. Wilson then filed a request for transcripts, which was denied; however, Mr.  
10 Oronoz filed a request for the appointment of counsel as part of his reassurance to Wilson  
11 that Wilson could continue to pursue post-conviction relief despite failing to inform Wilson  
12 of the Order of Affirmance in 2009. Mr. Brower was appointed, and the matter proceeded  
13 on a briefing schedule.

14 On October 10, 2011, Wilson filed his First Petition. The State opposed the First  
15 Petition and moved to dismiss, arguing the First Petition was time barred as it was filed well  
16 past the year deadline from the disposition of the direct appeal. In reply, Wilson argued there  
17 was good cause for the late filing, which Wilson argued his belief that this had already been  
18 determined by the trial court. Wilson had filed for an extension of time, after which counsel  
19 was appointed to represent him, a schedule was set, and his counsel had timely filed his First  
20 Petition according to the schedule. Wilson reasonably believed these actions in the trial court  
21 had resolved his requested extension of time on these proceedings.

1 At the July 11, 2013, hearing, the trial court pointed out that Wilson had actual notice  
2 in late-July of 2010 regarding his appeal, but Brower had not filed the First Petition until  
3 October of 2011. Brower argued that the First Petition was not filed until October of 2011  
4 because he had erroneously requested a briefing schedule, indicating it was his fault this  
5 occurred. *Id.* at p. 24. Conceivably, Brower may have been confused by the proceedings in  
6 this case since counsel is not typically appointed until a *pro se* petition has been filed and  
7 reviewed by the court to determine if further briefing is needed. Technically, Wilson had  
8 filed several pleadings setting out complaints about his prior counsel and the delay in having  
9 received notification regarding his appeal, as well as receiving his file so he could prepare a  
10 petition in the case. Given all of this information before the trial court, it is possible that  
11 Brower reasonably believed he was filing a supplemental petition, as is usually the case, to  
12 the filings that could have been construed as a petition given their contents. At the July 11<sup>th</sup>  
13 hearing, Mr. Brower indicated that he had filed the First Petition, but thought the court had  
14 excused the time bars when briefing had occurred. "I'm the one that actually filed the one  
15 writ, but again I thought we were already past the time bar issues when that occurred." *Id.*  
16 ln. 19-21. Despite this acceptance of error by Brower, the trial court dismissed the First  
17 Petition for being untimely. *Id.* at p. 25. Brower then requested transcripts of the hearing and  
18 updated findings, which the trial court ordered. *Id.* at p. 26.

19 Wilson was not entitled to counsel in post-conviction relief but was entitled to liberal  
20 procedural protections in his ability to be allowed to amend pleadings. *Eldridge* at 1132.  
21 Further, strict time limits should not be insisted upon where restraints resulting from  
22 Wilson's incarceration prevent more timely compliance with court deadlines. *Id.* The Motion

1 filed on August 5, 2010, was "inartful"; however, it raised the issue that Wilson did not have  
2 his case file and could not have raised post-conviction issues without review and reliance  
3 upon the contents of such file; he was significantly hindered regarding the ability to research  
4 any issues that could exist since he was not entitled to representation at that stage of the  
5 proceedings. *Id.* at 1137.

6 Wilson has a fundamental constitutional right to access to this Court. *Miller* at 787.  
7 Wilson pursued, to the best of his ability, his desire to pursue post-conviction remedies,  
8 bringing it to the Court's attention when he did not have a case file or adequate time to  
9 prepare for the same due to Mr. Oronoz's failure to inform him of the filing of the  
10 Remittitur and Order of Affirmance in 2009. Wilson demonstrated this fact by continuing to  
11 pursue his case file from Mr. Oronoz while the appeal was pending and after it was closed –  
12 although Mr. Oronoz did not inform him of this fact.

13 These facts, taken together, demonstrate "good cause" to excuse the procedural bar  
14 pursuant to NRS 34.726(1). Upon discovering that the Order of Affirmance had been  
15 entered, Wilson pursued filing documents to preserve his ability to commence post-  
16 conviction relief. The pleadings filed after his discovery evidences Wilson's intent for post-  
17 conviction relief and should excuse the procedural bar. Taken together with the other facts  
18 of this case, Wilson would have been able to demonstrate an error in the trial court's  
19 determination of "good cause" on the direct appeal from the denial of the First Petition.  
20 This demonstration supports the *Strickland* factor of prejudice with regard to Brower's failing  
21 to adequately advise Wilson regarding the law and precedent on dismissing his appeal and  
22 pursuing instead a motion to withdraw his guilty plea.



1                   (3) Alternatively, This Court De Facto Accepted Wilson's Pro Se Pleadings as a  
2                   Petition for a Writ of Habeas Corpus and its Actions Implied Good Cause  
3                   for the Untimely Filing Had Been Established.  
4

5                   In construing NRS 34.735, the Nevada Supreme Court has stated, "...rather, all that  
6 is required is that petitioner support his claims with specific facts." *Ruffin v. State*, 124 Nev.  
7 1505, 238 P.3d 851 (2008). Pursuant to NRS 34.750, a trial court may appoint counsel to  
8 represent the petitioner in habeas corpus proceedings. "After appointment by the court,  
9 counsel for the petitioner may file and serve supplemental pleadings..." NRS 34.750 (3).

10                  In this case, Wilson discovered the entry of the Order of Affirmance on or about July  
11 22, 2010. Significantly and repetitively before and after that date, Wilson pursued obtaining  
12 his case file from Mr. Oronoz. Having received no response, he filed a bar complaint and  
13 began filing pleadings in the trial court and in the Nevada Supreme Court, raising the issues  
14 that he did not have a copy of his file and Mr. Oronoz failed to inform him of the entry of  
15 the Order of Affirmance.

16                  Mr. Oronoz finally responded—albeit too late—requesting that counsel be appointed  
17 to represent Wilson in post-conviction relief proceedings, then withdrew. By December of  
18 2010, Wilson was represented by counsel and a briefing schedule was set; despite the fact  
19 Wilson had not filed a formal petition for a writ of habeas corpus.

20                  A briefing schedule was set and the parties briefed the issues herein, with Wilson  
21 filing a formal petition in October of 2011. However, the State was the first to raise the issue  
22 of the procedural bar in its response. In reply, Wilson argued this court had already  
23 determined good cause by setting a briefing schedule and appointing him counsel.

1 Wilson in fact filed an informal petition for writ of habeas corpus on August 5, 2010,  
2 merely one day past the one (1) year deadline for doing so. It included a request for an  
3 extension of that deadline. Both Wilson and Brower—in his argument in reply to the State's  
4 response—believed that the trial court had already determined good cause by setting briefing  
5 and appointing counsel for Wilson.

6 All that was required of Wilson was to support his claims with specific facts. *Raffin* at  
7 851. Wilson specifically argued he did not have a copy of his case file and Mr. Oronoz had  
8 failed to inform him of the entry of the Order of Affirmance and the Remittitur in July and  
9 August of 2009. *See, id.* Pursuant to routine procedure in Eighth District Court, Wilson was  
10 appointed counsel – absent a formal petition for habeas corpus relief – and a briefing  
11 schedule was set. Facts were properly presented to this Court that Wilson was raising the  
12 issue of not having his case file, and challenging that his counsel had not informed him of  
13 the resolution of his direct appeal. *See* NRS 34.750(3). The briefing schedule was also  
14 routine procedure because, after appointment, counsel typically files a supplemental brief to  
15 the original petition. *Id.* Accordingly, this Court *de facto* accepted Wilson's pro se pleadings,  
16 particularly the August 5, 2010, motion, as a petition for a writ of habeas corpus, which was  
17 filed one (1) day late of the procedural deadline, and took action thereon by appointing  
18 counsel and setting briefing. As such, it was erroneously determined good cause was lacking  
19 in the determination of the First Petition. As such, good cause existed in this matter for the  
20 procedural delay.

21 It was ineffective assistance for Mr. Brower to fail to make this argument on the  
22 direct appeal, given that it had a substantial likelihood of success. Instead he improperly

1 advised Wilson as to the precedent and law, and this failure prejudiced Wilson in the  
2 outcome.

3 **C. Wilson Raised Meritorious Claims in the First Petition for Writ of Habeas**  
4 **Corpus that Would Have Succeeded, Evidencing Significant Prejudice for**  
5 **Brower's Ineffectiveness.**  
6

7 "The constitutional right to effective assistance of counsel extends to a direct appeal."  
8 *Thomas v. State*, 120 Nev. 37, 83 P.3d 818, 823 (2004). "Before imposing sentence, the court  
9 shall...afford counsel an opportunity to speak on behalf of the defendant." NRS 176.015.  
10 "It is well established that the sentencing (of the defendant) is a critical stage of the criminal  
11 proceeding at which he is entitled to the effective assistance of counsel." *Cunningham v. State*,  
12 94 Nev. 128, 575 P.2d 936, 938 (1978) citing *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct.  
13 1197, 1205, 51 L.Ed.2d 393 (1977); see also *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 234, 19  
14 L.Ed.2d 336 (1967); *Smith v. Warden*, 85 Nev. 83, 450 P.2d 356 (1969).

