

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

DELARIAN K. WILSON, )

Appellant, )

VS. )

STATE OF NEVADA, )

Respondent. )

Case No.: 68576

**APPELLANT’S REPLY BRIEF**

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1  
2 **ARGUMENT**

3 **I. WILSON HAS ESTABLISHED GOOD CAUSE TO EXCUSE THE**  
4 **PROCEDURAL TIME BAR PURSUANT TO NEVADA LAW.**

5  
6 “The constitutional right to effective assistance of counsel extends to a  
7 direct appeal.” *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102 (1996) *citing*  
8 *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). “It is true under  
9 the Sixth Amendment to the United States Constitution there is no right to  
10 effective assistance of counsel, or to counsel at all, in post-conviction  
11 proceedings.” *McKague v. Whitley*, 112 Nev. 159, 162, 912 P.2d 255 (1996).  
12 Further, “[t]he Nevada Constitution also does not guarantee a right to counsel in  
13 post-conviction proceedings, as we interpret the Nevada Constitution’s right to  
14 counsel provision as co-extensive with the Sixth Amendment to the United  
15 States Constitution.” *Id. citing Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504  
16 (1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985)  
17 (adopting the federal standard of review for petitions alleging ineffective  
18 assistance of counsel claims in Nevada).

19 Regardless of the constitutional right to be represented by effective  
20 assistance in criminal proceedings, “[a] lawyer shall provide competent  
21 representation to a client. Competent representation requires the legal  
22 knowledge, skill, thoroughness and preparation reasonably necessary for the

1 representation.” NEV. R. PROF. CONDUCT 1.1. The RULES OF PROFESSIONAL  
2 CONDUCT continue as follows:

3       Upon termination of representation, a lawyer shall take steps to the  
4       extent reasonably practicable to protect a client's interests, such as  
5       giving reasonable notice to the client, allowing time for  
6       employment of other counsel, surrendering papers and property to  
7       which the client is entitled and refunding any advance payment of  
8       fee or expense that has not been earned or incurred.

9  
10 NEV. R. PROF. CONDUCT 1.16(d).

11       “A defendant who is appealing from a judgment of conviction may not  
12       appear without counsel.” NRAP 46A(b)(1). “After judgment or final  
13       determination, an attorney may withdraw as attorney of record at any time upon  
14       the attorney’s filing a withdrawal, with or without the client’s consent.” SCA  
15       46.

16       Habeas relief is constitutionally based as it specifically pertains to a  
17       person’s liberty interest:

18       Any person convicted of a crime and under sentence of death or  
19       imprisonment who claims that the conviction was obtained, or that  
20       the sentence was imposed, in violation of the Constitution of the  
21       United States or the Constitution or laws of this State, or who  
22       claims that the time the person has served pursuant to the judgment  
23       of conviction has been improperly computed, may, without paying  
24       a filing fee, file a postconviction petition for a writ of habeas  
25       corpus to obtain relief from the conviction or sentence or to  
26       challenge the computation of time that the person has served.

1 NRS 34.724. Historically when this Court has been unclear regarding habeas  
2 corpus proceedings, it has looked to the United States Supreme Court for  
3 guidance and has adopted its interpretation. *See, e.g., Hill v. Warden, Nevada*  
4 *State Prison*, 96 Nev. 38, 39-40, 604 P.2d 807 (1980); *see also Foster v.*  
5 *Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d 453, 456 (2010) (“[S]erve[s] as  
6 persuasive authority for this court’s examination of this issue . . .”).

7 Federal law requires the filing of the federal petition within one (1) year  
8 of the state conviction becoming final, which is tolled while a properly filed  
9 state post-conviction petition is pending. 28 U.S.C.A. § 2244(d); 2254. A  
10 Nevada state petition “...must be filed within 1 year after entry of the judgment  
11 of conviction or, if an appeal has been taken from the judgment, within 1 year  
12 after the appellate court ... issues its remittitur.” NRS 34.726(1).

