

IN THE SUPREME COURT OF THE STATE OF NEVADA

DELARIAN K. WILSON,)

Appellant,)

VS.)

STATE OF NEVADA,)

Respondent.)

Case No.: 68576
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APPELLANT’S OPENING BRIEF

Steven B. Wolfson
Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
Attorney for Respondent

Matthew D. Carling
1100 S. Tenth Street
Las Vegas, NV 89101
Attorney for Appellant

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WILSON DEMONSTRATED AN IMPEDIMENT EXTERNAL TO THE DEFENSE, WHICH CONSTITUTED GOOD CAUSE TO EXCUSE ANY PROCEDURAL BARS TO THE SUPPLEMENTAL PETITION AND THAT HE WOULD BE UNDULY PREJUDICED IF THE SUPPLEMENTAL PETITION WAS DISMISSED.

A. Oronoz And Brower's Actions Or Failures To Act Constitute Impediments External To Wilson's Ability To Time File The First Petition.

B. The Errors In This Matter Worked To Wilson's Actual And Substantial Disadvantage.

II. NRS 34.800 DOES NOT APPLY TO THIS CASE.

- I. WILSON DEMONSTRATED AN IMPEDIMENT EXTERNAL TO THE DEFENSE, WHICH CONSTITUTED GOOD CAUSE TO EXCUSE ANY PROCEDURAL BARS TO THE SUPPLEMENTAL PETITION AND THAT HE WOULD BE UNDULY PREJUDICED IF THE SUPPLEMENTAL PETITION WAS DISMISSED.**

 - A. Oronoz And Brower's Actions Or Failures To Act Constitute Impediments External To Wilson's Ability To Time File The First Petition.**
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STATEMENT OF THE CASE

A. Facts Regarding Sentencing.

On April 19, 2007, Wilson was charged by the State upon the filing of the *Information*, which charged Wilson with the following, to wit: Conspiracy to Commit Burglary (Gross Misdemeanor); Conspiracy to Commit Robbery (Felony); Burglary while in Possession of a Deadly Weapon (Felony); Robbery with Use of a Deadly Weapon (Felony); Assault with Use of a Deadly Weapon (Felony); Sexual Assault with Use of a Deadly Weapon (Felony); First Degree Kidnapping with Use of a Deadly Weapon (Felony); Coercion with Use of a Deadly Weapon (Felony); and Open or Gross Lewdness with Use of a Deadly Weapon (Gross Misdemeanor). APP 0001-0009. Wilson was initially arraigned on February 27 and March 1, 2007. APP 0015-0016. On May 17, 2007, Wilson requested his release on his recognizance or a reduction in bail, which was denied upon hearing on May 22, 2007. APP 0104-126. Wilson was appointed counsel and James A. Oronoz represented Wilson in the proceedings until Mr. Keith Brower was appointed in the post-conviction stage.

On March 6, 2008, Wilson moved to sever this case from that of his co-defendant, Narcus Wesley (hereinafter, “**Wesley**”) and to suppress evidence, which the State opposed. APP 0358-0364; 0365-0392; 0395-0434. These motions were heard at hearing in March of 2008, and a Franks Hearing was

1 scheduled for March 31, 2008, which was continued to April 9, 2008; however,
2 the Franks Hearing and jury trial dates were vacated due to successful plea
3 negotiations between the parties. APP 0482-0490.

4 As a result of the plea negotiations, the State filed its *Amended*
5 *Complaint*, which charged Wilson with the following, to wit: Counts 1 and 2 –
6 Robbery with Use of a Deadly Weapon (Felony), and; Count 3 – Sexual Assault
7 (Felony). APP 0491-0493. Wilson entered into a Guilty Plea Agreement with
8 the State based on the *Amended Complaint*, which was accepted by the trial
9 court on April 1, 2008. APP 0482-0490.

10 On July 3, 2008, Defendant was sentenced as follows, to wit: Count 1 –
11 Robbery with Use of a Deadly Weapon – a maximum of 180 months with a
12 minimum parole eligibility of 72 months, plus an equal and consecutive term of
13 180 months maximum and 72 months minimum for the Use of a Deadly
14 Weapon; Count 2 – Robbery with Use of a Deadly Weapon - a maximum of
15 180 months with a minimum parole eligibility of 72 months, plus an equal and
16 consecutive term of 180 months maximum and 72 months minimum for the Use
17 of a Deadly Weapon, and; Count 3 – Sexual Assault – LIFE, with a minimum
18 parole eligibility of 10 years. APP 0821-0822. The Counts were ordered to run
19 consecutive to each other, with 500 days credit for time served. APP. 0822. It
20 was additionally ordered that a special sentence of a lifetime of supervision was

1 imposed upon release from any term of imprisonment, probation, or parole. *Id.*
2 Wilson was ordered to register as a sex offender within 48 hours of release from
3 custody. *Id.* Wilson was also assessed fines in the amount of \$25.00 in
4 administrative fee, \$150.00 DNA analysis fee, and \$3,196.00 restitution, which
5 was to be paid jointly and severally with Wesley. APP 0787-0820. *Id.*

6 **B. Facts Regarding Direct Appeal.**

7 The *Judgment of Conviction* in this matter was filed on July 16, 2008
8 (hereinafter, the “**Judgment of Conviction**”) and Wilson filed his *Notice of*
9 *Appeal* on August 5, 2008. APP 0821-0822; 0828-0829. On July 15, 2009, the
10 Nevada Supreme Court affirmed the Judgment of Conviction in a written
11 opinion (the “**Order of Affirmance**”) and Remittitur was issued on August 4,
12 2009. APP 2021-2026; 2027.

13 The Order of Affirmance indicated that Wilson attacked his sentence on
14 appeal by arguing it was excessive because 1) his sentence was unreasonably
15 disproportionate to Wesley’s sentence, and 2) the trial court relied on highly
16 suspect or impalpable evidence in sentencing Wilson. APP 2022. The Opinion
17 determined the trial court had wide discretion in its sentencing and the gravity
18 of the crime supported the severity of Wilson’s sentence. APP 2022-2023.
19 Further, Wilson did not contend the sentencing statutes used by the trial court
20 was unconstitutional or that the sentences were not within the statutory limits

1 and thus, the trial court did not abuse its discretion. APP 2023. Lastly, the
2 Nevada Supreme Court rejected Wilson's argument that the trial court abused
3 its discretion when it relied on evidence from Wesley's trial that Wilson was the
4 ring leader and thus deserving of a more severe sentence because Wilson did
5 not cite any legal authority to support his claim. APP 2023-2026. Hence,
6 because it is an appellant's responsibility to present the relevant authority and
7 cogent argument, the court declined to address the claim further. APP 2026.

8 On August 5, 2010, Wilson filed *pro se*, in the district court, his *Motion*
9 *for An Order Instructing the Attorney of Record to Provide Petitioner with a*
10 *Complete and Copy of the Case File in the Above Entitled Cases Number,*
11 which requested that Mr. Oronoz be ordered to provide Wilson with the entire
12 copy of his file, as Mr. Oronoz had failed to do so despite repeated requests and
13 as Wilson had not received notice of the disposition of the direct appeal until
14 very recently, despite the fact the direct appeal had resolved in 2009. APP
15 2040-2052. The motion was heard on August 17, 2010, wherein the motion was
16 granted and Mr. Oronoz was directed to provide the files to Wilson; on August
17 19, 2010, Mr. Oronoz mailed Wilson's case file to Wilson. APP 2053.