15 "While there is no rule of law that requires a court to sentence codefendants to  
16 identical terms, an appellant's allegations of the same must be sufficient to state a claim for  
17 relief." *Nobles v. Warden, Nevada Dept. of Prisons*, 106 Nev. 67, 787 P.2d 390, 391 (1990).  
18 Further, an appellant's brief must contain argument, including citations to authorities and  
19 parts of the record upon which the appellant relies. NEV. R. APP. P. 28(a)(9).

20 In this case, Wilson raised meritorious claims in the First Petition that would have  
21 been successful had it not been dismissed as untimely based on Brower's failure to  
22 adequately raise the issues and his advice that Wilson should dismiss the appeal and pursue a  
23 remedy that was unavailable to him. Wilson argued in the First Petition that Mr. Oronoz was  
24 ineffective for failing to order the transcripts of the co-defendant's trial in order to be

1 prepared for sentencing, wherein this Court determined Wilson was in the "ring-leader"  
2 based on its personal knowledge of the co-defendant's trial. Additionally, Wilson argued Mr.  
3 Oronoz was ineffective for failing to adequately brief the issue of the disparity of the  
4 sentence between the co-defendants.

5 Wilson was entitled to effective assistance on direct appeal. *Thomas* at 823. At  
6 sentencing, Wilson was also entitled to effective assistance and Mr. Oronoz had the  
7 opportunity to speak on Wilson's behalf. NRS 176.015 and *Cunningham* at 938. Mr. Oronoz  
8 had the responsibility to be familiar with the case in order to adequately represent Wilson's  
9 case to this Court. This included being familiar with the co-defendant's case, which included  
10 defense to the concept that Wilson was the "ring-leader" of the crime. In requesting leniency  
11 for Wilson, Mr. Oronoz failed to present an argument that contradicted this Court's opinion  
12 that Wilson was the "ring-leader."

13 Mr. Oronoz was also required to abide by the RULES OF APPELLATE PROCEDURE  
14 and provide a cogent argument that included citations to authorities and parts of the record  
15 in support of the argument. NEV. R. APP. P. 28(a)(9). The Order of Affirmance noted the  
16 absence of this in the opening brief on direct appeal. In arguing the disparity of the  
17 sentences given to the co-defendants in this matter, Mr. Oronoz's argument was required to  
18 assert allegations sufficient to state a claim for relief. *Nobles* at 391. The first step of this  
19 argument would have been ordering the transcripts of the co-defendants trial to rely upon in  
20 attacking the basis of the trial court's opinion that Wilson was the "ring-leader." Mr. Oronoz  
21 failed to do so even for the appeal. Based on these facts, Wilson presented meritorious  
22 claims in the First Petition that had a reasonable likelihood of success and should be heard

1 on their merits. Absent Brower and Oronoz's ineffectiveness, this Court would have found  
2 "good cause" to overcome the procedural bar or, alternatively, the matter had a substantial  
3 likelihood of prevailing on appeal therefrom.

4 Wilson's constitutional right to effective assistance of counsel extended to his direct  
5 appeal, his First Petition proceedings, and his appeal from its dismissal. *Thomas* at 823;  
6 *Cunningham* at 938, *citing Gardner*, 430 U.S. at 358, 97 S.Ct. at 1205; *see also Memphis*, 389 U.S.  
7 128, 88 S.Ct. 254; *Smith*. Brower and Oronoz were ineffective in their respective  
8 representations of Wilson throughout the process of this proceeding, which denied Wilson  
9 his Due Process rights to be heard on the merits of his First Petition and the direct appeal  
10 taken therefrom, which was dismissed on erroneous advice of Brower. Wilson has incurred  
11 substantial prejudice thereby, and respectfully requests this Court grant his petition for writ  
12 of habeas corpus to correct these errors and provide him the process due him.

13 **WHEREFORE**, DELARIAN WILSON prays that the court will conduct an  
14 evidentiary hearing and grant habeas corpus relief to which he may be entitled in this  
15 proceeding.

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1 **CERTIFICATE OF MAILING**

2  
3 I hereby certify that, on this 6<sup>th</sup> day of February, 2015, I sent by first-class mail,  
4 postage-prepaid, a true and correct copy of the above *PETITION FOR WRIT OF HABEAS*  
5 *CORPUS* to the following parties:

6 Clark County District Attorney's Office  
7 200 Lewis Avenue  
8 Las Vegas, Nevada 89155-2215  
9

10 CARLING LAW OFFICE, PC

11 /s/ Matthew D. Carling  
12 MATTHEW D. CARLING, ESQ.  
13 Nevada Bar No.: 007302  
14 1100 S. Tenth Street  
15 Las Vegas, NV 89101  
16 (702) 419-7330 (Office)  
17 (702) 446-8065 (Fax)  
18 CedarLegal@gmail.com  
19 *Court Appointed Attorney for Petitioner,*  
20 DELARIAN WILSON  
21  
22

  
CLERK OF THE COURT

RSPN  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
JAMES R. SWEETIN  
Chief Deputy District Attorney  
Nevada Bar #005144  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DELARIAN WILSON,  
#1966773

Defendant.

CASE NO: 07C232494-1

DEPT NO: IX

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

DATE OF HEARING: March 10, 2015  
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to and Motion to Dismiss Defendant's "Supplemental" Petition for Writ of Habeas Corpus (Post-Conviction).

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

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On March 28, 2008, the State charged Delarian Wilson ("Defendant") by way of  
4 Amended Information with two counts of Robbery with Use of a Deadly Weapon and one  
5 count of Sexual Assault. Pursuant to negotiations, Defendant entered into a Guilty Plea  
6 Agreement with the State consistent with the Amended Information the same day, wherein he  
7 pleaded guilty to all three counts.

8 On July 3, 2008, Defendant appeared for sentencing with his counsel, James Oronoz,  
9 Esq. Defendant was sentenced to 72 to 180 months plus an equal and consecutive term of 72  
10 to 180 months for the use of a deadly weapon on each of Counts 1 and 2, respectively, and life  
11 imprisonment with a minimum parole eligibility of 10 years with respect to Count 3. Counts  
12 1, 2, and 3 were to run consecutive to one another. The Court further imposed a special  
13 sentence of lifetime supervision and mandatory registration as a sex offender should Defendant  
14 ever be released, and Defendant was ordered to pay \$3,196.00 in restitution. Defendant  
15 received 500 days credit for time served. The Judgment of Conviction was entered on July 18,  
16 2008.

17 On August 5, 2008, Defendant filed a Notice of Appeal. Mr. Oronoz thereafter filed an  
18 Opening Brief in the Nevada Supreme Court on Defendant's behalf, challenging the  
19 constitutionality of Defendant's sentence. See Nevada Supreme Court Case No. 52104. On  
20 July 7, 2009, the court affirmed Defendant's conviction. Remittitur issued on August 4, 2009.

21 On July 10, 2010, within one year after remittitur issued, Defendant sent Mr. Oronoz a  
22 letter stating that Defendant had "learned via [Defendant's] mother that [Defendant] was  
23 denied relief on [Defendant's] direct appeal as of April 2010," and requesting a copy of  
24 Defendant's case file. See Motion for Order filed 08/05/2010, p. 7. On July 29, 2010, also  
25 within one year of the issuance of remittitur, Defendant sent a Proper Person letter to the  
26 Nevada Supreme Court regarding "counsel and time for filing an appeal in the matter." See  
27 Nevada Supreme Court Case No. 52104.

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1 On August 5, 2012, Defendant filed a Proper Person "Motion for an Order Instructing  
2 the Attorney of Record to Provide Petitioner with a Complete and Copy of the Case File in the  
3 Above Entitled Case Number." On August 17, 2010, the court granted the motion. On August  
4 28, 2010, a Certificate of Mailing was filed indicating Mr. Oronoz had provided Defendant  
5 with a copy of the complete case file on August 19, 2010.

6 On August 27, 2010, Defendant filed a Proper Person "Application for Extension of  
7 Time" in the Nevada Supreme Court, requesting that the court "grant...an extension of time  
8 to his remittitur," thereby affording him more time to file a Petition for Writ of Habeas Corpus  
9 (Post-Conviction) under NRS Chapter 34. See Nevada Supreme Court Case No. 52104.  
10 Finding that Defendant's appeal had closed and Defendant presented no grounds warranting  
11 recall of the remittitur, the court denied Defendant's Application on September 7, 2010. Id.

