IN THE SUPREME COURT OF THE STATE OF NEVADA

DELARIAN K. WILSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 68576

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RESPONDENT'S ANSWERING BRIEF

Appeal From the Denial of Appellant's
Second Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DELARIAN K. WILSON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 68576

RESPONDENT'S ANSWERING BRIEF

Appeal from the denial of Appellant's
Second Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(b)(1) because it is a post-conviction appeal that involves a conviction for an offense that is a category A Felony.

STATEMENT OF THE ISSUE(S)

I. WHETHER THE ACTIONS OF APPELLANT'S PRIOR COUNSELS CONSTITUTES AN EXPEDIMENT EXTERNAL TO THE DEFENSE TO CONSTITUTE GOOD CAUSE

II. WHETHER NRS 34.800 APPLIES IN THE INSTANT CASE

STATEMENT OF THE CASE

On April 20, 2007, Delarian K. Wilson, aka, Delarian Kameron Wilson (hereinafter "Wilson"), and Narcus S. Wesley, aka, Narcus Samone Wesley (hereinafter "Wesley"), were charged by way of Information with the following

counts: Count 1 – Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 199.480, 205.060); Count 2 – Conspiracy to Commit Robbery (Felony – NRS 199.480, 200.380); Counts 3, 11 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060); Counts 4, 6, 7, 9 – Robbery with Use of a Deadly Weapon (Felony- NRS 200.380, 193.165); Counts 5, 8 – Assault with Use of a Deadly Weapon (Felony – NRS 200.471, 193.165); Count 10 – First Degree Kidnapping with Use of a Deadly Weapon (Felony – NRS 200.310, 200.310, 193.165); Counts 12 through 15, 17 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); Count 16 – Coercion with Use of a Deadly Weapon (Felony – NRS 207.190, 193.165); and Count 18 – Open or Gross Lewdness with Use of a Deadly Weapon (Gross Misdemeanor – NRS 201.210, 193.165). 1 Appellant's Appendix ("AA") 1-9.

On March 6, 2008, Wesley filed a Motion to Sever Defendants. 2 AA 351-364. On March 11, 2008, Wilson, through counsel, James A. Oronoz, Esq., filed a Joinder to Wesley's Motion to Sever Defendants. 2 AA 393-394. Prior to the court ruling on the motion, Wilson's case negotiated. 9 AA 2003-2004.

On March 28, 2008, pursuant to negotiations, the State filed an Amended Information charging Wilson with the following: Counts 1 and 2 - Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); and Count 3 – Sexual Assault (Felony – NRS 200.364, 200.366). 2 AA 491-493. On this same date Wilson

pleaded guilty to the charges as contained in the Amended Information, pursuant to the negotiations. 2 AA 499; 3 AA 500-518. The Guilty Plea Agreement was also filed on that same day. 2 AA 482-490.

On July 3, 2008, Wilson was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: Count 1 – maximum of 180 months with a minimum parole eligibility of 72 months, plus an equal and consecutive term of 180 months maximum and 72 months minimum for the deadly weapon enhancement; Count 2 – maximum of 180 months with a minimum parole eligibility of 72 months plus an equal and consecutive term of 180 months maximum and 72 months minimum for the deadly weapon enhancement; Count 3 – life with a minimum parole eligibility of 10 years, Counts 1, 2, and 3 to run consecutive to each other; with 500 days credit for time served. 4 AA 821-822, 857-877. Wilson was further ordered to a special sentence of lifetime supervision to commence upon release from any term of imprisonment, probation or parole. 4 AA 822, 865-866. Additionally, Wilson was ordered to register as a sex offender in accordance with NRS 179D.460 within 48 hours after any release from custody. Id. On July 16, 2008, the Judgement of Conviction was filed. 4 AA 821-822.

Wilson filed his pro per Notice of Appeal on July 18, 2008. 4 AA 828-829. James A. Oronoz, Esq., subsequently represented Wilson pro bono on direct appeal. 9 AA 2078. On July 7, 2009, the Nevada Supreme Court affirmed Wilson's

Judgment of Conviction. 9 AA 2021-2026. Remittitur issued on August 4, 2009. 9 AA 2027.