13 Federal authority exists in caselaw that the deadline for habeas corpus  
14 may be equitably tolled, which is discussed *post*. Nevada allows for a late filed  
15 petition if good cause can be established, to wit: (1) “...that the delay is not the  
16 fault of the petitioner; and (2) dismissal of the petition as untimely will unduly  
17 prejudice the petitioner.” NRS 34.726(1)(a)&(b). Under the first element of  
18 fault, “...a petitioner must show that an impediment external to the defense  
19 prevented him or her from complying with the state procedural default rules.”  
20 *State v. Huebler*, 275 P.3d 91, 95, --Nev.-- (2012) *citing Hathaway v. State*, 119

1 Nev. 248, 252, 71 P.3d 503, 506 (2003). “Under the second requirement, a  
2 petitioner must show that errors in the proceedings underlying the judgment  
3 worked to the petitioner's actual and substantial disadvantage.” *Id. citing Hogan*  
4 *v. Warden*, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993).

5 In a case similar to the instant case, the Ninth Circuit reviewed the  
6 dismissal of an untimely filed federal petition after the petitioner had exhausted  
7 his state post-conviction relief in Nevada, having been recently denied on  
8 appeal in post-conviction proceedings. *Gibbs v. Legrand*, 767 F.3d 879 (9<sup>th</sup> Cir.  
9 2014). Therein, Gibbs’ conviction was affirmed on direct appeal by this Court  
10 in 2003. *Id.* at 883. In 2007, Gibbs’ post-conviction relief petition was rejected  
11 on the merits and Gibbs appealed to this Court. *Id.* Gibbs was appointed  
12 counsel, Figler, to represent him for the appeal; however, the relationship  
13 “quickly soured”. *Id.*

14 Figler did not respond to Gibbs’ letters and Gibbs lodged a complaint  
15 against Figler with the Nevada State Bar, who alerted Figler of the complaint  
16 and caused Figler to reach out to Gibbs. *Id.* Gibbs and Figler thereafter moved  
17 forward together, having resolved the bar complaint, and Figler filed the appeal  
18 with this Court. *Id.* Figler thereafter promised Gibbs in a letter that he would  
19 forward Gibbs “any receipt of notice from the Supreme Court” and invited  
20 Gibbs’ correspondence to the address on the letterhead. *Id.*

1 In 2010, this Court affirmed the denial of Gibbs' post-conviction petition;  
2 however, Figler failed to send any notice of the denial to Gibbs. *Id.* In the  
3 months following, Gibbs wrote to Figler again expressing frustration that Figler  
4 was not communicating. *Id.* Gibbs received no response from Figler. *Id.* Gibbs  
5 then wrote directly to this Court requesting a docket sheet and discovered the  
6 denial of the appeal six (6) months earlier. *Id.* Gibbs then "promptly" wrote to  
7 Figler asking what he was supposed to do now, to which Figler did not respond.  
8 *Id.* at 883-884. In February of 2011, having still received no response, Gibbs  
9 wrote to Figler and terminated him as counsel and requested the return of  
10 Gibbs' documents within five (5) days. *Id.* at 884. Gibbs indicated he needed to  
11 undertake the "daunting task" of preparing for a federal habeas petition. *Id.* By  
12 the end of that month, Gibbs' sister obtained a box of documents from Figler  
13 and by May of 2011, Gibbs filed his federal petition, sixty-five (65) days after  
14 obtaining the files from Figler. *Id.* The warden moved to dismiss the federal  
15 petition as untimely and Gibbs argued Figler's misconduct entitled Gibbs to  
16 equitable tolling to excuse the late filing. *Id.*

17 Gibbs was required to have filed the federal petition by October 22, 2010,  
18 but did not do so until May 3, 2011. *Id.* Citing the United States Supreme Court,  
19 the Ninth Circuit held, "AEDPA's one-year statute of limitations is subject to  
20 equitable tolling." *Id.* citing *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct.