12 On October 27, 2010, Defendant filed a Motion to Appoint Post-Conviction Relief  
13 Counsel. The State filed an Opposition on November 23, 2010. On December 14, 2010, the  
14 court granted Defendant's motion, and Keith Brower, Esq., was confirmed as Post-Conviction  
15 counsel. At a status conference on January 13, 2011, the court set a briefing schedule for  
16 Defendant's petition for post-conviction relief.

17 On October 10, 2011, over two years after remittitur issued from Defendant's direct  
18 appeal, Mr. Brower filed a Petition for Writ of Habeas Corpus (Post-Conviction) ("First  
19 Petition") on Defendant's behalf. Mr. Brower alleged Mr. Oronoz had provided ineffective  
20 assistance of counsel on appeal in part by failing to provide Defendant with a copy of his case  
21 file. At that time, Mr. Brower was apparently under the impression that the District Court's  
22 granting Defendant's motion to appoint post-conviction counsel indicated that the court had  
23 found good cause to overcome the one-year procedural bar applicable to Defendant's First  
24 Petition pursuant to NRS 34.726. See Petition for Writ of Habeas Corpus, 10/10/2011, p. 4.  
25 No such finding had in fact been made. The State filed its Response and Motion to Dismiss  
26 Defendant's Petition on November 1, 2011, arguing that the Petition was procedurally time-  
27 barred. On December 13, 2011, the court agreed and denied the Petition, finding it had been  
28 procedurally barred even before Mr. Brower was appointed. See District Court Minutes,

1 12/13/2011.

2 On January 6, 2012, the court filed its Findings of Fact, Conclusions of Law & Order,  
3 stating Defendant had failed to establish good cause to overcome the procedural bar. On  
4 January 30, 2012, Defendant filed a "Motion for Clarification and/or Reconsideration of  
5 Denial of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)," requesting that  
6 the court clarify its reasoning for the denial of Defendant's First Petition in the presence of  
7 Defendant. Defendant also challenged the court's finding that his Petition was time-barred,  
8 arguing that his appellate counsel, Mr. Oronoz, neglected to inform Defendant of the status of  
9 his appeal such that Defendant "could not be aware of the need to file a petition to avoid the  
10 procedural time-bar." See Motion to Reconsider, 1/30/2012, p. 2.

11 On February 21, 2012, before the court could hear Defendant's Motion to Reconsider,  
12 Defendant appealed the denial of the First Petition to the Nevada Supreme Court. The same  
13 day, this Court entered an Order staying its Findings of Fact, Conclusions of Law & Order  
14 until such time as Defendant's Motion for Reconsideration could be heard. The matter  
15 convened for hearing on March 13, 2012, and the court ordered the matter be taken off calendar  
16 until an order from the Nevada Supreme Court regarding Defendant's appeal had issued. See  
17 District Court Minutes, 03/13/2012. However, on January 18, 2013, before such order could  
18 issue, Defendant filed a Notice of Voluntary Withdrawal of Appeal. See Nevada Supreme  
19 Court Case No. 60309. Defendant has represented that this withdrawal was a result of  
20 Defendant's wish to withdraw his guilty plea, rather than continue to pursue an appeal from  
21 the denial of his First Petition. See Defendant's Supplemental Petition for Writ of Habeas  
22 Corpus (Post-Conviction), p. 10.

23 On May 23, 2013, Defendant filed a motion to place the matter back on calendar. On  
24 July 11, 2013, an evidentiary hearing was held on the First Petition, despite the court's  
25 previous denial. At the hearing, Mr. Brower informed the court that "Defendant does not wish  
26 to withdraw his plea..." and that he "withdrew the appeal because we're trying to address the  
27 reconsideration of the time-bar issue, which is the whole reason we're here." See Reporter's  
28 Transcript 07/11/13, p. 3-4. The State called the court's attention to the letter written by

1 Defendant in July of 2010, in which he admits he knew the Nevada Supreme Court denied his  
2 appeal, as evidence that Defendant became aware remittitur issued within the one year time  
3 period in which to properly file a petition for post-conviction relief. Id. at p. 15. Defendant  
4 testified and admitted that he learned his appeal was denied before the one year time period  
5 had expired. Id. at p. 21. The court found Defendant had actual knowledge of the denial in July  
6 of 2010, before the one year period had run, and there was no good cause to overcome the time  
7 bar. Id. at p. 24-26. The court denied Defendant's First Petition for the second time, and entered  
8 its Findings of Fact, Conclusions of Law & Order on November 12, 2013.

9 On December 10, 2013, Defendant again appealed the denial of his First Petition to the  
10 Nevada Supreme Court, and once again voluntarily withdrew the appeal on May 12, 2014. See  
11 Nevada Supreme Court Case No. 64617.

12 On August 19, 2014, Mr. Brower withdrew as counsel. On September 4, 2014, Matthew  
13 Carling, Esq., was confirmed as counsel for Defendant. On February 9, 2015, Mr. Carling filed  
14 the instant "Supplemental" Petition for Writ of Habeas Corpus (Post-Conviction)("Petition").  
15 The State hereby responds and moves to dismiss the Petition as follows.

### 16 ARGUMENT

17 At the outset, the State notes that Defendant's instant Petition, though labeled as a  
18 "supplemental," is in fact simply a second, untimely petition for post-conviction relief. While  
19 counsel for a petitioner for a writ of habeas corpus may serve "supplemental" pleadings after  
20 being appointed, this is true only where the petitioner has filed a Proper Person Petition for  
21 Writ of Habeas Corpus necessitating counsel's appointment. See NRS 34.750. In the instant  
22 matter, Defendant's only prior petition for post-conviction relief was filed by previous counsel  
23 over three years ago. As such, this Court should not be misled by Defendant's categorizing the  
24 instant Petition as a "supplement." Moreover, for the reasons discussed below, Defendant's  
25 Petition should be dismissed as procedurally barred.

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1 **I. DEFENDANT'S PETITION SHOULD BE DISMISSED**

2 **A. Defendant's Petition is Time-Barred Pursuant to NRS 34.726**

3 The mandatory provision of NRS 34.726(1) states:

4 Unless there is good cause shown for delay, a petition that  
5 challenges the validity of a judgment or sentence must be filed  
6 within 1 year after entry of the judgment of conviction or, if an  
7 appeal has been taken from the judgment, **within 1 year after**  
8 **the Supreme Court issues its remittitur.** For the purposes of  
9 this subsection, good cause for delay exists if the petitioner  
10 demonstrates to the satisfaction of the court:

- 11 (a) That the delay is not the fault of the petitioner; and  
12 (b) That dismissal of the petition as untimely will unduly  
13 prejudice the petitioner.

14 (Emphasis added). "[T]he statutory rules regarding procedural default are mandatory and  
15 cannot be ignored when properly raised by the State." State v. Eighth Judicial Dist. Court, 121  
16 Nev. 225, 233, 112 P.3d 1070, 1075 (2005). Per the statutory language, the one-year time bar  
17 begins to run from the date the judgment of conviction is filed or a remittitur from a timely  
18 direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998);  
19 see Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726  
20 should be construed by its plain meaning).

21 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme  
22 Court rejected a habeas petition that was filed two (2) days late, pursuant to the "clear and  
23 unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance  
24 of filing a petition within the one-year mandate, absent a showing of "good cause" for the  
25 delay in filing. Gonzales, 590 P.3d at 902. The one-year time bar is therefore strictly construed.  
26 In contrast with the short amount of time to file a notice of appeal, a prisoner has an ample full  
27 year to file a post-conviction habeas petition, so there is no injustice in a strict application of  
28 NRS 34.726(1), despite any alleged difficulties with the postal system. Gonzales, 118 Nev. at  
595, 53 P.3d at 903.

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1 Here, Defendant filed an appeal from his Judgment of Conviction. The Nevada  
2 Supreme Court affirmed Defendant's conviction on July 7, 2009, and the Remittitur issued on  
3 August 4, 2009. Therefore, Defendant had until August 4, 2010 to file a timely Petition for  
4 post-conviction relief. Not only was Defendant's first Petition for Writ of Habeas Corpus  
5 untimely, but the instant Petition was filed more than four years too late. Therefore, absent a  
6 showing of good cause, Defendant's Petition must be dismissed as time-barred pursuant to  
7 NRS 34.726(1).

8 **B. Defendant Has Not Shown Good Cause to Overcome the**  
9 **Procedural Bars**

10 To avoid procedural default under NRS 34.726, a defendant has the burden of pleading  
11 and proving specific facts that demonstrate good cause for his failure to present his claim in  
12 earlier proceedings or comply with the statutory requirements. See Hogan v. Warden, 109  
13 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev.  
14 656, 659, 764 P.2d 1303, 1305 (1988).

15 "To establish good cause, appellants must show that an impediment external to the  
16 defense prevented their compliance with the applicable procedural rule." Clem v. State, 119  
17 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.  
18 248, 251, 71 P.3d 503, 506 (2003); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537  
19 (2001). Such an external impediment could be "that the factual or legal basis for a claim was  
20 not reasonably available to counsel, or that 'some interference by officials' made compliance  
21 impracticable," Hathaway, 74 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106  
22 S.Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.  
23 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing must not be  
24 the fault of the petitioner. NRS 34.726(1)(a).