On August 27, 2010, Wilson filed a Proper Person Motion-Application for Extension of Time with the Nevada Supreme Court. 11 AA 2320. On September 7, 2010, the Nevada Supreme Court denied Wilson's Motion. 11 AA 2320-2321. On October 27, 2010, Wilson through counsel, James A. Oronoz, Esq., filed Defendant's Motion to Appoint Post-Conviction Relief Counsel. 9 AA 2076-2081. On November 23, 2010, the State's Opposition to Defendant's Motion to Appoint Post-Conviction Relief Counsel was filed. 9 AA 2084-2088.

Keith C. Brower, Esq., was appointed as counsel, and on October 10, 2011, filed a Petition for Writ of Habeas Corpus (Post-Conviction) on Wilson's behalf. 9 AA 2091. The State filed its Response on November 1, 2011. 9 AA 2107. On December 5, 2011, Wilson filed his Reply. 9 AA 2121-2122. On December 13, 2011, the district court found Wilson's Petition was time barred and denied the Petition. 9 AA 2152-2156.

The Findings of Fact, Conclusions of Law and Order denying Wilson's Petition were filed on January 6, 2012. 9 AA 2123-2130. The Notice of Entry of Decision and Order was filed January 18, 2012. 9 AA 2131. Wilson filed a Motion for Clarification and/or Reconsideration of Denial of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) on January 30, 2012. 9 AA 2140-2141. An

Order Staying the Findings of Fact, Conclusions of Law, and Order was filed on February 21, 2012. 9 AA 2142.

On February 21, 2012, Wilson filed a Notice of Appeal on the denial of his petition. 9 AA 2143. On February 24, 2012, the State filed its Opposition to Defendant's Motion for Clarification and/or Reconsideration of Denial of Defendant's Petition for Writ of Habeas Corpus. 9 AA 2144-2148. On March 13, 2012, the Motion was heard but the district court refrained from issuing a ruling due to this Court having jurisdiction on the case due to the pending appeal. 9 AA 2157-2162.

On September 14, 2012, Wilson filed a Motion for Limited Remand for Purposes of Concluding Appellant's Motion for Reconsideration with this Court. See Wilson v. State, Docket No. 60309. This Court issued an Order Denying Motion on September 21, 2012. Id. On January 18, 2013, Wilson filed a Notice of Voluntary Withdrawal of Appeal. Id. This Court issued the Order Dismissing Appeal on January 29, 2013. Id.

On July 11, 2013, the court held an evidentiary hearing on Wilson's Petition filed on October 10, 2011. 9 AA 2165-2196. The district court denied the writ as time barred and for lack of good cause to overcome the time bar. 9 AA 2189. On November 12, 2013, the court filed updated Findings of Fact, Conclusions of Law and Order, including information from the evidentiary hearing. 9 AA 2197-2205.

The Notice of Entry of Findings of Fact, Conclusions of Law and Order was filed on November 19, 2013. 9 AA 2206-2215.

On December 10, 2013, Wilson filed a Notice of Appeal from the denial of his Post-Conviction Petition for Writ of Habeas Corpus and the Findings of Fact, Conclusions of Law and Order. 9 AA 2217. Wilson again withdrew his appeal and on August 6, 2014, Keith C. Brower, Esq., filed a Motion to Withdraw. 9 AA 2221-2223.

On February 9, 2015, Wilson, through appointed counsel, Matthew Carling, Esq., filed a Petition titled "Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)." 9 AA 2224-2249; 10 AA 2250-2265. On March 6, 2015, the State filed a Response and Motion to Dismiss Defendant's "Supplemental" Petition for Writ of Habeas Corpus (Post-Conviction). 10 AA 2266-2276. On March 26, 2015, a Stipulation to Enlarge Briefing Schedule and Order was filed. 10 AA 2277-2278. On April 20, 2015, Wilson filed a Reply to State's Response. 10 AA 2279-2296.

On May 6, 2015, the district court denied the "Supplemental" Petition as time barred. RA 6. The Findings of Fact, Conclusions of Law and Order denying Wilson's "Supplemental" Petition was filed on July 22, 2015. 10 AA 2297-2303. The Notice of Entry of Findings of Fact, Conclusions of Law and Order was filed on July 24, 2015. 10 AA 2304-2311.

On August 4, 2015, Wilson filed a Notice of Appeal from the denial of his "Supplemental" Petition. 10 AA 2312-2313. Wilson's Opening Brief was filed on December 7, 2015. The State's Respondent's Brief is as follows.