1 2549, 177 L.Ed.2d 130 (2010). Again citing the United States Supreme Court,  
2 the Ninth Circuit held, “[a] litigant seeking equitable tolling bears the burden of  
3 establishing two elements: (1) that he has been pursuing his rights diligently,  
4 and (2) that some *extraordinary circumstance* stood in his way and prevented  
5 timely filing.” *Id.* at 884-885 citing *Holland* quoting *Pace v. DiGuglielmo*, 544  
6 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)(internal quotations  
7 omitted)(emphasis added).

8 In addressing the second element of extraordinary circumstance, *Gibbs*  
9 upheld, “[b]ut attorney misconduct can be so egregious as to create an  
10 ‘extraordinary circumstance justifying equitable tolling.’” *Id.* at 885 citing  
11 *Holland*, 560 U.S. at 651-652, 130 S.Ct. 2549. *Gibbs* also relies upon the  
12 holdings of *Maples v. Thomas* and *Towery v. Ryan*, which were cited by Wilson  
13 in his opening brief, “[a]n attorney’s failure to communicate about a key  
14 development in his client’s case can, therefore, amount to attorney  
15 abandonment and thereby constitute an extraordinary circumstance.” *Id.* at 885-  
16 886 citing *Maples*, -- U.S. --, 132 S.Ct. 912, 923–924, 181 L.ed.2d 807 (2012);  
17 see also *Towery v. Ryan*, 673 F.3d 933, 942–43 (9th Cir.2012).

18 *Gibbs* therefore determined it was “absolutely critical” that *Gibbs* had  
19 trouble communicating with Figler and was not timely informed of the denial of  
20 his appeal. *Id.* at 886. Thus, “[i]f *Gibbs*’s attorney effectively abandoned him,

1 Gibbs cannot be charged with the knowledge that the Nevada Supreme Court  
2 had denied his appeal.” *Id. Gibbs* continues as follows:

3 Failure to inform a client that his case has been decided,  
4 particularly where that decision implicates the client’s ability to  
5 bring further proceedings and the attorney has committed himself  
6 to informing his client of such a development, constitutes attorney  
7 abandonment. *See Mackey v. Hoffman*, 682 F.3d 1247, 1253 (9th  
8 Cir.2012). Attorneys are generally required to “perform reasonably  
9 competent legal work, to communicate with their clients, to  
10 implement clients’ reasonable requests, [and] to keep their clients  
11 informed of key developments in their cases.” *Holland*, 560 U.S. at  
12 652–53, 130 S.Ct. 2549. Gibbs’s attorney failed on all but the first  
13 count.

14  
15 *Id.* Furthermore, “[this court has] granted equitable tolling in circumstances  
16 where it would have technically been possible for a prisoner to file a petition,  
17 but a prisoner would have likely been unable to do so.” *Id.* at 888.

18 In examining the element of diligence, *Gibbs* determined as follows:

19 After Figler wrote to him in May 2010, Gibbs wrote to Figler three  
20 times before contacting the Nevada Supreme Court in December of  
21 that year. He had no reason to contact the court earlier. Figler had  
22 assured him that he would perform the simple task of forwarding  
23 the Nevada Supreme Court’s notice upon receipt. And although  
24 Figler had abandoned Gibbs for periods before, he had also  
25 stepped up to the plate in time to fulfill his legal duties when  
26 contacted by the State Bar. Moreover, it was Figler’s ethical duty  
27 to take “steps to the extent reasonably practicable to protect  
28 [Gibbs’s] interests” if he had ceased representing him, Nev. R.  
29 Prof. Conduct 1.16(d), and, if so, to notify the court so that the  
30 court would send its disposition to Gibbs rather than Figler, Nev.

1 R.App. P. 3C(b)(3). *See* [*Mackey v. Hoffman*, 682 F.3d 1247, 1253  
2 (9th Cir.2012)]. In light of these circumstances, we have no trouble  
3 concluding that Gibbs acted with reasonable diligence in  
4 discovering, albeit after the untolled federal filing deadline had  
5 run, the Nevada Supreme Court’s denial of his petition.