25 The Nevada Supreme Court has clarified that "appellants cannot attempt to manufacture  
26 good cause[.]" Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a  
27 "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at  
28 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). The court has

1 also made clear that excuses such as the lack of assistance of counsel when preparing a petition,  
2 as well as the failure of trial counsel to forward a copy of the file to a petitioner do not  
3 constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute  
4 on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004);  
5 Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Importantly, because a defendant enjoys  
6 no constitutional right to post-conviction counsel, such counsel's performance does not  
7 constitute good cause to overcome the procedural bar imposed by NRS 34.726. Brown v.  
8 McDaniel, 130 Nev. \_\_\_, \_\_\_, 331 P.3d 867, 869 (2014).

9 Additionally, in order to demonstrate prejudice to overcome the procedural bars, a  
10 defendant must show "not merely that the errors of [the proceeding] created possibility of  
11 prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state  
12 proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952, 960,  
13 860 P.2d 710, 716 (1993) (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853,  
14 34 P.3d 540, 545.

15 Just as he failed to demonstrate good cause to overcome the procedural bar when this  
16 Court twice considered Defendant's first untimely petition, Defendant has again failed to  
17 demonstrate good cause to overcome the time bar four years later. To the extent Defendant  
18 alleges Mr. Oronoz's failure to keep him apprised of the status of his appeal and provide him  
19 a copy of his case file constitutes good cause, this Court has repeatedly found it does not.  
20 Moreover, as discussed above, Defendant admitted that he became aware of the Nevada  
21 Supreme Court's denial of his appeal within the one year time period for appropriately filing  
22 a petition for post-conviction relief. However, Defendant's First Petition was not filed until  
23 over one year later. Moreover, the Nevada Supreme Court has plainly ruled that an attorney's  
24 failure to provide a Defendant with a copy of his case file does not constitute good cause to  
25 overcome procedural bars.

26 To the extent Defendant argues Mr. Brower's "ineffectiveness" somehow amounts to  
27 good cause to overcome the time bar, this argument is misguided. To begin with, Mr. Brower  
28 was appointed on December 14, 2012, over four months after the one year period for filing

1 had run, at which point any petition Defendant could have filed was already time-barred. As  
2 such, Mr. Brower's performance subsequent to his appointment, whether effective or  
3 ineffective, is of no consequence as it has no bearing on the fact that Defendant simply cannot  
4 demonstrate good cause to overcome the time bar to begin with. Defendant appears to be under  
5 the mistaken impression that the time period in which good cause can be shown to have  
6 occurred somehow re-started after his First Petition was denied. Rather, without good cause to  
7 overcome the time bar initially, Defendant cannot hope to establish good cause from  
8 circumstances arising after the time bar had already been triggered. Moreover, as the Nevada  
9 Supreme Court has made clear, post-conviction counsel's performance cannot amount to good  
10 cause to overcome the time bar. Accordingly, Defendant has once again failed to demonstrate  
11 good cause, and his Petition should be summarily dismissed.

12 **C. The District Court Must Apply the Procedural Bars**

13 The Nevada Supreme Court has specifically held that the district court has a duty to  
14 consider whether the procedural bars apply to a post-conviction petition (and not arbitrarily  
15 disregard them), and that the District Court must in fact apply the procedural bars if warranted.  
16 In State v. Eighth Judicial District Court, 121 Nev. 225, 234, 112 P.3d 1070 (2005), the court  
17 held as follows:

18           Given the untimely and successive nature of [defendant's]  
19           petition, the district court had a duty imposed by law to  
20           consider whether any or all of [defendant's] claims were barred  
21           under NRS 34.726, NRS 34.810, NRS 34.800, or by the law of  
22           the case . . . [and] the court's failure to make this determination  
23           here constituted an arbitrary and unreasonable exercise of  
24           discretion.

25 (Emphasis added), see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82  
26 (2003) (wherein the Nevada Supreme Court held that parties cannot stipulate to waive, ignore  
27 or disregard the mandatory procedural default rules nor can they empower a court to disregard  
28 them). Insofar as Defendant has not demonstrated good cause sufficient to overcome the  
procedural time-bar, Defendant's Petition must be dismissed.

//

//

1 **D. Defendant's Petition is Barred by Laches Pursuant to NRS 34.800**

2 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
3 exceeding five years [elapses] between the filing of a judgment of conviction, an order  
4 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of  
5 conviction and the filing of a petition challenging the validity of a judgment of conviction..."  
6 The Nevada Supreme Court observed in Groesbeck v. Warden, "[P]etitions that are filed many  
7 years after conviction are an unreasonable burden on the criminal justice system. The  
8 necessity for a workable system dictates that there must exist a time when a criminal conviction  
9 is final." 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984). To invoke the presumption, the  
10 statute requires the State plead laches in its motion to dismiss the petition. NRS 34.800(2).  
11 The State affirmatively pleads laches in the instant case. In order to overcome the presumption  
12 of prejudice to the State, a defendant has the heavy burden of proving a fundamental  
13 miscarriage of justice. Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001).

14 Remittitur on Defendant's Direct Appeal issued on August 4, 2009. Since more than  
15 five years have elapsed between the issuance of remittitur and the filing of Defendant's instant  
16 Petition, NRS 34.800 directly applies in this case, and as such, this Court should summarily  
17 dismiss the instant Petition pursuant to NRS 34.800, as the lengthy delay in filing is unexcused.

18 **CONCLUSION**

19 Based on the foregoing, the State respectfully requests that this Court dismiss  
20 Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

21 DATED this 6th day of March, 2015.

22 Respectfully submitted,

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

25  
26 BY /s/ JAMES R. SWEETIN  
27 JAMES R. SWEETIN  
Chief Deputy District Attorney  
28 Nevada Bar #005144



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**CERTIFICATE OF SERVICE**

I hereby certify that service of the above and foregoing was made this 6th day of  
MARCH 2015, to:

MATTHEW CARLING, ESQ.  
cedarlegal@gmail.com

BY /s/ HOWARD CONRAD  
Secretary for the District Attorney's Office  
Special Victims Unit

bjc/SVU



  
CLERK OF THE COURT

1 **SAO**  
2 **MATTHEW D. CARLING, ESQ.**  
3 Nevada Bar No.: 007302  
4 1100 S. Tenth Street  
5 Las Vegas, NV 89101  
6 (702) 419-7330 (Office)  
7 (702) 446-8065 (Fax)  
8 CedarLegal@gmail.com  
9 *Court-Appointed Attorney for Defendant,*  
10 **DELARIAN K. WILSON**

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

11 **STATE OF NEVADA,**

Plaintiff,

12 vs.

13 **DELARIAN K. WILSON,**

Defendant.

Case No.: 07C232494-2  
Dept. No.: ~~XXIV~~ 1X

**PLEASE NOTE  
DEPT. CHANGE**

**STIPULATION TO ENLARGE BRIEFING SCHEDULE AND ORDER**

14  
15 The Defendant, DELARIAN K. WILSON, by and through his attorney, MATTHEW  
16 D. CARLING, ESQ., seeks to enlarge the briefing schedule. Counsel for the Defendant still  
17 needs to conduct additional research and is dealing with a large post-conviction case load  
18 within the next 30 days. At the Defendant's request, the State of Nevada, by and through its  
19 attorney, H. LEON SIMON, ESQ., Deputy District Attorney, while reserving its right to raise  
20 the one (1) year time bar, if appropriate, agrees to stipulate to continue the briefing schedule in  
21 the above-captioned matter as follows:  
22  
23

- 24 1. That the Defendant will file his Supplement to his Petition for Writ of Habeas  
25 Corpus (Post-Conviction) on or before February 5, 2015;
- 26 2. That the State will file its Response 60 days thereafter on or before April 6,  
27 2015;
- 28

- 1 3. That the Defendant will file his Reply 14 days thereafter on or before April 20,  
2 2015; and  
3 4. That with this Court's permission, the Hearing for argument currently scheduled  
4 for March 10, 2015, in this matter be vacated and rescheduled for a date  
5 convenient for this Court after April 20, 2015.

6 Grounds for this Stipulation are that counsel for the Defendant requires additional time  
7 to review the case and obtain evidence that may be attached to the Supplement. This  
8 Stipulation is entered in good faith by both parties and is not for the purpose of undue delay.