STATEMENT OF THE FACTS

On the late evening of February 18, 2007, Aitor Eskandon, Justin Foucault, Ryan Tognotti, and Clint Tognotti, where watching a movie in the living room of the residence located at 690 Great Dane, Henderson, Nevada, while Justin Richardson and D.B were sleeping in the upstairs bedroom. 1 AA 33. There was a knock at the door and Ryan opened it. Id. Wilson and Wesley were at the door, entered the residence, then Wilson asked Ryan where Grant was. Id. Ryan had no knowledge of who Grant was and told him so. Id. Both Wilson and Wesley lifted up the front of their shirts exposing and subsequently pulling firearms from their waist bands. Id. They pointed the handguns at Aitor, Justin, Ryan, and Clint, and directed them to get on the ground in a circle, with their arms over their heads stacking their hands on top of each other in the middle of the circle. Id. The group was asked if there was anyone else in the residence. Id. After obtaining the response that D.B. and Justin were in the upstairs bedroom asleep, Wilson went upstairs and woke D.B. and Justin. 1 AA 34, 133. Wilson escorted them to the living room and told them to lay face down on the ground with their hands in the center of the circle with the rest of the group. 1 AA 34, 134-137.

Wilson then asked the group for all of their money. 1 AA 34, 139. Angry that together the group only had about $20.00, Wilson asked who had money in their bank accounts. 1 AA 34. Ryan and Justin both responded that they did. Id. Wilson took Ryan and drove him to two banks to withdraw a total of $900.00, while Wesley remained at the residence. Id. When Wilson returned with Ryan, Wilson ordered Justin and D.B. to engage in sexual intercourse in front of them. Id. Out of the stress of the situation, Justin was not able to perform sexually. Id. Justin was told that if he did not perform, everyone would be killed. Id. Justin was still not able to perform, so Ryan was instructed to stimulate himself to erection. Id. Ryan was unsuccessful due to stress. Id.

D.B. was then approached by Wesley, who digitally penetrated her vagina. Id. Thereafter, Wilson notified the group they were leaving and instructed them not to call the police or they would come back and kill everyone. Id. Wilson and Wesley fled taking all of the victim's cell phones. Id. Wilson and Wesley were subsequently arrested. 1 AA 36.

On April 20, 2007, Wilson and Wesley were charged by way of Information as set forth in the Statement of the Case. See Supra; 1 AA 1-9. On March 28, 2008, Wilson pleaded guilty, pursuant to negotiations, while Wesley went to trial. 2 AA 491-493; 4 AA 906. Both Wilson and Wesley were sentenced on July 3, 2008. 4 AA 857-877.

On July 18, 2008, Wilson filed a Notice of Appeal alleging his sentence was excessive and unreasonably disproportionate to his co-defendant's sentence, also alleging that the district court relied on highly suspect or impalpable evidence. 4 AA 828-829; 9 AA 2022. This Court affirmed Wilson's sentence on July 7, 2009, and Remittitur issued on August 4, 2009. 9 AA 2021-2027.

Wilson received notice that his Remittitur had issued in July of 2010. 9 AA 2189. However, Wilson did not file a Petition for Writ of Habeas Corpus (Post-Conviction) until October 10, 2011, more than three months and a year from when he was placed on notice of his Remittitur issuing. 9 AA 2091, 2179. In his first petition, Wilson alleged ineffective assistance of counsel against Oronoz at sentencing and on appeal. 9 AA 2091-2095. Specifically, Wilson alleged that Oronoz was unprepared to argue against the district court's observation of Wilson being the "ring leader," due to his alleged failure to review Wesley's trial transcripts prior to Wilson's sentencing, and that Oronoz failed to raise case law to support his argument that the district court should not have considered the facts from Wesley's trial when sentencing Wilson. Id. In his Petition, Wilson erroneously alleged that good cause had already been found by the district court for Oronoz's alleged failure to notify him of his Remittitur being issued in time to file a timely petition. 9 AA 2094.