18 On August 27, 2010, Wilson filed his *Application for Extension of Time*
19 in the Nevada Supreme Court, which requested the extension of the remittitur in
20 order to file a petition for writ of habeas corpus based on Mr. Oronoz's failure

1 to alert Wilson to the Order of Affirmance in a timely manner. *See*, Case No.
2 52104. Wilson requested this continuance *pro se*. *See, id.* A copy of this request
3 was sent to the State. *Id.* Wilson requested time from August 4, 2010, to August
4 4, 2011, within which to file a petition for writ of habeas corpus, a post-
5 conviction appeal, and all other petitions in state or federal court. *Id.* On
6 September 7, 2010, the Nevada Supreme Court issued its *Order* regarding the
7 extension of time, in which it directed the clerk to file the motion, despite the
8 fact the appeal was closed and the remittitur had been issued on August 4, 2009.
9 APP. 2320-2321. The Order stated Wilson had not asserted any grounds in
10 which to recall the issuance of the remittitur and it could not extend the time for
11 the filing of a petition for a writ of habeas corpus. APP. 2320-2321. The court
12 instructed Wilson to file the petition in the district court and, if such petition
13 was untimely, to prove good cause and prejudice to overcome any procedural
14 bar. *Id.* Accordingly, Wilson's motion was denied. *Id.*

15 On October 1, 2010, Wilson requested, again *pro se*, transcripts of court
16 proceedings in the district court. APP 2054-2071. The motion was heard on
17 October 19, 2010, wherein the motion was denied without prejudice because the
18 trial court was unsure what issues Wilson wished to pursue in post-conviction
19 proceedings. APP 2082-2083.

1 On October 27, 2010, Wilson filed *Motion to Appoint Post Conviction*
2 *Relief Counsel*, which was opposed by the State. APP 2076-2081; 2084-2088.
3 The motion was heard on November 30, 2010, and Wilson was not present.
4 APP 2082. The trial court determined to appoint counsel for Wilson. *Id.*

5 On December 14, 2010, Mr. Keith Brower was appointed to represent
6 Wilson and the matter was continued to set a briefing schedule. *See*, 2089.

7 **C. Facts Occurring Post-Direct Appeal and Involving Wilson’s**
8 **First Petition for Writ of Habeas Corpus.**
9

10 On October 10, 2011, Wilson filed the First Petition, as defined *supra*.
11 APP 2091-2104. Wilson raised two (2) grounds in the First Petition, which
12 were: 1) Wilson was deprived of effective assistance of counsel when Mr.
13 Oronoz failed to review the transcripts of Wesley’s trial and was thus
14 unprepared to address whether Wilson was the “ring leader” of the perpetration
15 of the crime at the time of sentencing; and 2) Wilson was deprived of effective
16 assistance of counsel when Mr. Oronoz failed to cite any case law in his brief
17 on direct appeal in support of his legal arguments. APP 2095-2096. The State
18 opposed the First Petition and moved to dismiss, arguing the First Petition was
19 time barred as it was filed well past the year deadline from the disposition of the
20 direct appeal. APP 2107-2115. In reply, Wilson argued there was good cause
21 for the late filing, which had already been determined by the trial court. APP
22 2121-2122.

1 Hearing on the First Petition was held on December 13, 2011, and the
2 trial court denied the First Petition both procedurally and on its merits. APP
3 2123-2129; 2131-2139. The *Findings of Fact, Conclusions of Law, and Order*
4 was filed on January 6, 2012 (the “**Findings and Conclusions**”), which Wilson
5 requested to be clarified and/or reconsidered (APP. 2140-2141); however, the
6 trial court determined to enter an order staying the findings and conclusions
7 after briefing on Wilson’s request to clarify or stay the Findings and
8 Conclusions on February 21, 2012. APP 2142.

9 Wilson’s request to clarify or stay the Findings and Conclusions was
10 based upon the argument that there were misapplication of the facts therein.
11 APP. 2140-2141. Wilson argued he could not have been aware of the need to
12 file a petition for a writ of habeas corpus when he discovered the appeal had
13 been resolved due to the erroneous information from Mr. Oronoz. *Id.* The
14 State opposed the request to clarify, arguing the district court lacked jurisdiction
15 over the motion due to the filing of the appeal but regardless, the motion should
16 be denied. APP. 2144-2148.

17 Wilson appealed the Findings and Conclusions on February 21, 2012.
18 APP 2143. This appeal was withdrawn based on Wilson’s new counsel’s
19 advice to pursue the withdrawal of Wilson’s guilty plea; however, based on
20 *Harris v. State*, which was issued weeks after the withdrawal of the appeal,

1 Wilson was unable to pursue the withdrawal of his guilty plea. Thus, Wilson's
2 remaining option was to pursue further proceedings in the trial court to
3 determine the issue of the time bars governing habeas corpus petitions.
4 Accordingly, On May 23, 2013, Wilson moved to place the matter back on the
5 calendar in order for the Motion for Reconsideration could be heard in the
6 district court. APP. 2163.

7 On June 4, 2013, the matter was set for evidentiary hearing on the limited
8 issue of good cause to excuse procedural bars. Testimony and other evidence
9 was received by the trial court, which is detailed *post*. On November 12, 2013,
10 the trial court entered its *Findings of Fact, Conclusions of Law and Order*,
11 which dismissed the First Petition on the basis that Wilson had failed to plead
12 sufficient facts to demonstrate good cause for delaying to file the First Petition
13 within the one (1) year deadline. APP 2197-2205. Further, the Court determined
14 Mr. Brower was appointed subsequent to the time bar for the First Petition.
15 APP 2200. Thus, the trial court dismissed the First Petition as untimely. APP
16 2201. Wilson timely appealed on December 10, 2013. APP. 2217.

17 On August 19, 2014, Mr. Brower moved to withdraw as counsel for
18 Wilson, alleging a conflict of interest. APP 2221-2223. Mr. Brower stated that
19 he advised Wilson to withdraw his appeal in the Nevada Supreme Court
20 regarding time-bar issues and instead pursue withdrawing his guilty plea. APP

2222. However, after withdrawing the appeal, *Harris v. State* was issued, which rendered Wilson's claims unavailable based on the holdings therein. *Id.* Thus, Mr. Brower stated Wilson's available claim was his ineffectiveness and needed to be handled by another attorney and requested that a new attorney be appointed to assist Wilson in pursuing the claim. *Id.*

D. Facts Giving Rise to This Appeal.

On February 2, 2015, through present counsel, Wilson filed *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* (previously defined as the "**Supplemental Petition**"), which argued the following grounds:

I. Brower was ineffective for advising Wilson to voluntarily dismiss his appeal from the First Petition denial in favor of filing a motion to withdraw his guilty plea without informing Wilson of the precedent and law that contradicted this strategy;

A. Brower was ineffective for advising Wilson to dismiss his appeal from the First Petition; APP. 2243-2248;

B. "Good cause" existed for the untimely filing of Wilson's First Petition, which challenge had a likelihood of prevailing on direct appeal absent Wilson's dismissal on advice of Brower's (APP. 2248-2261).