9 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

10 CARLING LAW OFFICE, PC

STEVEN WOLFSON, ESQ.  
DISTRICT ATTORNEY

11 *Not necessary this is duplicate stipulation*  
12 MATTHEW D. CARLING, ESQ.  
13 Nevada Bar No.: 007302  
14 1100 S. Tenth Street  
15 Las Vegas, NV 89101  
16 (702) 419-7330 (Office)  
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Attorneys for Defendant

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Nevada Bar No.: 000411  
200 S. Third Street  
P.O. Box 552212  
Las Vegas, Nevada 89155-2212  
Attorneys for Plaintiff

*original  
lost*

18 **ORDER**

19 IT IS HEREBY ORDERED that the above Stipulation be entered and the same is  
20 hereby approved by the Court.

21 IT IS FURTHER ORDERED that the Hearing set in this matter be vacated and  
22 rescheduled for the 28<sup>th</sup> day of April, 2015, at 9:00 a.m.

23 DATED this 16<sup>th</sup> day of March, 2014.

24  
25  
26 *Janet P. Zylstra*  
27 DISTRICT COURT JUDGE  
28

  
CLERK OF THE COURT

PET  
Matthew D. Carling  
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*Attorney for Petitioner/ Defendant*  
DELARIAN WILSON

DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

-vs-

DELARIAN WILSON,

Defendant.

Case No. 07C232494-1

Depl. No. XXIV

Evidentiary Hearing Requested

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

COMES NOW Defendant Delarian Wilson ("Wilson"), by and through counsel Matthew D. Carling and, pursuant to NRS. 34.724, hereby submits this Reply on the *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* (hereinafter, the "Petition"). This Reply pertains directly to those new matters raised and contained within the *State's Response and Motion to Dismiss Defendant's Supplemental Petition and Writ of Habeas Corpus (Post-Conviction)* dated March 6, 2015 (the "Response") and is supported by the following memorandum of points and authorities, the papers and pleadings on file herein, together with oral argument at the time of hearing.

002279

1                                    **ADDITIONAL STATEMENT OF FACTS**

2            Wilson incorporates herein the Statements of Case and Facts as contained in the  
3    Petition and further presents the following timeline of events for this Court's convenience  
4    and for support in this Reply.

5            1.     On July 15, 2008, the *Judgment of Conviction* was entered by this Court pursuant  
6    to Wilson's guilty plea.

7            2.     On July 13, 2009, the *Order of Affirmance* was entered by the Nevada Supreme  
8    Court.

9            3.     On August 4, 2009, the *Remittitur* entered.

10           4.     On July 21, 2010, Wilson wrote to Mr. Oronoz indicating his mother had  
11    discovered the entry of the Order of Affirmance. Wilson also called Mr. Oronoz's office  
12    multiple times.

13           5.     On July 25, 2010, Wilson again wrote to Mr. Oronoz, requesting his file and  
14    all other materials including pleadings and transcripts.

15           6.     On July 26, 2010, Wilson wrote a letter to this Court, which is part of the  
16    record in this case, indicating he only just discovered the Order of Affirmance.

17           7.     On August 1, 2010, Wilson wrote to Mr. Oronoz regarding the Order of  
18    Affirmance.

19           8.     On August 3, 2010, Wilson filed *pro se* in the district court his *Motion for An*  
20    *Order Instructing the Attorney of Record to Provide Petitioner with a Complete and Copy of the Case File in*  
21    *the Above Entitled Cases Number.*

1           9.     On August 14, 2010, Wilson again wrote to Mr. Oronoz requesting his case  
2 file and all other materials.

3           10.    On August 27, 2010, Wilson filed for an extension of time on entry of the  
4 *Remittitur* with the Nevada Supreme Court, seeking additional time in which to file a petition  
5 for writ of habeas corpus. Although the motion was submitted in proper person by a  
6 represented defendant, the Nevada Supreme Court directed it be entered on the record as  
7 properly filed. *See* Docket, Nevada Supreme Court Case No. 52104.

8           11.    On September 7, 2010, the Supreme Court entered its *Order* stating that  
9 "Appellant has not asserted any ground that would warrant a recall of the remittitur, see  
10 Wood v. State, 60 Nev. 139, 104 P.2d 187 (1940), and we cannot extend the time for filing a  
11 post-conviction petition for a writ of habeas corpus under NRS chapter 34, see State v.  
12 Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003); rather, appellant must file an appropriate  
13 petition in the district court and, if the petition is untimely, allege and provide good cause for  
14 delay and prejudice to overcome the procedural bar as provided in NRS 34.726." The Court  
15 declined to opine on the procedural bar and denied the motion for extension of time on the  
16 *Remittitur*.

17           12.    On October 1, 2010, Wilson requested, again *pro se*, transcripts of court  
18 proceedings in the district court.

19           13.    On October 27, 2010, Wilson filed his *Motion to Appoint Post Conviction Relief*  
20 *Counsel*, which was opposed by the State on grounds of lack of threshold showing rather  
21 than any time-bar. The motion was heard on November 30, 2010, and Wilson was not  
22 present. The trial court determined to appoint counsel for Wilson. On December 14, 2010,

1 Mr. Keith Brower was appointed to represent Wilson and the matter was continued to set a  
2 briefing schedule.

3 14. On January 13, 2011, the matter was convened for a status check and the  
4 briefing schedule was set. Wilson's opening brief was set to be filed on April 25, 2011, the  
5 State's response on July 25, 2011, and Wilson's reply on September 26, 2011. However, on  
6 October 4, 2011, the matter convened for hearing and an abbreviated briefing schedule was  
7 set, which required Wilson's opening brief to be filed on October 10, 2011, the State's  
8 response on November 28, 2011, and Wilson's reply on December 5, 2011, and set the  
9 matter for argument on December 13, 2011.

10 15. On October 10, 2011, Wilson filed the First Petition, wherein Wilson argued  
11 that Mr. Oronoz was ineffective for failing to order the transcripts of the co-defendant's trial  
12 in order to be prepared for sentencing, causing this Court to determine Wilson was the  
13 "ring-leader" based on its personal knowledge of the co-defendant's trial. Additionally,  
14 Wilson argued Mr. Oronoz was ineffective for failing to adequately brief the issue of the  
15 disparity of the sentence between the co-defendants in the direct appeal from the conviction.

16 16. The State argued the First Petition was untimely and procedurally barred, and  
17 denied by this Court both procedurally and on its merits.

18 17. On January 6, 2012, the district court filed its *Findings of Fact, Conclusions of Law*  
19 *and Order* denying the First Petition.

20 18. On January 30, 2012, Wilson filed its *Motion for Clarification and/or*  
21 *Reconsideration*.



1        19. On February 21, 2012, the district court filed its *Order Staying the Findings of*  
2 *Fact, Conclusions of Law and Order* filed on January 6, 2012.

3        20. On February 21, 2012, Wilson appealed from the denial of the First Petition.  
4 *See* Supreme Court Case No. 60309.

5        21. On February 24, 2012, the State filed its *State's Opposition to Defendant's Motion*  
6 *for Clarification and/or Reconsideration of Denial of Defendant's Petition for Writ of Habeas Corpus*,  
7 wherein it argued that the district court lacked jurisdiction over the motion given that it had  
8 transferred to the Nevada Supreme Court upon filing of the February 21, 2012, notice of  
9 appeal; that Wilson had not obtained leave of the court to have the First Petition reheard  
10 under N.J.D.C.R. 2.24(a); and that Wilson had not shown that the court overlooked or  
11 misapprehended any material issue of fact or law in its denial of the First Petition.

12        22. On September 14, 2012, Wilson filed his *Motion for Limited Remand For Purposes*  
13 *of Concluding Appellant's Motion for Reconsideration* in appellate Case No. 60309. Such motion  
14 was denied on September 21, 2012, with direction to counsel to inform the court when a  
15 decision had been reached below on reconsideration. Briefing was suspended.

16        23. On January 18, 2013, Wilson filed his *Notice of Voluntary Withdrawal of Appeal* in  
17 Case No. 60309.

18        24. On January 29, 2013, the Nevada Supreme Court entered its *Order Dismissing*  
19 *Appeal* in Case No. 60309.

20        25. On June 4, 2013, the matter came for a hearing, at which the *Minutes* indicate  
21 that "[t]his Court STAYED the Findings of Fact, and Conclusions of Law because deft was not  
22 present, and ORDERED, matter set for hearing on Deft's Petition for Writ of Habeas Corpus."

1       26. Wilson thus pursued further proceedings in the district court and, on  
2 November 12, 2013, the trial court entered its *Findings of Fact, Conclusions of Law and Order*  
3 which again dismissed the First Petition based on a failure to demonstrate good cause to  
4 overcome the procedural bars.

5       27. On July 11, 2013, the matter came for a hearing on the First Petition on the  
6 limited issue of good cause to excuse procedural bars pertaining to the First Petition,  
7 whereat the State argued that Wilson needed to appeal the time-bar issue to the Nevada  
8 Supreme Court.