On December 13, 2011, the district court denied Wilson's first Petition as time barred and for failing to establish good cause to overcome the procedural bars. 9 AA 2152-2156. The court found that in his first Petition Wilson failed to establish that Oronoz's representation fell below an objective standard of reasonableness; or in the alternative, that there was a reasonable probability that the results of the proceedings would have been different; and failed to show that any omitted case law had a reasonable probability of success on appeal. 9 AA 2123-2130. The Findings of Fact, Conclusions of Law and Order were filed on January 6, 2012, and subsequently stayed after Wilson filed a Motion to for Clarification and/or Reconsideration of Denial of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). 9 AA 2123-2130; 2140-2141. Due to Wilson also filing an appeal from the denial of his first Petition on February 21, 2012, the district court lacked jurisdiction to rule on the Motion for Clarification and/or Reconsideration. 9 AA 2140-2141, 2158.

The district court directed Wilson to request a limited remand from this Court for the district court to render a decision on his Motion. 9 AA 2158. Wilson later withdrew his appeal and the matter was set for an evidentiary hearing on July 11, 2013. 9 AA 2165-2196; see Wilson v. State, Docket No. 60309 (January 18, 2013). At the evidentiary hearing, Wilson was the sole witness to testify. 9 AA 2165-2196. Wilson presented letters he had written to his former attorney Oronoz. 9 AA 2175-2179, 2181-2186. Within one of the letters to Oronoz, dated July 27, 2010, Wilson

stated he knew that the Supreme Court issued its decision on his appeal. 9 AA 2179. Wilson also testified to the following: 1) Oronoz filed his appeal; 2) Wilson and his mother called Oronoz's office twice a month to check the status of the appeal; and 3) in July of 2010, Wilson was notified by his mother that his appeal was denied. 9 AA 2182-2186.

The district court again denied Wilson's Petition as time barred. 9 AA 2197-2205. The district court held that Wilson failed to establish good cause to overcome the procedural bars because Wilson learned that Remittitur issued in his appeal prior to the one year deadline for Wilson to file a timely petition for writ of habeas corpus. 9 AA 2189. Despite having the timely information, Wilson did not file the petition until a year and three months after finding out Remittitur issued. 9 AA 2189. On November 12, 2013, the court filed updated Findings of Facts, Conclusions of Law and Order to include the information elicited from the evidentiary hearing. 9 AA 2197-2205.

Wilson filed an appeal from the denial of his first Petition, and then voluntarily withdrew the appeal. See Wilson v. State, Docket No. 64617. Brower, Wilson's then post-conviction attorney, withdrew and Carlin was appointed as new post-conviction counsel. 9 AA 2221-2223; RA 4. The district court set a briefing schedule at the request of defense counsel who was standing in to accept appointment on Carlin's behalf. RA 4. Thereafter, Wilson, through Carlin, filed a second petition titled

"Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)," on February 9, 2015. 9 AA 2224-2265. Wilson's "Supplemental" Petition alleged ineffective assistance against Brower for advising him to voluntarily dismiss his appeal in favor of filing a motion to withdraw his guilty plea. 9 AA 2243. On May 6, 2015, the district court held that Wilson's Petition was not a supplemental petition, rather a second petition, and denied the Petition for the following reasons: 1) Wilson failed to establish good cause for the delay; 2) Mr. Bower's appointment four months after the time period for filing a timely petition and his conduct as post-conviction counsel does not make the petition supplemental, nor timely; and 3) Wilson was on notice of the denial of his appeal in July of 2010, before the deadline for him to file a timely petition had elapsed, yet Wilson waited over a year to file his petition. RA 6. Wilson now appeals the denial of his second Petition.

SUMMARY OF THE ARGUMENT

The district court properly denied Wilson's second Petition for Writ of Habeas Corpus. Wilson's petition was in fact a second petition, not a supplemental petition to his first petition. Wilson's second petition was untimely and he failed to establish good cause to overcome the procedural bars. The actions of Wilson's prior counsels do not constitute an impediment external to the defense, thus, again Wilson failed to establish good cause to overcome the procedural bars.

The district court properly applied NRS 34.800 to Wilson's second, untimely petition. Wilson's Remittitur issued on August 4, 2009. Wilson's second Petition for Writ of Habeas Corpus was filed February, 9, 2015, more than five years after issuance of Remittitur.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DENIED WILSON'S SECOND PETITION BECAUSE WILSON FAILED TO DEMONSTRATE GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS.