1. Wilson's appellate attorney on direct appeal failed to provide Wilson with his case file in this matter, thereby prejudicing Wilson's ability to timely petition for habeas corpus relief upon Wilson's discovery of the entry of the remittitur, APP. 2249-2254;

2. Upon discovery of the entry of the Remittitur, Wilson made diligent efforts to pursue post-conviction relief, APP. 2254-2258;

3. Alternatively, the district court *de facto* accepted Wilson's pro se pleadings as a petition for writ of habeas corpus and its actions implied good cause for the untimely filing had been established, APP. 2259-2261;

1 **C.** Wilson raised meritorious claims in the First Petition that would
2 have succeeded, evidencing significant prejudice for Brower’s
3 ineffectiveness, APP. 2261-2263.

4
5 APP. 2224-2265.

6
7 The State responded as follows (APP. 2266-2276): 1) the petition was
8 time-barred by NRS 34.726 (APP. 2271-2272); 2) Wilson had not established
9 good cause to overcome the procedural bars, (APP. 2272-2274), and; 3) the
10 petition is barred by laches pursuant to NRS 34.800 (APP. 2275). In reply,
11 Wilson argued the following points and cited clarified facts:

12 **I.** Wilson timely filed the petition and it should be granted, APP. 2286-
13 2295.

14 **A.** The Petition was timely; however, good cause existed to excuse
15 any procedural bar, APP. 2286-2293;

16 **B.** NRS 34.800 does not apply, APP, 2293-2295.

17
18 APP. 2279-2296.

19 The Dismissal Order was filed on July 22, 2015. APP. 2305. The
20 Dismissal Order determined the Supplemental Petition was not in fact a
21 supplement but was rather a second, untimely petition for post-conviction relief.
22 APP. 2308. “While counsel for a petitioner for a writ of habeas corpus may
23 serve ‘supplemental’ pleadings after being appointed, this is true only where the
24 petitioner has filed a Proper Person Petition for Writ of Habeas Corpus
25 necessitating counsel’s appointment.” *Id. citing* NRS 34.750. The Dismissal
26 Order determined Wilson’s only prior attempt at post-conviction relief was filed

1 by previous counsel over three (3) years previously and thus, the Supplemental
2 Petition was not, in fact, a supplement. APP. 2308-2309. Further, the
3 Dismissal Order determined the Supplemental Petition was procedurally barred
4 similar to the First Petition because good cause had not been established to
5 overcome the procedural bar. APP. 2309. “Just as [Wilson] failed to
6 demonstrate good cause to overcome the procedural bar when this Court twice
7 considered Petitioner’s first untimely petition, Petitioner has again failed to
8 demonstrate good cause to overcome the time bar four years later.” *Id.*
9 Additionally, “[t]o the extent Petitioner alleges trial counsel’s failure to keep
10 him apprised of the status of his direct appeal and provide him a copy of his
11 case file constitutes good cause, the Nevada Supreme Court has clarified that
12 generally, excuses such as the lack of assistance of counsel when preparing a
13 petition, as well as the failure of trial counsel to forward a copy of the file to a
14 petitioner does not constitute good cause.” *Id.* citing *Phelps*, 104 Nev. At 660,
15 764 P.2d at 1306 *superseded by statute on other grounds as recognized by Nika*
16 *v. State*, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); *Hood v. State*, 111
17 Nev. 335, 890 P.2d 797 (1995).

18 The Dismissal Order also determined Wilson admitted he became aware
19 of the denial of his appeal within the one (1) year time period in order to file a
20 petition for post-conviction relief. APP. 2309-2310. “Petitioner also fails to

1 demonstrate good cause based on Mr. Brower's alleged ineffectiveness, as
2 Petitioner enjoys no constitutional right to post-conviction counsel and
3 therefore such counsel's performance cannot constitute good cause to overcome
4 the procedural bar." *Id.* Thus, "...Petitioner has not demonstrated an
5 impediment external to the defense that would excuse the significant delay in
6 filing, and his Petition is therefore procedurally barred pursuant to NRS
7 34.726." APP. 2310.

8 Lastly, the Dismissal Order additionally found that the Supplemental
9 Petition was barred by the doctrine of laches pursuant to NRS 34.800, which
10 creates a rebuttable presumption of prejudice to the State if a period exceeding
11 five (5) years elapses between a judgment of conviction and an order imposing
12 a sentence of imprisonment or a decision on direct appeal of a judgment of
13 conviction and the filing of a petition challenging the validity of a judgment of
14 conviction. *Id.* The Dismissal Order thus found that a period of more than five
15 (5) years had elapsed from the issuance of remittitur and the filing of the
16 Supplemental Petition and NRS 34.800 directly applied. *Id.* The Supplemental
17 Petition was therefore summarily denied on these bases. *Id.*

18 Wilson timely filed his Notice of Appeal from the Dismissal Order on
19 August 4, 2015. APP. 2312-2313. This brief consequently follows.

20 **STATEMENT OF THE FACTS**

1 **A. March 28, 2008, Change of Plea Hearing.**

2 On March 28, 2008, Wilson appeared for a change of plea hearing, in
3 which he was questioned by the trial court regarding the voluntariness of his
4 plea. APP. 0499-0518. Wilson described the events supporting his pleas. APP.
5 0505. Wilson robbed two (2) people at gunpoint and aided a sexual assault.
6 APP. 0506. Wilson committed these acts with Wesley, his co-defendant. *Id.*
7 Wilson also took one (1) of the people to an ATM machine to get money out.
8 *Id.* Wesley was the actual person who committed the sexual assault, but Wilson
9 admitted this made him viable of having committed the sexual assault as well.
10 APP. 0507. The district court accepted the guilty plea and determined it was
11 given freely and voluntarily. APP. 0510. The matter was then set for
12 sentencing.

13 **B. July 3, 2008, Sentencing Hearing.**

14 On July 3, 2008, both Wilson and Wesley appeared together for
15 sentencing. APP. 0858. The trial court determined that it would apply the
16 newly amended guidelines at that time to both defendants, despite the State's
17 argument to the contrary. *Id.* The State argued that all leniency had been
18 extended to Wilson in the plea negotiation and no further mercy should be
19 extended because, had Wilson gone to trial, he would have faced 12 life
20 sentences while negotiations gave him one (1) life sentence with a ten (10) year

1 minimum. APP. 0859. Wesley, however, was convicted of 18 counts of varying
2 crimes, including Conspiracy to Commit Burglary, Open and Gross Lewdness,
3 Assault with the Use of a Deadly Weapon, Second Degree Kidnapping, Sexual
4 Assault with the Use of a Deadly Weapon, Coercion with the Use of a Deadly
5 Weapon. APP. 866. When the sentences were compared, it was determined
6 Wesley would serve seventeen (17) years less than Wilson. *Id.* The theory
7 presented by the State and agreed to by the trial court was that Wilson “played
8 the lead role” in this criminal episode engaged in by both Wilson and Wesley.
9 APP. 0865. The trial court stated, “...even though [Wilson]’s only got three
10 counts, he’s going to end up doing more time than Narcus, but they are both
11 doing substantial, substantial amounts of time.” *Id.* (p. 32, ln. 1-3).