9       28. At such hearing, the trial court stated the disposition of the appeal occurred in  
10 July of 2009 and the First Petition was filed in the Fall of 2011, which was past the time for  
11 post-conviction writs. 7/11/2013 Tr. at pp. 6-7. Brower informed the court that the fact that  
12 the First Petition was not filed until October of 2011 was because he requested a briefing  
13 schedule after being appointed, and this was his fault. *Id.* at p. 24. Brower stated, "I'm the  
14 one that actually filed the one writ, but again I thought we were already past the time bar  
15 issues when that occurred." *Id.*, ln. 19-21. Despite this, the trial court determined Wilson was  
16 past the time bar in filing the First Petition. *Id.* at p. 25. At the conclusion of the hearing, the  
17 district court denied the First Petition again on grounds that it was time-barred.

18       29. On November 12, 2013, the district court entered the *Findings of Fact,*  
19 *Conclusions of Law and Order* denying the relief requested in the First Petition, and further  
20 noting that Wilson's petition was time-barred prior to Brower being appointed and he had  
21 not shown good cause to overcome that mandatory time bar. It did not address the merits  
22 of Wilson's arguments as contained in the First Petition.

1       30. On December 10, 2013, Wilson filed his notice of appeal from the November  
2 12, 2013, *Findings of Fact, Conclusions of Law and Order*. See, Supreme Court Case No. 64617.

3       31. On May 12, 2014, Wilson filed to voluntarily dismiss his appeal in Case No.  
4 64617.

5       32. On May 14, 2014, the Nevada Supreme Court entered its *Order Dismissing*  
6 *Appeal* in appellate Case No. 64617.

7       33. On June 12, 2014, the case of *Harris v. State* was handed down by the Nevada  
8 Supreme Court indicating that a post-conviction petition for a writ of habeas corpus  
9 provides the exclusive remedy for a challenge to the validity of the guilty plea made after  
10 sentencing for persons in custody on the conviction being challenged. *Ibid.*, 329 P.3d 619  
11 (Nev. 2014).

12       34. On August 19, 2014, Mr. Brower moved to withdraw as counsel for Wilson,  
13 alleging a conflict of interest. Mr. Brower stated that he advised Wilson to withdraw his  
14 appeal in the Nevada Supreme Court regarding time-bar issues and instead pursue  
15 withdrawing his guilty plea. However, Brower noted that *Harris v. State* was issued after  
16 withdrawal, which rendered Wilson's claims unavailable based on the holdings therein. Thus,  
17 Mr. Brower stated Wilson's available claim was his ineffectiveness and needed to be handled  
18 by another attorney. He requested that a new attorney be appointed to assist Wilson in  
19 pursuing the claim.

20       35. On September 4, 2014, the district court appointed counsel herein to  
21 represent Wilson in these matters, directing that counsel "file the original WRIT or a  
22 supplemental to the Writ on or before Thursday, 12/4/2014..." See, *Minutes*, 09/04/2014.

1 36. The State and counsel herein thereafter stipulated to an extension of the  
2 briefing schedule, allowing the supplemental petition to be filed in February of 2015. The  
3 original stipulation was noted by the district court as having been lost; however, it was  
4 replaced and appears on the record as of March 26, 2015.

5 37. On February 9, 2015, Wilson filed his supplemental petition.

6 **ARGUMENT**

7 **I. WILSON TIMELY FILED THE PETITION AND IT SHOULD BE**  
8 **GRANTED.**

9 **A. Petition Is Timely; However, Good Cause Exists To Excuse Any**  
10 **Procedural Bar.**

11 NRS 34.745(4) states as follows:  
12

13  
14 If the petition is a second or successive petition challenging the validity of a  
15 judgment of conviction or sentence and if it plainly appears from the face of  
16 the petition or an amended petition and documents and exhibits that are  
17 annexed to it, or from records of the court that the petitioner is not entitled to  
18 relief based on any of the grounds set forth in subsection 2 of NRS 34.810,  
19 the judge or justice shall enter an order for its summary dismissal and cause  
20 the petitioner to be notified of the entry of the order.  
21

22 "A petition may allege that the petitioner is unable to pay the costs of the proceedings or to  
23 employ counsel. If the court is satisfied that the allegation of indigency is true and the  
24 petition is not dismissed summarily, the court may appoint counsel to represent the  
25 petitioner." NRS 34.750(1). In determining whether counsel should be appointed, the trial  
26 court considers "...the severity of the consequences facing the petitioner", the difficulty of  
27 the issues, and whether counsel is necessary to proceed with discovery. NRS 34.750(1)(a),  
28 (c). "After appointment by the court, counsel for the petitioner may file and serve  
29 supplemental pleadings, exhibits, transcripts and documents[.]" NRS 34.750(3).

1 The State argues the Petition should be dismissed as time-barred pursuant to NRS  
2 34.726 because it was filed more than one (1) year after the *Remittitur* from the Nevada  
3 Supreme Court. Response at p. 5. The State argues the Petition at issue at this time was filed  
4 more than four (4) years after the *Remittitur* herein. *Id.* at p. 6. Thus, the State argues the  
5 Petition should be dismissed. This argument is incorrect based on the circumstances of this  
6 case.

7 The procedural history of this case is much more complex than the State has set  
8 forth. It requires more than simply calculating the time frame from the *Remittitur* issued in  
9 2009 by the Nevada Supreme Court. The *Remittitur* issued August 4, 2009. It is unclear  
10 precisely what date Wilson discovered the issuance; however, the record indicates his mother  
11 did not find out until July 21, 2010, and thereafter informed him because his counsel had  
12 been nonresponsive to Wilson's many letters seeking a status. The time for filing a writ of  
13 habeas corpus ran on August 4, 2010. On August 5, 2010, Wilson filed a motion directing  
14 Ordoz—who had ignored Wilson's personal requests—to release a copy of Wilson's record  
15 to him in order to pursue post-appeal remedies. This motion was granted on August 17,  
16 2010. On August 27, 2010, Wilson filed for an extension of time on entry of the *Remittitur*  
17 with the Nevada Supreme Court. *See*, Docket, Nevada Supreme Court Case No. 52104. On  
18 September 7, 2010, the Supreme Court denied extension stating that Wilson did not assert  
19 any ground warranting a recall of the *Remittitur*, and noting it could not extend the time for  
20 filing a post-conviction petition for a writ of habeas corpus, further directing Wilson to file  
21 an appropriate petition in the district court and, if untimely, allege and provide good cause  
22 for delay and prejudice to overcome the procedural bar.

1 On October 27, 2010, Wilson filed his *Motion to Appoint Post Conviction Relief Counsel*,  
2 which was opposed by the State. On December 14, 2010, Brower was appointed to  
3 represent Wilson. On January 13, 2011, the briefing schedule was set, with Wilson's petition  
4 to be filed on April 25, 2011; however, this date was reset to October 10, 2011, with the  
5 matter for argument on December 13, 2011. Wilson timely filed the First Petition by the  
6 briefing schedule deadline of October 10, 2011.

7 However, in December of 2011 at arguments, the trial court determined that the First  
8 Petition was time-barred as having not been filed within one (1) year of the *Remittitur*. On  
9 January 6, 2012, the district court filed its *Findings of Fact, Conclusions of Law and Order* denying  
10 the First Petition; however, Wilson timely filed for reconsideration on January 30, 2012, and  
11 the denial was stayed on February 21, 2012. A hearing was held July 11, 2013, on  
12 reconsideration of the denial; however, the trial court ultimately entered its denial on  
13 November 12, 2013, finding no reason to reconsider its prior order, noting specifically that  
14 Wilson was time-barred before he was even appointed counsel in the case.

15 Wilson timely appealed the denial of the First Petition to pursue challenging the time-  
16 bar and finding that he lacked "good cause" for an extension of time. *See*, Supreme Court  
17 Case No. 64617. On the mis-advice of counsel that Wilson should instead pursue withdrawal  
18 of his guilty plea through motion to the district court, Wilson voluntarily dismissed this  
19 appeal. On May 14, 2014, the Nevada Supreme Court entered its *Order Dismissing Appeal* in  
20 appellate Case No. 64617. In Brower's withdrawal from the case, he relied upon entry of the  
21 *Harris v. State* case one month after the voluntary dismissal as having dictated that Wilson  
22 was now barred from the action he had advised him to undertake; however, the concepts



1 *Harris* disposed of were a very narrow limited exception requiring proof of a "manifest  
2 injustice." Brower had advised Wilson to voluntarily dismiss his appeal of the "good cause"  
3 finding to not extend his time for filing the First Petition, and pursue something Wilson  
4 never intended to pursue—withdrawal of his plea—and do so under a very narrowly limited  
5 exception. This was unsound advice. Wilson's intent was always to challenge his sentencing,  
6 at which he believes he was not adequately represented. His challenges in the First Petition  
7 were inadequate representation at sentencing (counsel was unprepared) and failure to raise  
8 the district court's use of the co-defendant's trial against Wilson at sentencing. These were  
9 viable issues.