Wilson's second Petition was untimely under NRS 34.726 and there is no good cause to overcome the procedural bars. As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the Judgment of Conviction is filed or a Remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). Wilson's Judgment of Conviction was filed on July 16, 2008, he appealed the conviction, the appeal was denied, and Remittitur issued on August 4, 2009. 4 AA 828-829; 9 AA 2021-2027. Thus, Wilson had until August 4, 2010, to file a timely petition for writ of habeas corpus pursuant to NRS Chapter 34 (post-conviction), which he did not. 9 AA 2091. Wilson's first Petition was not filed until October 10, 2011. Id. Nonetheless, the district court afforded Wilson every opportunity, by staying the Findings of Fact, Conclusions of Law and Order, and thereafter holding an evidentiary hearing on his first Petition. 9 AA 2165-2196. The district court,

following the evidentiary hearing, ultimately denied Wilson's Petition on July 11, 2013. 9 AA 2165-2196. Wilson then filed a second Petition for Writ of Habeas Corpus on February 9, 2015, five years and five months after Remittitur. 9 AA 224-2265. This second Petition was also denied as time barred because the allegations contained failed to overcome the procedural time bar. 9 AA 2224-2265; RA 6.

This Court has emphasized that application of the procedural default rules is mandatory. State v. District Court (Riker), 121 Nev. 225, 231-33, 112 P.3d 1070, 1074-75 (2005); State v. Greene, 129 Nev. ___, ___, 307 P.3d 322, 326 (2013). To excuse a procedural default under NRS 34.726(1), a petitioner must demonstrate the following: 1) "[t]hat the delay is not the fault of the petitioner" and 2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. Accord, NRS 34.810(3). Wilson has failed to demonstrate either. Accordingly, the district court properly denied Wilson's second Petition as procedurally barred.

A. Wilson failed to demonstrate good cause

In the instant case, Wilson failed to show good cause for the delay in filing his second Petition. As grounds for good cause, Wilson alleges that Oronoz failed to provide him with a copy of his file until August 19, 2010. AOB 32-33. Wilson alleges that this impediment resulted in a "domino effect" of further impediments through Brower's alleged ineffective assistance of counsel. Id. In order to show good cause, "a petitioner must show that an impediment external to the defense prevented

him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989)). "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.'" Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986) (internal quotations omitted). Clearly, any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Here, Wilson's argument that Oronoz's failure to provide him with a copy of his file constitutes good cause for his second Petition fails. Any delay in transferring Wilson's file does not constitute good cause. An attorney's failure to a defendant his files did not prevent the defendant from filing a timely petition, and thus did not constitute good cause for the defendant's procedural default. Hood v. State, 111 Nev. 335, 337-38, 890 P.2d 797, 798 (1995) (citing Phelps v. Director, Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (superseded by statute on other grounds, as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004)); see also Sullivan v. State, 120 Nev. 537, 542 n.14, 96 P.3d 761, 765 n.14

(2004); Hathaway v. State, 119 Nev. 248, 254 n.13, 71 P.3d 503, 507 n.13 (2003). Additionally, in Wilson's own Answering Brief, Wilson asserts that he had a copy of his file but that his personal copies were "mistakenly destroyed." AOB 32. Thus, Wilson was not prevented from filing a timely petition simply because he was not provided with a duplicate copy of his file by Oronoz after his personal copy was mistakenly destroyed. Therefore, Wilson's claim that his file was not provided in time for him to file a timely petition is insufficient to excuse the procedural defaults and he failed to establish good cause to overcome the tardy filing of his Petition.

As Wilson states in his opening brief, in Murray, the United States Supreme Court specified that good cause to overcome procedural default "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S. at 488, 106 S. Ct. at 2645; AOB 30. In Murray the U.S. Supreme Court also stated that as long as counsel is not constitutionally ineffective under Strickland v. Washington, 466 U.S. 668 (1984) "we discern no inequity in requiring [a defendant] to bear the risk of attorney error that results in a procedural default." Id. Here, Wilson's alleged good cause failed because counsel's failure to provide a copy of Wilson's file to him was not external to the defense. Further, as Wilson conceded, he had full knowledge that his appeal had been denied and Remittitur had issued well before the expiration for him to file a timely petition for writ of habeas corpus. Therefore, Wilson is unable

to show that Oronoz's failure was an impediment external to the defense, and thus, failed to show good cause.