12 **C. January 13, 2011, Hearing.**

13 On January 13, 2011, the matter was convened for a status check and the
14 briefing schedule was set on the First Petition. APP. 2117. Wilson’s opening
15 brief was set to be filed on April 25, 2011, the State’s response on July 25,
16 2011, and Wilson’s reply on September 26, 2011. *Id.* The matter was set for
17 argument on October 4, 2011¹. *Id.*

¹ However, on October 4, 2011, the matter convened for hearing and an abbreviated briefing schedule was set, which required Wilson’s opening brief to be filed on October 10, 2011, the State’s response on November 28, 2011, and Wilson’s reply on December 5, 2011, and set the matter for argument on

1 **D. December 13, 2011, Hearing.**

2 Wilson was not present for hearing on December 13, 2011. APP. 2152.
3 The hearing was convened for arguments upon whether Wilson had timely filed
4 the First Petition. *See, id.* The trial court determined that the First Petition was
5 time barred and further, even upon the merits of the First Petition, Wilson could
6 not win. *Id.* The trial court stated that the co-defendant, Wesley, had gone to
7 trial and had been convicted on each count. APP. 2153. The trial court also
8 noted that Wilson "...was the one who started the whole thing." *Id.*, ln. 22-23.
9 The trial court stated on the record regarding the sentences imposed upon both
10 Wilson and Wesley: "[t]hey got hit pretty hard. They deserved every single
11 year. They tortured those kids that were in that house, absolutely. This thing has
12 been completely reviewed, reviewed, reviewed. There is not one single
13 meritorious issue in favor of this writ on behalf of this Defendant. It is denied."
14 *Id.* at p. 6, ln. 8-16. The trial court then appointed Keith Brower to continue to
15 represent Wilson for the appeal. *Id.* at pp. 6-7.

16 **E. March 13, 2012, Hearing.**

17 This case convened for hearing, wherein Mr. Brower informed the
18 district court that, in reviewing some of the procedural issues, a stay may not

December 13, 2011. This briefing schedule was ultimately adhered to by the parties.

1 work for Wilson's appeal issues and so a notice of appeal was filed. APP. 2158.
2 The district court stated that, until this Court ruled, it did not have jurisdiction
3 to rule on the request to clarify. *Id.* Mr. Brower stated he was asking this Court
4 to remand the case back to the district court for a decision on "the one hearing",
5 which the district court had determined was procedurally time barred. *Id.* Mr.
6 Brower indicated Wilson had been unable to attend the hearing in December of
7 2011 to testify regarding his knowledge of when the time bar began to run,
8 which was one of the main reasons Wilson requested reconsideration. *Id.* The
9 district court noted an order of transport had been entered; however, Wilson
10 was not brought. *Id.* Wilson stated on the record what had happened in the case,
11 including that Mr. Oronoz had confirmed he was at fault but the First Petition
12 had been denied on its merits and as procedurally barred. APP. 2159. The
13 district court stated it would fix it, that Wilson would be present for hearings,
14 and this Court would review it. *Id.* The district court thus determined to take the
15 matter off the calendar until this Court entered a disposition. *Id.*

16 **F. July 11, 2013, Hearing.**

17 The First Petition was again heard on July 11, 2013, wherein Mr. Brower
18 explained to the trial court that Wilson entered a guilty plea with the trial court,
19 Wesley went to trial, both defendants were sentenced at the same time after the
20 same trial court presided over Wesley's trial, and there had been

1 miscommunication between Wilson and Mr. Oronoz, who was trial and direct
2 appeal counsel for Wilson. APP. 2166-2167. Mr. Brower argued that Wilson
3 had not been present for the December 13, 2011, hearing, and that the issue
4 raised by the First Petition was that there was an error with sentencing. APP.
5 2167. It was not Wilson's desire to withdraw his guilty plea. *Id.* However, the
6 First Petition was dismissed because the trial court determined it was untimely,
7 as it was due within a year of the disposition of the direct appeal. *See, id.*

8 Mr. Brower stated that the Findings and Conclusions from the December
9 13, 2011, hearing presented an issue for the appeal from them, which the trial
10 court stayed; however, Mr. Brower stated he was instructed to file the notice of
11 appeal to preserve Wilson's rights. APP. 2168. Mr. Brower then filed a motion
12 to remand to the trial court with the Nevada Supreme Court, which resulted in a
13 "weird" ruling that instructed Wilson to get permission from the trial court. *Id.*
14 When Wilson requested this permission from the trial court, Mr. Brower stated
15 it was agreed that the Nevada Supreme Court ordered Wilson to do briefing but
16 because Mr. Brower was not able to do that in the right amount of time, he
17 withdrew the appeal "...because we're trying to address the reconsideration of
18 the time bar issue, which is the whole reason we're here." *Id.* at ln. 18-20.

19 The trial court clarified that the basis of the First Petition was the
20 ineffectiveness of Mr. Oronoz because he did not have the transcript of

1 Wesley's trial at the time of sentencing and therefore he was not adequately
2 prepared to address the issues at sentencing, particularly because the same trial
3 court presided over Wesley's trial and sentenced both defendants. APP. 2169-
4 2170. Mr. Brower argued the transcripts were necessary for Mr. Oronoz to be
5 prepared to counter that Wilson was the ringleader, which was Wesley's
6 position in his trial. APP. 2170.

7 However, the trial court stated the disposition of the appeal occurred in
8 July of 2009 and the First Petition was filed in Fall of 2011, which was past the
9 time for post-conviction writs. APP. 2170-2171. Mr. Brower stated that Wilson
10 had not been informed of the appeal's disposition by Mr. Oronoz and Wilson
11 had retained the correspondence between himself and Mr. Oronoz. APP. 2171.
12 As a result of this failure of Mr. Oronoz to inform Wilson of the disposition of
13 the appeal, Wilson reported Mr. Oronoz to the bar and, in response to the bar's
14 involvement with the matter, Mr. Oronoz stated he would send Wilson his file
15 and try to have counsel appointed to help Wilson pursue post-conviction
16 remedy, which is how Mr. Brower was appointed. APP. 2171-2172. The trial
17 court stated that any delay occurred after Mr. Brower's appointment; however,
18 the delay was not made any less of an issue. APP. 2172. Mr. Brower argued
19 this hearing was necessary because Wilson was not present for the previous

1 hearing and Wilson was in possession of the letters between himself and Mr.
2 Oronoz and had brought them with him to court. *Id.*

3 The State argued Wilson was required to appeal the time-barred issue and
4 then Wilson could come back and address the merits of the First Petition. APP.
5 2174-2175. However, Wilson argued he could not submit documents to the
6 appellate court without first submitting them to the trial court for consideration,
7 particularly since Wilson was arguing good cause existed to excuse the delay of
8 the filing of the First Petition. APP. 2175. The trial court agreed to review the
9 correspondence between Mr. Oronoz and Wilson. *Id.*

10 However, the State argued that Wilson received notice from Mr. Oronoz
11 regarding the disposition of the direct appeal July 27, 2010, but did not file the
12 First Petition until October of 2011. APP. 2179-2180. Thus, the State argued
13 Wilson waited a full year after receiving notice of the disposition of the appeal
14 to file the First Petition, when he should have filed at the time he first realized
15 the appeal had been completed. *Id.*

16 Wilson was sworn in and testified regarding the timeline of the events.
17 APP. 2180. Wilson testified it took four (4) to five (5) months to simply get a
18 copy of the appeal from Mr. Oronoz. APP. 2182. Wilson testified he called Mr.
19 Oronoz's office twice a month and asked about the status of the appeal and Mr.
20 Oronoz would always state he had not heard anything yet. *Id.* Wilson testified