10 On September 4, 2014, this court appointed counsel herein to represent Wilson in  
11 these matters, directing that counsel "file the original WRIT or a supplemental to the Writ  
12 on or before Thursday, 12/4/2014..." *See, Minutes*, 09/04/2014. The parties thereafter  
13 stipulated to an extension of the briefing schedule, allowing the supplemental petition to be  
14 filed in February of 2015.

15 Wilson's current petition, whether deemed "supplemental" or not, is timely taken  
16 from the dismissal of his appeal from the First Petition on mis-advice of counsel, which  
17 occurred in May of 2014. However, Wilson has been required to evidence the prejudice  
18 attending such mis-advice in order to meet the *Strickland* requirement, which necessitated  
19 arguments in the current petition as to the viability of the issue to be raised on the appeal, as  
20 well as the viability of the issues contained in the First Petition that has never been  
21 adjudicated on its merits.

1 The State has considered only a narrow portion of the procedural history of this case,  
2 making its entire argument that the First Petition was time-barred; however, the issue before  
3 this Court is only minimally based on that issue. Technically that issue is not before this  
4 Court in this matter at all. Reconsideration by this Court as to its November 2013 *Findings of*  
5 *Fact and Conclusions of Law and Order* dismissing the First Petition as time-barred has already  
6 been sought by Wilson previously and denied, resulting in the entry of that final order on the  
7 matter. However, Wilson has presented his arguments that he would have raised on his  
8 mistakenly withdrawn appeal to this Court to meet the prejudice prong of *Strickland* with  
9 regard to Brower's mis-advice on Wilson dismissing his appeal in favor of pursuing a very  
10 narrowly limited scope of withdrawing his guilty plea by motion to the district court.

11 Review of Wilson's petition at issue herein evidences that Wilson first argues that  
12 Brower was ineffective in his mis-advice to voluntarily withdraw the appeal. Brower  
13 withdrew from this matter specifically on the recognition that he had misadvised Wilson and  
14 Wilson needed new counsel to pursue these matters. The next argument in the petition  
15 pertains to the idea that "good cause" did exist to support the fact that Wilson's appeal  
16 would have been viable had he not dismissed it based on Brower's misadvice. However, this  
17 could be rendered harmless if the arguments raised in the First Petition can be determined to  
18 be lacking in merit or otherwise insufficient, thus Wilson was required to argue the viability  
19 of the issues contained in the First Petition to further evidence why the appeal would be  
20 viable. The State has misunderstood the procedural history and the purpose behind these  
21 proceedings altogether. Wilson is not supplementing the First Petition, but rather has raised  
22 a new petition challenging Brower's misadvice on voluntarily dismissing his appeal, which

1 required arguing the merits of that possible appeal as well as the First Petition to meet the  
2 *Strickland* requirement of prejudice for such ineffectiveness claim.

3 "To establish ineffective assistance of counsel, a claimant must show both that  
4 counsel's performance was deficient and that the deficient performance prejudiced the  
5 defense. To show prejudice, the claimant must show a reasonable probability that **but for**  
6 **counsel's errors the result of the trial would have been different.**" *Thomas v. State*, 120  
7 Nev. 37, 83 P.3d 818, 823 (2004)(emphasis added). Wilson met this requirement in the  
8 current petition by showing how the arguments on appeal would have had a chance of  
9 changing the outcome, and that those contained in the First Petition would have similarly  
10 provided Wilson relief.

11 "The failure of an attorney to inform his client of the relevant law clearly satisfies the  
12 first prong of the *Strickland* analysis..." *Mitchell v. Kemp*, 483 U.S. 1026, 107 S.Ct. 3248, 3251  
13 (1987), citing *Hill v. Lockhart*, 474 U.S. 52, 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)(WHITE,  
14 J., concurring in judgment). "...[A]lthough counsel need not be a fortune teller, he must be  
15 a reasonably competent legal historian. Though he need not see into the future, he must  
16 reasonably recall (or at least research) the past..." *Kennedy v. Maggio*, 725 F.2d 269, 272 (5<sup>th</sup>  
17 Cir. 1984), citing *Cooks v. United States*, 461 F.2d 530, 532 (5<sup>th</sup> Cir.1972). Brower admitted  
18 that he had misinformed Wilson to voluntarily withdraw his appeal, and Brower withdrew  
19 on this basis so Wilson would have new counsel to challenge Brower's ineffectiveness. At  
20 the time of Brower's advice, NRS 176.165 stated as follows with regard to the withdrawal of  
21 a guilty plea by motion, which is the advice Brower gave Wilson to pursue rather than his  
22 appeal:

1  
2 Except as otherwise provided in this section, a motion to withdraw a plea of  
3 guilty, ... may be made only before sentence is imposed or imposition of  
4 sentence is suspended. To correct manifest injustice, the court after sentence  
5 may set aside the judgment of conviction and permit the defendant to  
6 withdraw the plea.  
7

8 Brower was aware that he had no evidence "manifest injustice" with regard to Wilson's guilty  
9 plea in order to obtain relief; however, Wilson had never previously taken issue with his plea  
10 in his direct appeal, the First Petition, or otherwise, and maintained no grounds to challenge  
11 the plea itself, let alone to the heightened standard of proving "manifest injustice." Wilson  
12 only took issue with the sentencing and the ineffectiveness of his counsel at sentencing and  
13 then on appeal for not challenging a related issue to that sentencing problem. By having  
14 Wilson voluntarily dismiss his appeal, Brower left him only one avenue of relief, that being a  
15 second petition for writ of habeas corpus; however, NRS 34.810(2) further states as follows:

16 A second or successive petition must be dismissed if the judge or justice  
17 determines that it fails to allege new or different grounds for relief and that the  
18 prior determination was on the merits or, if new and different grounds are  
19 alleged, the judge or justice finds that the failure of the petitioner to assert  
20 those grounds in a prior petition constituted an abuse of the writ.  
21

22 Since the First Petition did not contain any challenge to Wilson's guilty plea, Wilson was  
23 without remedy to raise it in a second petition. Thus, Brower's advising Wilson that he had  
24 a different avenue to pursue if he voluntarily dismissed his appeal was incorrect, even before  
25 the *Harris* decision did away with raising withdrawal of a guilty plea by motion absent any  
26 time-bar. Brower's advice was not soundly based in existing law and has substantially  
27 prejudiced Wilson by denying him his right to appeal the finding that no "good cause"

1 existed to extend the time for filing his First Petition, and further denied him his right to a  
2 meritorious decision on the issues raised in the First Petition if such appeal should prevail.

3 **B. NRS 34.800 Does Not Apply To This Case.**

4  
5 NRS 34.800 states as follows:

- 6 1. A petition may be dismissed if delay in the filing of the petition:
- 7 (a) Prejudices the respondent or the State of Nevada in responding to the
- 8 petition, unless the petition shows that the petition is based upon
- 9 grounds of which the petitioner could not have had knowledge by the
- 10 exercise of reasonable diligence before the circumstances prejudicial to
- 11 the State occurred; or
- 12 (b) Prejudices the State of Nevada in its ability to conduct a retrial of the
- 13 petitioner, unless the petitioner demonstrates that a fundamental
- 14 miscarriage of justice has occurred in the proceedings resulting in the
- 15 judgment of conviction or sentence.
- 16 2. A period exceeding 5 years between the filing of a judgment of conviction,
- 17 an order imposing a sentence of imprisonment or a decision on direct
- 18 appeal of a judgment of conviction and the filing of a petition challenging
- 19 the validity of a judgment of conviction creates a rebuttable presumption
- 20 of prejudice to the State. In a motion to dismiss the petition based on that
- 21 prejudice, the respondent or the State of Nevada must specifically plead
- 22 laches. The petitioner must be given an opportunity to respond to the
- 23 allegations in the pleading before a ruling on the motion is made.
- 24

25 The State cites to NRS 34.800 and argues more than five (5) years has lapsed since  
26 the *Remittitur* issued (August 2009) and this petition was filed (February 2015). Response at  
27 p. 10. However, NRS 34.800 does not apply to this matter and the State's argument is  
28 simply a result of their misunderstanding of the procedural posture of this case, as argued  
29 *supra*.

30 First and foremost, the time period of five (5) years is not met herein, but is simply  
31 based in the State's mistaken belief that this petition does nothing more than to supplement  
32 the First Petition. This ignores the fact that the First Petition was denied by the district court

1 in November of 2013, from which Wilson appealed and then voluntarily dismissed his  
2 appeal—the issue of his counsel's ineffectiveness in such process now being raised herein.  
3 Even if this petition had “supplemented” it, the filing of the First Petition (filed October  
4 2011) was within five years of the decision on the direct appeal of the judgment of  
5 conviction (August 2009) and would defeat application of NRS 34.800 as an ongoing  
6 proceeding with nothing more than an amendment to the original. The five year time frame  
7 of NRS 34.800 is suspended upon filing of the First Petition, no matter how many times it is  
8 amended in the future.