Additionally, in his Opening Brief, Wilson now includes new allegations that Oronoz "abandoned him without notice," in an attempt to get another bite at the apple on his claim of ineffective assistance of counsel to constitute an impediment external to the defense. AOB 35. However, this claim is being raised for the first time on appeal and the district court never had an opportunity to hear this claim. As such, this Court should not consider this argument[1]. The Nevada Supreme Court has held that "parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997) (internal quotation omitted). Since Wilson failed to raise this argument below, it must now be considered waived. Id.; see also, Guy v. State, 108 Nev. 770, 780 839 P.2d 578, 584 (1992),

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[1] Regardless, in Wilson's abandonment argument he cites to Towery v. Ryan, 673 F.3d 933 (9th Cir. 2012), and Maples v. Thomas, ___ U.S. ___, 132 S. Ct. 912, 922-923 (2012), both which pertain to rules governing federal habeas proceedings and not Nevada's statutory good cause standard, which requires a showing that an "impediment external to the defense" prevented him from complying with the procedural rules. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). The decision in Maples clearly states that mere negligence on the part of petitioner's attorney, such as missing a filing deadline, does not qualify as cause because the attorney acts as the petitioner's agent and the petitioner bears the risk of the attorney's conduct. ___ U.S. at ___, 132 S. Ct. at 922-923.

cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

Wilson also alleges that Brower's representation of Wilson establishes good cause to overcome the procedural bars. AOB 33. However, this argument also fails. The record shows that Brower was appointed on December 14, 2012, over four months after the one year period for filing had run. 9 AA 2221-222. As such, Brower's performance subsequent to his appointment, whether effective or ineffective, is of no consequence as it has no bearing on the fact that any petitions filed thereafter would be subject to the procedural bar. This Court has consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute "good cause" to excuse procedural defaults. See Brown v. McDaniel, 130 Nev. ___, ___, 331 P.3d 867, 869 (2014); see also McKague v. Warden, 112 Nev. 159, 163-65, 912 P.2d 255. 258; cf. Crump v. Demosthenes, 113 Nev. 293, 303 & n.5, 934 P.2d 247, 253 & n.5; Mazzan v. Warden, 112 Nev. 838, 841, 921 P.2d 920, 921-22 (1996). This is because there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel." McKague, 112 Nev. at 164-65, 912 P.2d at 258. Thus, the district court properly held that Wilson's allegation did not constitute good cause, and denied the second Petition as time barred. Id.

Wilson failed to show good cause to overcome the procedural bars. Oronoz failing to provide him his file, when Wilson knew that his appeal had been denied well within the time frame to file a timely petition is not good cause. Further, Brower's representation of Wilson cannot be good cause as Brower was appointed after the deadline for Wilson to file a timely petition. Thus, Wilson failed to demonstrate any impediments external to himself failing to establish good cause to give rise to consideration of the claims in his second Petition. Therefore, the district court properly found that Wilson failed to demonstrate good cause to overcome the procedural bars.

B. Wilson fails to demonstrate actual prejudice

If a petitioner can establish cause, he must still show actual prejudice resulted from the errors of which he complains, i.e., "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage."[2] State v. Huebler, 128 Nev. ___, ___, 275 P.3d 91, 94-95 (2012) (citing Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993)). A defendant has the burden of pleading and proving specific facts that demonstrate both good cause *and* prejudice to overcome the procedural bars. State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003). This Court explained that in order to

[2] The district court found that Wilson failed to establish good cause. As such, it did not evaluate whether Wilson demonstrated actual prejudice sufficient to overcome the procedural bars. RA 6.

establish prejudice, the defendant must show "not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan, 109 Nev. at 960, 860 P.2d at 716.

Wilson fails to establish actual prejudice. Wilson alleges prejudice based on the allegations that 1) Oronoz's failure to provide his entire file resulted in actual and substantial prejudice; and 2) ineffective assistance of counsel by Brower for his erroneous belief that good cause had been established caused a delay in filing of the first petition and Brower's willful ignorance of the law rendered erroneous legal options to Wilson. AOB 37-39. As to Wilson's first argument, Wilson argues that Oronoz failed to provide Wilson with his entire file even after repeated requests. AOB 37. He alleges this prejudiced him because Oronoz's error worked to Wilson's actual and substantial disadvantage. Id. As discussed above, failure of trial counsel to forward a copy of the file to a petitioner does not constitute good cause, so it cannot be said to demonstrate prejudice. See Hood, 111 Nev. at 337-38, 890 P.2d at 798; see also Sullivan, 120 Nev. at 542 n.14, 96 P.3d at 765 n.14; Hathaway, 119 Nev. at 254 n.13, 71 P.3d at 507 n.13; Phelps, 104 Nev. at 660, 764 P.2d at 1306 (superseded by statute on other grounds, as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004). Wilson, on his own, acknowledges that he in fact did have copies of his file, but without providing further explanation states that