1 this continued for a year. *Id.* Wilson testified he discovered the appeal was
2 closed when he spoke to his mother, who had found the appeal closed online.
3 APP. 2182-2183. Wilson's mother contacted Mr. Oronoz's office and the
4 secretary told her there was nothing to report on the appeal; however, ten (10)
5 minutes later, the secretary called his mother back and told her the appeal had
6 been denied a year ago. APP. 2183. Wilson then called Mr. Oronoz directly,
7 who told Wilson he would take care of it. *Id.* Wilson then filed a motion for an
8 extension of time with the Nevada Supreme Court, which directed him to
9 address the issue with his attorney of record. APP. 2184. Wilson continued to
10 attempt to contact Mr. Oronoz but was not receiving any contact from him or
11 his office. *Id.* Wilson then wrote and filed a 68 page complaint with the Nevada
12 Bar Association because he felt Mr. Oronoz had tried to sabotage his post-
13 conviction relief. *Id.* A few weeks later, Wilson was contacted by telephone by
14 Mr. Oronoz, who apologized and told Wilson he would fix things and get
15 Wilson a new attorney to fight the appeal. *Id.* Mr. Oronoz confirmed to Wilson
16 that he had made a mistake and apologized. APP. 2185. Wilson also filed a
17 motion with the trial court requesting that Mr. Oronoz hand over all his court
18 documents because he never received the remittitur from the Nevada Supreme
19 Court. *Id.*

1 At the time Wilson filed the motion for extension of time with the
2 Nevada Supreme Court, he was directed to address the issue with Mr. Oronoz.
3 *Id.* Mr. Oronoz told Wilson he was going to come to court, appoint a new
4 attorney, and Wilson would be able to continue to pursue his post-conviction
5 relief. *Id.* Wilson testified he received a letter thereafter showing him the
6 motion for the appointment of a new attorney, which resulted in Mr. Brower
7 being appointed to represent Wilson in post-conviction proceedings. *Id.*

8 Mr. Brower argued that, when he was appointed, briefing schedules were
9 set. APP. 2187. Mr. Brower requested the trial court to allow him to make the
10 record in order for Wilson to pursue an appeal. *Id.* Mr. Brower further argued
11 good cause existed to allow the untimeliness of the First Petition. *Id.*

12 When the trial court began to state the timeline of this case including that
13 by the time Wilson had actual notice in July of 2010 regarding his appeal, Mr.
14 Brower stated the fact that the First Petition was not filed until October of 2011
15 was because he requested a briefing schedule and this was his fault. APP. 2188.
16 Mr. Brower stated, “I’m the one that actually filed the one writ, but again I
17 thought we were already past the time bar issues when that occurred.” *Id.*, ln.
18 19-21. Despite this, the trial court determined Wilson was past the time bar in
19 filing the First Petition. APP. 2189. Mr. Brower then requested transcripts of
20 the hearing and updated findings, which the trial court ordered. APP. 2190.

1 **G. Facts Pertaining to Contact Between Wilson and His**
2 **Attorneys.**

3
4 On December 24, 2008, Mr. Oronoz wrote to Wilson stating he had
5 ordered transcripts from Wesley's trial but had yet to receive some of them and
6 thus had requested a continuance in order to file the opening brief in Wilson's
7 appeal. APP 2240. Mr. Oronoz felt the transcripts were necessary in order to
8 argue the variance of sentences between Wilson and Wesley. *Id.*

9 On March 23, 2009, Wilson wrote to Mr. Oronoz requesting a copy of his
10 brief and appendix in the appeal as well as copies of the sentencing documents.
11 *Id.* On December 13, 2009, Wilson wrote to Mr. Oronoz that all of his appellate
12 materials had been mistakenly destroyed and requested all copies of documents
13 relating to the current appeal. *Id.* Wilson also requested specific transcripts from
14 hearings earlier in the case, which he had requested from Mr. Oronoz almost a
15 year previously. APP 2240-41. Wilson noted that these materials would likely
16 be valuable for future appeals. APP 2241.

17 Lisa Wilson, the mother of Wilson, was searching the internet on July 13,
18 2010, in order to locate information regarding Wilson's appeal since the appeal
19 had been pending for a long time and she had not heard about any outcome.
20 APP 2241. Mrs. Wilson accessed a website that indicated to her that Wilson's
21 appeal was listed as "closed". *Id.* Due to the hour, Mrs. Wilson determined to
22 call Mr. Oronoz the next morning to determine what this meant. *Id.* Mrs.

1 Wilson called Mr. Oronoz's office the next morning and discovered he had
2 changed offices and his phone number. *Id.* Upon calling the new number, Mrs.
3 Wilson was informed that Mr. Oronoz was not available to take her call;
4 however, the receptionist stated Wilson had called earlier that morning and she
5 had explained to him there had not been any decisions in his case as of that day.
6 *Id.* Mrs. Wilson then asked why Wilson's appeal was being listed as closed,
7 which the receptionist answered it merely meant the original case was closed
8 but not the appeal. *Id.* After ending the call, the receptionist called Mrs. Wilson
9 back within five (5) minutes and stated the appeal decision had been rendered in
10 July. *Id.* Mr. Oronoz's office mailed a copy of the Order of Affirmance to Mrs.
11 Wilson on July 14, 2010, which revealed the Order of Affirmance was dated
12 July 7, 2009. *Id.* Mrs. Wilson called Mr. Oronoz's office to determine why it
13 had taken a year to send the Order of Affirmance and left messages on July 19,
14 21, and 22, 2010, and never received a call back from Mr. Oronoz or his office.
15 *Id.* Mrs. Wilson spoke with Wilson on July 22, 2010, and discussed with him
16 the contact she had with Mr. Oronoz and her discovery of the Order of
17 Affirmance. *Id.*

18 On July 21, 2010, Wilson wrote to Mr. Oronoz detailing that his mother
19 had discovered the Order of Affirmance, which Wilson stated he had no
20 knowledge of even though Wilson had called Mr. Oronoz's office numerous

1 times and had been told nothing had been heard on the appeal. Wilson thus
2 requested a copy of his file and all related materials. APP 2242.

3 On July 25, 2010, Wilson wrote to Mr. Oronoz and requested his entire
4 file and all other related materials, including certain pleadings. *Id.* Wilson also
5 requested transcripts for certain hearings in the matter, which Mr. Oronoz had
6 previously requested in the case. *Id.* Wilson requested Mr. Oronoz's prompt
7 response. *Id.*

8 On July 26, 2010, Wilson wrote a letter to the trial court in this matter,
9 which was filed and made part of the record herein. APP 2242; 2040-2052.
10 Wilson alerted the parties to the fact that he had only been recently informed of
11 the Order of Affirmance and had yet to receive any response from Mr. Oronoz
12 regarding his concerns. *Id.* Wilson also inquired as to what he was supposed to
13 do next. *Id.*

14 On August 1, 2010, Wilson wrote to Mr. Oronoz that Mr. Oronoz had
15 stated to Wilson that he thought he told Wilson about the Order of Affirmance,
16 but if Wilson did not remember this, then Mr. Oronoz guessed he did not in fact
17 tell Wilson. APP. 2242. Wilson wrote that, because of this failure, Wilson was
18 likely procedurally time barred to pursue other relief. Wilson again requested
19 his file and any other related materials. *Id.*

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

3 **SUMMARY OF THE ARGUMENT**

4 Based on the facts of this case, Wilson's earlier attorneys have both
5 acted as impediments external to Wilson's ability to pursue habeas corpus relief
6 in a timely manner. As further detailed *post*, Wilson demonstrates the delays
7 were not his fault and he will be unduly prejudiced if the Supplemental Petition
8 is dismissed as untimely. *State v. Huebler*, -- Nev. --, 275 P.3d 91, 94-95
9 (2012).