9       However, this is not a supplement to the First Petition, but rather a second petition  
10 brought on new grounds, with the applicable five year time frame also not applying to  
11 invoke NRS 34.800. This petition was filed in February of 2015 from the final decision of  
12 the Nevada Supreme Court on Wilson's voluntary dismissal of his appeal in May of 2014,  
13 not for the purpose of challenging the appeal decision from the judgment of conviction in  
14 August of 2009. Although the current petition could have a domino effect of impacting the  
15 judgment of conviction, the State cannot show how this would be prejudicial to them at all,  
16 particularly since they have been involved throughout the process of the direct appeal, the  
17 First Petition, the denial of the First Petition, the voluntarily withdrawn appeal, and these  
18 proceedings.

19       The purpose of NRS 34.800 was not to set a limitation on the *completion* of complex  
20 processes such as these, but rather on the *inception* of them to ensure that the State is capable  
21 of defending against them without loss of information or evidence. It sets a five-year  
22 limitation from the filing of a judgment or appellate decision to the *filing* of a petition directly



1 impacting that conviction. Wilson properly followed this process by the filing of the First  
2 Petition, albeit late around two years after, but still within the five years of NRS 34.800. This  
3 second petition does not directly challenge the judgment of conviction or the direct appeal  
4 decision, but rather the loss of his right to appeal the denial of his First Petition.

5 If this Court sees fit to provide Wilson his right to appeal the denial of the First  
6 Petition on grounds that he was denied his Sixth Amendment right to the effective assistance  
7 of counsel in his decision to withdraw such appeal, he would then be required to prevail on  
8 that appeal before the merits of the First Petition would ever be addressed to possibly  
9 impact the judgment of conviction, but each step in this process would simply reinstate the  
10 prior filings and follow the First Petition timely filed with regard to the limitation set out in  
11 NRS 34.800. The State participated in all of these prior proceedings and if any prejudice  
12 exists at all in it, it is very minimal, particularly in comparison to the rights deprived Wilson  
13 based on the ineffectiveness of his counsel as argued in these proceedings. Even if NRS  
14 34.800 somehow could apply, it only creates a "rebuttable presumption" which is easily  
15 rebutted by the processes alone in this matter.

1 **CONCLUSION**

2 WHEREFORE, based upon the foregoing, Wilson respectfully requests this Court  
3 grant his Petition and foregoing prayer as contained in his Supplemental Petition in this  
4 matter.

5 Respectfully submitted this 20<sup>th</sup> day of April, 2015.

6 CARLING LAW OFFICE, PC  
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14 CedarLegal@gmail.com  
15 Court Appointed Attorney for Petitioner,  
16 DELARIAN WILSON

17 **CERTIFICATE OF SERVICE**

18 I hereby certify that, on this 20<sup>th</sup> day of April, 2015, I sent a true and correct copy of  
19 the above *REPLY TO STATE'S RESPONSE AND MOTION TO DISMISS*  
20 *DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS* to  
21 the following parties:  
22

23 Ryan J. MacDonald, Esq.  
24 Deputy District Attorney  
25 Ryan.macdonald@clarkcountynvda.com  
26

27 CARLING LAW OFFICE, PC  
28 /s/ Matthew D. Carling  
29 MATTHEW D. CARLING, ESQ.  
30  
31  
32

ORIGINAL

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CLERK OF THE COURT

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

12 DELARIAN WILSON,  
13 #1966773

14 Defendant.

CASE NO: 07C232494-2

DEPT NO: IX

15 FINDINGS OF FACT, CONCLUSIONS OF

16 LAW AND ORDER

17 DATE OF HEARING: MAY 6, 2015  
18 TIME OF HEARING: 9:00 AM

19 THIS CAUSE having come on for hearing before the Honorable JENNIFER  
20 TOGLIATTI, District Judge, on the 6th day of May, 2015, the Petitioner not being present,  
21 represented by MATTHEW D. CARLING, ESQ., the Respondent being represented by  
22 STEVEN B. WOLFSON, Clark County District Attorney, by and through SARAH OVERLY,  
23 Deputy District Attorney, and the Court having considered the matter, including briefs,  
24 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court  
25 makes the following findings of fact and conclusions of law:

26 //

27 //

28 //

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1 FINDINGS OF FACT

2 CONCLUSIONS OF LAW

3 This is Petitioner Delarian Wilson's "Supplemental" Petition for Writ of Habeas Corpus  
4 (Post-Conviction). On March 28, 2008, the State charged Petitioner by way of Amended  
5 Information with two counts of Robbery with Use of a Deadly Weapon and one count of  
6 Sexual Assault. Petitioner pled guilty to the charges the same day. On July 3, 2008, Petitioner  
7 was sentenced to 72 to 180 months plus an equal and consecutive term of 72 to 180 months  
8 for the use of a deadly weapon on each of Counts 1 and 2, respectively, and life imprisonment  
9 with a minimum parole eligibility of 10 years with respect to Count 3. Counts 1, 2, and 3 were  
10 to run consecutive to one another. The Court further imposed a special sentence of lifetime  
11 supervision and mandatory registration as a sex offender should Petitioner ever be released.  
12 Petitioner received 500 days credit for time served. The Judgment of Conviction was entered  
13 on July 18, 2008. On July 7, 2009, the Nevada Supreme Court affirmed Petitioner's conviction,  
14 and Remittitur issued on August 4, 2009.

15 On July 10, 2010, within one year after remittitur issued, Petitioner sent his counsel a  
16 letter stating that Petitioner had "learned via [Petitioner's] mother that [Petitioner] was denied  
17 relief on [Petitioner's] direct appeal as of April 2010," and requesting a copy of Petitioner's  
18 case file. See Motion for Order filed 08/05/2010, p. 7. On July 29, 2010, also within one year  
19 of the issuance of remittitur, Petitioner sent a Proper Person letter to the Nevada Supreme  
20 Court regarding "counsel and time for filing an appeal in the matter." See Nevada Supreme  
21 Court Case No. 52104.

22 On October 27, 2010, Petitioner filed a Motion to Appoint Post-Conviction Counsel,  
23 and on December 14, 2010, this court granted the request and Keith Brower, Esq., was  
24 confirmed as counsel. On October 10, 2011, over two years after remittitur issued from  
25 Petitioner's direct appeal, Mr. Brower filed a Petition for Writ of Habeas Corpus (Post-  
26 Conviction) ("First Petition") on Petitioner's behalf. Mr. Brower alleged trial counsel had  
27 provided ineffective assistance of counsel on appeal in part by failing to provide Petitioner  
28 with a copy of his case file. At that time, Mr. Brower was apparently under the impression that

1 this Court's granting Petitioner's motion to appoint post-conviction counsel indicated that the  
2 Court had found good cause to overcome the one-year procedural bar applicable to Petitioner's  
3 First Petition pursuant to NRS 34.726. However, no such finding had in fact been made. The  
4 State filed its Response and Motion to Dismiss Defendant's Petition on November 1, 2011,  
5 arguing that the Petition was procedurally time-barred. On December 13, 2011, this Court  
6 agreed and denied the Petition, finding it had been procedurally barred even before Mr. Brower  
7 was appointed.

8 On January 6, 2012, the court filed its Findings of Fact, Conclusions of Law & Order,  
9 stating Petitioner had failed to establish good cause to overcome the procedural bar. On  
10 January 30, 2012, Petitioner filed a "Motion for Clarification and/or Reconsideration of Denial  
11 of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)," requesting that the  
12 court clarify its reasoning for the denial of Defendant's First Petition in the presence of  
13 Petitioner. Petitioner also challenged the court's finding that his Petition was time-barred,  
14 arguing that his appellate counsel, Mr. Oronoz, neglected to inform Petitioner of the status of  
15 his appeal such that Petitioner "could not be aware of the need to file a petition to avoid the  
16 procedural time-bar." See Motion to Reconsider, 1/30/2012, p. 2.

17 On February 21, 2012, before the Court could hear Petitioner's Motion to Reconsider,  
18 Petitioner appealed the denial of the First Petition to the Nevada Supreme Court. The same  
19 day, this Court entered an Order staying its Findings of Fact, Conclusions of Law & Order  
20 until such time as Petitioner's Motion for Reconsideration could be heard. The matter  
21 convened for hearing on March 13, 2012, and this Court ordered the matter be taken off  
22 calendar until an order from the Nevada Supreme Court regarding Petitioner's appeal had  
23 issued. See District Court Minutes, 03/13/2012. However, on January 18, 2013, before such  
24 order could issue, Petitioner filed a Notice of Voluntary Withdrawal of Appeal. See Nevada  
25 Supreme Court Case No. 60309. Petitioner has represented that this withdrawal was a result  
26 of his wish to withdraw his guilty plea, rather than continue to pursue an appeal from the denial  
27 of his First Petition.

28 //