those copies were "mistakenly destroyed," and that this resulted in his need to have Oronoz provide the entire file. AOB 32. Wilson therefore fails to show that he was prejudiced by this allegation because he could still have filed a timely petition and was not prevented from doing so by counsel's failure to provide him with yet another copy of his file. Thus, Wilson does not meet the burden of establishing actual and substantial disadvantage. Accordingly, there is no basis for a claim of prejudice.

Under his second contention, Wilson argues that Brower's erroneous belief that good cause had already been determined by the district court led to the delay in filing his first petition and that Brower engaged in willful ignorance of the law, which establishes Wilson was prejudiced. AOB 38-39. However, as discussed above, by the time the court appointed Brower, the time for Wilson to file a timely petition had elapsed. RA 6. This despite the fact that Wilson, on his own, could have filed a timely petition.

Even if Brower acted as Wilson's agent, the standard is not to look at whether the attorney error caused the attorney to cease to be an agent of the petitioner, but rather whether it constitutes a violation of petitioner's right to counsel. AOB 38; Coleman v. Thompson, 501 U.S. 722, 753-754; 111 S. Ct. 2546, 2567-2568 (1991). Here, because there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, there is no violation of Wilson's right to counsel. See McKague, 112 Nev. at 164-65, 912 P.2d at 258. As such, Brower's

actions fail to establish an actual and substantial disadvantage to Wilson. Further, because ineffective assistance of post-conviction counsel does not constitute "good cause", it precludes review as a claim of prejudice. NRS 34.726; see Brown v. McDaniel, 130 Nev. ___, ___, 331 P.3d 867, 869 (2014).

Thus, the district court properly denied Wilson's Petition as he failed to demonstrate good cause and prejudice to overcome the procedural bars.

II.
NRS 34.800 IS APPLICABLE TO THE INSTANT CASE

NRS 34.800 states that a petition may be dismissed if the delay in the filing of the petition "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction . . ." as it creates a rebuttable presumption of prejudice to the State.[3]

The Remittitur on Wilson's direct appeal was issued on August 9, 2009. 9 AA 2027. However, Wilson did not file the instant second Petition until February 9, 2015. 9 AA 2224-2265. Since more than five years elapsed between the Remittitur

[3] NRS 34.800 also requires that the State plead laches in its motion to dismiss the petition. The State pleaded laches in its Response and Motion to Dismiss Defendant's "Supplemental" Petition for Writ of Habeas Corpus (Post-Conviction). 10 AA 2266-2076

from Wilson's direct appeal and the filing of the second Petition, NRS 34.800 directly applies to this case.

The claims in Wilson's second Petition stem from his allegation of error of notice of his Remittitur issuing in 2009. NRS 34.800 creates a rebuttable presumption of prejudice to the State if it has to go back years later to re-prove aged matters. For this very reason the doctrine of laches must be applied in the instant matter. Therefore, the district court properly denied Wilson's second Petition pursuant to NRS 34.800, as the delay of over five years in filing was unexcused.

Lastly, Wilson contends that this Court apply NRS 34.800 from the date of the denial of the first Petition, November 12, 2013. AOB 40-41. This is erroneous because the statute is clear that the petition may be dismissed if a period of 5 years has elapsed from the time Remittitur issued to the date the petition in question has been filed. See NRS 34.800. Remittitur issued on August 4, 2009, and Wilson filed the Second Petition on February 9, 2015. This is a period exceeding 5 years.

Wilson's second contention that the "Supplemental" Petition is not a supplement but rather raises new grounds does not address the purpose of statutory laches and is therefore irrelevant. AOB 40. As such, the district court properly found that Wilson's second Petition was barred by statutory laches.

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/ / /

CONCLUSION

Based on the foregoing, the State respectfully requests that the denial of Wilson's second petition be upheld.

Dated this 11th day of February, 2016.

Respectfully submitted,

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CERTIFICATE 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 5,634 words and does not exceed 30 pages.
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 11th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 11, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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