10 Wilson was abandoned by Mr. Oronoz without notice during the
11 pendency of the direct appeal from the Judgment of Conviction. Mr. Oronoz
12 failed to communicate with Wilson, provide him his file when repeatedly
13 requested, and did not apprise Wilson of key occurrences in his case. While
14 Wilson discovered the entry of the Remittitur of the direct appeal within days of
15 the procedural time bar for a petition for habeas corpus, Wilson did not possess
16 his file due to Mr. Oronoz's failure to provide it, and Wilson then began to file
17 multiple pleadings to alert this Court and the district court of the circumstances.

18 To compound this discovery, Wilson requested and was appointed post-
19 conviction relief counsel, who mistakenly believed that his appointment
20 evidenced the excusal of the time bar and waited nearly a full year before filing

1 the First Petition. Mr. Brower than engaged in a course of reckless professional
2 conduct – mis-advice of the application of the law in the withdrawal of a guilty
3 plea, the voluntary dismissal of an appeal that had a strong likelihood of
4 success, and willful ignorance of the law in Wilson’s case in general. By the
5 end of his representation of Wilson, Mr. Brower admitted Wilson’s last
6 recourse was Mr. Brower’s ineffectiveness.

7 Both attorneys acted to prevent Wilson from timely pursuing post-
8 conviction relief. While Wilson is not entitled to effective assistance in post-
9 conviction proceedings, he is entitled to be free of impediment from exercising
10 his statutory ability to pursue habeas corpus proceedings in a timely fashion by
11 his own advocate. Similarly, these same reasons constitute substantial prejudice
12 to Wilson.

13 Lastly, NRS 34.800 was misapplied to this case because the First Petition
14 was denied by the district court in 2013 and Wilson appealed, which caused the
15 Supplemental Petition to be filed within the procedural time bar of the
16 voluntary dismissal of that appeal. Further, the filing of the First Petition was
17 within the five year requirement of the Remittitur in the direct appeal from the
18 Judgment of Conviction and these proceedings constitute an ongoing
19 proceeding since that time, as the proceedings have continued since then.

Accordingly, for the reasons argued herein, the Dismissal Order requires reversal.

ARGUMENT

I. WILSON DEMONSTRATED AN IMPEDIMENT EXTERNAL TO THE DEFENSE, WHICH CONSTITUTED GOOD CAUSE TO EXCUSE ANY PROCEDURAL BARS TO THE SUPPLEMENTAL PETITION AND THAT HE WOULD BE UNDULY PREJUDICED IF THE SUPPLEMENTAL PETITION WAS DISMISSED.

“To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate two things: ‘[t]hat the delay is not the fault of the petitioner’ and that the petitioner will be ‘unduly prejudice[d]’ if the petition is dismissed as untimely.” *State v. Huebler*, -- Nev. --, 275 P.3d 91, 94-95 (2012). “Under the first requirement, ‘a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.’” *Id.* at 95 citing *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). “An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.’” *Id.* citing *Hathaway* quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (citations and quotations omitted).

1 “Under the second requirement, a petitioner must show that errors in the
2 proceedings underlying the judgment worked to the petitioner’s actual and
3 substantial disadvantage.” *Id. citing Hogan v. Warden*, 109 Nev. 952, 959–60,
4 860 P.2d 710, 716 (1993). “We give deference to the district court’s factual
5 findings regarding good cause, but we will review the court’s application of the
6 law to those facts de novo.” *Id. citing Lott v. Mueller*, 304 F.3d 918, 922 (9th
7 Cir. 2002) (stating that district court’s findings of facts are reviewed for clear
8 error, but questions of law are reviewed de novo); *see also Lader v. Warden*,
9 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (using similar reasoning for
10 review of claims of ineffective assistance of counsel). Wilson therefore
11 addresses the first element, that any delay was not his fault, and then that he
12 will be unduly prejudiced if the Petitions are dismissed as untimely. Each
13 argument is undertaken *post*.

14 **A. Oronoz And Brower’s Actions Or Failures To Act Constitute**
15 **Impediments External To Wilson’s Ability To Timely File The**
16 **First Petition.**
17

18 “‘Generally, good cause means a substantial reason; one that affords a
19 legal excuse.’” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503 (2003). “To
20 show ‘good cause,’ a petitioner must demonstrate that an impediment external
21 to the defense prevented him from raising his claims earlier.” *Pelligrini v. State*,
22 117 Nev. 860, 886, 34 P.3d 519 (2001). “For example, such an impediment

1 might be demonstrated by a showing ‘that the factual or legal basis for a claim
2 was not reasonably available ... or that ‘some interference by officials’ made
3 compliance [with the procedural rule] impracticable.’” *Id.* at 886-887; *see also*,
4 *Riker v. Skolnik*, --Nev. --, *2, 281 P.3d 1213 (2009) (““This standard
5 recognizes that good cause means that some event or circumstance beyond a
6 defendant’s control precluded the filing of a timely habeas petition. We
7 conclude that the definition contemplates conditions that are not the ‘fault of the
8 petitioner.’”).

9 “To demonstrate cause, the petitioner must show the existence of ‘some
10 objective factor external to the defense [which] impeded counsel’s efforts to
11 comply with the State’s procedural rule.’” *LaGrand v. Stewart*, 133 F.3d 1253,
12 1261 (9th Cir. 1998) *citing Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct.
13 2639, 2645, 91 L.Ed.2d 397 (1986); *see also McCleskey v. Zant*, 499 U.S. 467,
14 497, 111 S.Ct. 1454, 1471–72, 113 L.Ed.2d 517, *reh’g denied*, 501 U.S. 1224,
15 111 S.Ct. 2841, 115 L.Ed.2d 1010 (1991) (cause is external impediment such as
16 government interference or reasonable unavailability of claim’s factual basis).

17 The United States Supreme Court has held as follows:

18 ...[T]he question of cause for a procedural default does not turn on
19 whether counsel erred or on the kind of error counsel may have
20 made. So long as a defendant is represented by counsel whose
21 performance is not constitutionally ineffective under the standard
22 established in *Strickland v. Washington*...we discern no inequity in
23 requiring him to bear the risk of attorney error that results in a

1 procedural default. Instead, we think that the existence of cause for
2 a procedural default must ordinarily turn on whether the prisoner
3 can show that some objective factor external to the defense
4 impeded counsel's efforts to comply with the State's procedural
5 rule. Without attempting an exhaustive catalog of such objective
6 impediments to compliance with a procedural rule, we note that a
7 showing that the factual or legal basis for a claim was not
8 reasonably available to counsel, *see Reed v. Ross*, 468 U.S., at 16,
9 104 S.Ct., at 2910, or that “some interference by officials,” *Brown*
10 *v. Allen*, 344 U.S. 443, 486, 73 S.Ct. 397, 422, 97 L.Ed. 469
11 (1953), made compliance impracticable, would constitute cause
12 under this standard.

13
14 *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.ed.2d. 397 (1986).

15 “An attorney who ‘abandons his client without notice,’ however,
16 ‘sever[s] the principal-agent relationship’ and ‘no longer acts, or fails to act, as
17 the client’s representative.’” *Towery v. Ryan*, 673 F.3d 933 (9th Cir. 2012) *citing*
18 *Maples v. Thomas*, -- U.S. --, 132 S.Ct. 912, 922-923, 181 L.Ed. 807 (2012).
19 Accordingly, “[h]is acts or omissions therefore ‘cannot fairly be attributed to
20 [the client].’” *Id. citing Maples* at 923 (alteration in original) (*quoting Coleman*
21 *v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d. 640 (1991)).

22 *Towery* analyzed the holdings set forth in *Maples*, finding as follows:

23 In *Maples*, the issue was whether counsel’s abandonment could
24 serve as cause for lifting the bar on procedural default. *See Maples*,
25 132 S.Ct. at 922. Cause exists where something external to the
26 petitioner, something that cannot fairly be attributed to him,
27 impeded his efforts to comply with the state’s procedural rule. *See*
28 *id.* Negligence on the part of a petitioner’s postconviction attorney
29 does not qualify as cause, because the attorney is the petitioner’s
30 agent, and the principal bears the risk of negligent conduct on the
31 part of his agent. *See id.* When an attorney abandons his client

1 without notice, however, the principal-agent relationship is
2 severed, and the attorney's acts or omissions can no longer be
3 fairly be attributed to the client. *See id.* at 922–23.

4
5 *Ibid.* at 943. *Towery* determined the defendant therein had not been abandoned
6 by his counsel because counsel continued to communicate and kept him
7 informed of key developments in the case. *See, id.*

8 Herein, this case is fraught with impediments external to the defense that
9 excuse any procedural bars in this case. These impediments are summarized as
10 follows, which constitute substantial reasons that afford a legal excuse to
11 comply with any procedural time bar, particularly since the impediments had a
12 domino effect into further impediments (*Hathaway* at 252):

13 **1. Direct Appeal:** The Remittitur resulting from the Direct Appeal
14 entered on August 4, 2009. Well before the entry of the Remittur, Wilson was
15 in contact with Mr. Oronoz, requesting a copy of his file. In fact, Wilson
16 provided correspondence between them before entry of the Remittur, which
17 evidences that Mr. Oronoz had communicated with Wilson in a written manner.
18 Wilson later testified that, although he discovered the Remittitur's entry before
19 the procedural deadline for a petition requesting post-conviction relief, he had
20 repeatedly requested his file from Mr. Oronoz since Wilson's personal copies
21 had been mistakenly destroyed and he would need this valuable information for
22 future proceedings. However, Mr. Oronoz did not send a copy of Wilson's file

1 until August 19, 2010. Regardless, as soon as Wilson learned of the entry of the
2 Remittitur, Wilson made efforts to file documents with this Court and with the
3 district court and stated in nearly every filing that Mr. Oronoz had failed to alert
4 Wilson of the Remittitur. In October of 2010, Wilson requested post-conviction
5 counsel, which was granted, and a briefing schedule was set.

6 **2. The First Petition:** A year later, Wilson's attorney, Mr. Brower,
7 filed the First Petition, mistakenly believing the trial court had already
8 determined good cause existed to excuse the procedural deadline due to Mr.
9 Oronoz's failure in alerting Wilson to the Remittitur. The First Petition was
10 denied and Wilson appealed while simultaneously requesting reconsideration or
11 clarification in the district court regarding its findings in dismissing the First
12 Petition. However, the district court was without the ability to entertain the
13 request to reconsider/clarify, because Wilson had filed the appeal. Accordingly,
14 Wilson sought remand in this Court to determine the issue more fully since
15 Wilson was unable to be present at the hearing on the First Petition. Regardless,
16 upon advice from Mr. Brower, Wilson withdrew the appeal involving the denial
17 of the First Petition in favor of pursuing the withdrawal of Wilson's guilty plea.
18 Within weeks of withdrawing the appeal, however, this Court issued *Harris v.*
19 *State*, which rendered Wilson unable to pursue any attempt to withdraw his
20 guilty plea. Wilson's remaining option was thus to pursue the request to

1 reconsider/clarify in the district court, which resulted in an evidentiary hearing;
2 however, the district court again dismissed the First Petition as untimely
3 without good cause sufficient to overcome the procedural bar, and Wilson again
4 appealed. Mr. Brower thereafter determined to withdraw, indicating Wilson's
5 only remaining argument was Mr. Brower's own ineffectiveness because
6 Wilson's claims were unavailable on appeal.

7 **3. The Supplemental Petition:** Wilson was thus appointed counsel
8 herein, who filed the Supplemental Petition, which argued the ineffectiveness of
9 Brower and Oronoz in causing the delay in the filing of the First Petition.
10 Wilson argued the First Petition raised issues that had a reasonable likelihood of
11 success absent attorney errors. However, the district court determined Wilson
12 learned of the Remittitur within a year of its entry, that any attorney
13 ineffectiveness did not amount to good cause to excuse the delay in the filing,
14 and that Wilson had failed to demonstrate an impediment external to the
15 defense that would excuse the significant delay in the Supplemental Petition.

16 Due to these detailed attorney impediments external to Wilson, Wilson
17 was prevented from filing the First Petition earlier. *Pelligrini* at 886. Mr.
18 Oronoz failed to act for five (5) months in providing Wilson with a copy of his
19 file, which Wilson no longer personally retained in his possession in order to
20 file a petition for post-conviction relief within days of discovering the

1 Remittitur. This action was an interference with Wilson's ability to even file a
2 petition at all within the one (1) year deadline because Mr. Oronoz did not
3 provide Wilson with the requested copy until *after* August 4, 2010. *Id.*
4 Wilson's ability to file the First Petition within the one year limitation was
5 beyond his control and was not his fault. *Riker* at *2.

6 The actions of Mr. Oronoz and then Mr. Brower was external to Wilson's
7 abilities to comply with the procedural deadline. *LaGrand* at 1261. While
8 Wilson would ordinarily bear the risk of attorney error that results in a
9 procedural default, Wilson was represented by Mr. Oronoz until December of
10 2010, but had been abandoned by him, which was unknown to Wilson until
11 after discovery of the Remittitur and without a copy of his file in order to file a
12 petition for post-conviction relief. *Murray*, 477 U.S. at 488. Mr. Oronoz
13 abandoned Wilson without notice, which severed the principal-agent
14 relationship between them before Wilson realized it had been severed and thus
15 Mr. Oronoz no longer acted or failed to act as Wilson's representative – all
16 without Wilson's knowledge. *Towery* at 933. Accordingly, Mr. Oronoz's failure
17 to alert Wilson and provide Wilson with a copy of his file cannot be attributed
18 to Wilson in the filing of the untimely First Petition. *Id.* Good cause existed to
19 excuse the procedural time bar in this matter because Mr. Oronoz acted or

1 failed to act external to Wilson and such cannot be fairly attributed to Wilson,
2 which impeded his ability to comply with the procedural time bar. *Id.* at 943.

3 Additionally, Mr. Oronoz did not act negligently. *See, id.* Mr. Oronoz
4 acted deliberately, ignoring Wilson's correspondence he had previously proven
5 he was capable of answering and failed to act until Wilson filed a bar complaint
6 against him. Wilson would ordinarily bear any risk of negligent behavior from
7 Mr. Oronoz; however, their principal-agent relationship had severed and Mr.
8 Oronoz's acts of omission cannot be fairly attributed to Wilson. *Id.* Unlike the
9 circumstances in *Towery*, Wilson was abandoned by Mr. Oronoz, who failed to
10 communicate or keep Wilson informed of key developments in his direct
11 appeal. *Id.*

12 Additionally, Mr. Brower's mistaken belief that the district court had
13 already found good cause to excuse the procedural time bar and his mis-advice
14 regarding the appeal associated with the First Petition caused needless delay in
15 the filing and disposition of the First Petition. Mr. Brower filed the First
16 Petition a year after Wilson requested his appointment and after Mr. Brower
17 requested additional time in two (2) briefing schedules. Mr. Brower evidenced
18 his lack of professional knowledge in post-conviction proceedings and
19 withdrawing a guilty plea, which endangered Wilson's abilities to pursue either
20 course of action.

1 Regardless of Mr. Brower's fumbles, Wilson timely filed the
2 Supplemental Petition within the procedural time bar for a successive petition.
3 Accordingly, the Dismissal Order should be reversed because Wilson
4 demonstrated good cause to excuse the procedural bars.

5 **B. THE ERRORS IN THIS MATTER WORKED TO WILSON'S**
6 **ACTUAL AND SUBSTANTIAL DISADVANTAGE.**

7
8 "In order to establish 'prejudice,' a petitioner must show 'not merely that
9 the errors of trial created a possibility of prejudice, but that they worked to his
10 actual and substantial disadvantage, in affecting the state proceedings with error
11 of constitutional dimensions.'" *Crump v. Warden, Nevada State Prison*, 113
12 Nev. 293, 302, 934 P.2d 247 (1997) *citing Hogan v. Warden*, 109 Nev. 952,
13 960, 860 P.2d 710, 716 (1993) (*quoting United States v. Frady*, 456 U.S. 152,
14 170, 102 S.Ct. 1584, 1595–96, 71 L.Ed.2d 816 (1982)).

15 Mr. Oronoz ignored repeated attempts by Wilson to collect his entire case
16 file in order for Wilson to pursue post-conviction proceedings, which Wilson
17 was required to undertake pro se initially. This failure prevented Wilson from
18 discovering that the time for post-conviction relief was passing. Mr. Oronoz's
19 failure to provide Wilson with his case file until August 19, 2010, was past the
20 time in which Wilson could file for post-conviction proceedings within a year
21 of the entry of the Remittitur on August 4, 2009. Wilson was prejudiced
22 because Mr. Oronoz's error worked to Wilson's actual and substantial

1 disadvantage, which infected his post-conviction proceedings with error of
2 constitutional dimensions and has prevented him from Due Process. *Crump* at
3 302. Accordingly, the delay in this matter was not Wilson's fault and the
4 dismissal of the First Petition as untimely unduly prejudiced Wilson.

5 Upon discovery of the Remittitur, Wilson diligently made efforts to
6 obtain post-conviction relief with such energy that, upon appointment, Mr.
7 Brower believed good cause had already been determined by the district court
8 by virtue of his appointment as Wilson's post-conviction counsel. While
9 mistaken, Mr. Brower's erroneous belief lead to additional delay in the filing of
10 the First Petition. While post-conviction petitioners are not entitled to effective
11 assistance, Mr. Brower acted as Wilson's agent. As licensed, practicing defense
12 attorney, Mr. Brower engaged in willful ignorance of the law in the context of
13 rendering legal options to Wilson. Mr. Brower acted in bias to any negative
14 effect applicable Nevada law would have on Wilson's case and had he merely
15 undertaken basic research of Nevada law, he would have determined the correct
16 course of action before taking the wrong course. Indeed, Mr. Brower admitted
17 before exiting this case that Wilson's last remaining option was to raise Mr.
18 Brower's ineffectiveness due to these actions. Mr. Brower deliberately chose to
19 ignore statutes and holdings that would have been pertinent to Wilson's case
20 and it cannot be said Mr. Brower acted negligently in a field where the

1 practitioners of law are held to a heightened knowledge of the field in order to
2 render any legal advice at all to clients and thus, he must be held to a
3 heightened standard of legal knowledge and the ability to research, analyze, and
4 apply it, despite that Wilson is not entitled to effective assistance in post-
5 conviction proceedings.

6 Accordingly, the actions of Oronoz and Brower combined worked to
7 Wilson's actual and substantial disadvantage, which prevented Wilson from
8 exercising his statutory right to file a petition for a writ of habeas corpus within
9 the appropriate time. *Id.* The Dismissal Order must therefore be reversed as
10 good cause exists to excuse the procedural bar and Wilson has met the requisite
11 element of prejudice. *Id.*

12 **II. NRS 34.800 DOES NOT APPLY TO THIS CASE.**

13
14 The Dismissal Order cites to NRS 34.800 and determined more than five
15 (5) years had lapsed since the *Remittitur* issued (August 2009) and the
16 Supplemental Petition was filed (February 2015). However, NRS 34.800 does
17 not apply.

18 The time period of five (5) years is not met herein, but was based on the
19 State's mistaken belief that the Supplemental Petition did nothing more than to
20 supplement the First Petition. This ignores the fact that the First Petition was

1 denied by the district court in November of 2013, from which Wilson appealed
2 and then voluntarily dismissed his appeal.

3 Even if the Supplemental Petition had “supplemented” the First Petition,
4 the filing of the First Petition (filed October 2011) was within five years of the
5 decision on the direct appeal of the Judgment of Conviction (August 2009) and
6 would defeat application of NRS 34.800 as an ongoing proceeding with nothing
7 more than an amendment to the original. The five year time frame of NRS
8 34.800 is suspended upon filing of the First Petition, no matter how many times
9 it is amended in the future.

10 However, the Supplemental Petition was not a supplement to the First
11 Petition, but rather a second petition brought on new grounds, with the
12 applicable five year time frame also not applying to invoke NRS 34.800. The
13 Supplemental Petition was filed in February of 2015 from the final decision of
14 the Nevada Supreme Court on Wilson’s voluntary dismissal of his appeal in
15 May of 2014, not for the purpose of challenging the appeal decision from the
16 Judgment of Conviction in August of 2009. Although the Supplemental Petition
17 could have a domino effect of impacting the Judgment of Conviction, the State
18 cannot show how this would be prejudicial to it at all, particularly since it has
19 been involved throughout the process of the direct appeal, the First Petition, the

1 denial of the First Petition, the voluntarily withdrawn appeal, and these
2 proceedings.

3 If any prejudice exists at all to the State, it is very minimal, particularly in
4 comparison to the rights deprived Wilson based on the actions of his attorneys
5 as argued *supra*. Even if NRS 34.800 somehow does apply, the substantial
6 prejudice suffered by Wilson easily rebuts it. Accordingly, the Dismissal Order
7 erroneously determined this statute applied and it should be reversed based
8 upon the reasons set forth herein.

9 **CONCLUSION**

10
11 WHEREFORE, based upon the foregoing, Wilson respectfully requests
12 that this Court reverse the district court's Dismissal Order and take any such
13 further action as this Court deems necessary.

14 RESPECTFULLY SUBMITTED this 7th day of December, 2015.

15 CARLING LAW OFFICES, PC

16 /s/ Matthew D. Carling
17 MATTHEW D. CARLING, ESQ.
18 1100 S. Tenth Street
19 Las Vegas, NV 89101
20 (702) 419-7330 (Office)
21 *Counsel for Appellant*
22
23

CERTIFICATION OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font; or

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of December, 2015.

CARLING LAW OFFICES, PC

/s/ Matthew D. Carling

MATTHEW D. CARLING, ESQ.

1100 S. Tenth Street

Las Vegas, NV 89101

(702) 419-7330 (Office)

Counsel for Appellant

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ADAM PAUL LAXALT
Nevada Attorney General

STEVEN B. WOLFSON
Clark County District Attorney

MATTHEW D. CARLING
Counsel for Appellant

/s/ Matthew D. Carling
MATTHEW D. CARLING, ESQ.
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
Counsel for Appellant