6 ...

7 Because it is most relevant to the causation question, we are  
8 primarily concerned with whether a claimant was “diligent in his  
9 efforts to pursue his appeal at the time his efforts were being  
10 thwarted.” [*Roy v. Lampert*, 465 F.3d 964, 970-971 (9<sup>th</sup> Cir. 2006)]  
11 (emphasis in original). In other words, diligence during the  
12 existence of an extraordinary circumstance is the key  
13 consideration. Also relevant is whether petitioners “pursued their  
14 claims within a reasonable period of time before the external  
15 impediment ... came into existence.” *Id.* at 972; see also [*Pace v.*  
16 *DiGuglielmo*, 544 U.S. 408, 419, 125 S.Ct. 1807, 161 L.Ed.2d 669  
17 (2005)].

18  
19 *Id.* at 890, 892. *Gibbs* determined that Gibbs routinely and diligently pursued  
20 relief and further that he had prepared a federal petition that was dissimilar to  
21 his state petition in just over two (2) months, which met the diligence element.  
22 *Id.* at 893. Accordingly, *Gibbs* reversed the dismissal of the federal petition. *Id.*

23 The State herein argues in its Answering Brief that Wilson did not  
24 establish good cause to excuse the procedural bars to the late filing of the First  
25 Petition. Wilson relied on Ninth Circuit and United States Supreme Court  
26 authority in arguing that Wilson’s appellate counsel Mr. Oronoz was ineffective  
27 by failing to alert Wilson of the denial of his appeal and failing to provide  
28 Wilson with his file after the habeas corpus deadline. This supported Wilson’s

1 position that he had been abandoned by Oronoz on appeal, which constituted  
2 good cause to excuse the procedural bar in the filing of the First Petition. The  
3 State argues Wilson's reliance on this authority is misplaced because such  
4 authority pertains to rules governing federal habeas proceedings and not  
5 Nevada's good cause standard, which requires a showing "impediment external  
6 to the defense". *See*, Answering Brief at p. 17. However, Wilson has  
7 demonstrated such an impediment constituting good cause, which is also  
8 consistent with federal authority that abandonment by counsel tolls the  
9 limitations period in filing a habeas petition.

10       Herein, the Judgment of Conviction entered on July 16, 2008. APP.  
11 0821-0822. The Order of Affirmance affirming the Judgment of Conviction  
12 entered on July 15, 2009, and Remittitur entered on August 4, 2009. APP.  
13 2021-2026; 2027. Thus, Wilson was required to file for post-conviction relief  
14 by approximately August 4, 2010.

15       On December 24, 2008, Oronoz wrote to Wilson stating he had ordered  
16 transcripts from Wesley's trial but had yet to receive some of them and thus had  
17 requested a continuance in order to file the opening brief in Wilson's appeal.  
18 APP 2240. This is the only evidence of correspondence from Oronoz to Wilson  
19 in the record during the pendency of the direct appeal from Wilson's  
20 conviction.

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

9           Lisa Wilson, the mother of Wilson, was searching the internet on July 13,  
10 2010, in order to locate information regarding Wilson's appeal since the appeal  
11 had been pending for a significant period of time and she had not heard about  
12 any outcome. APP 2241. Mrs. Wilson accessed a website that indicated to her  
13 that Wilson's appeal was listed as "closed". *Id.* Due to the hour, Mrs. Wilson  
14 determined to call Mr. Oronoz the next morning to determine what this meant.  
15 *Id.* Mrs. Wilson called Mr. Oronoz's office the next morning and discovered he  
16 had changed offices as well as his phone number. *Id.* Upon calling the new  
17 number, Mrs. Wilson was informed that Mr. Oronoz was not available to take  
18 her call; however, the receptionist stated Wilson had called earlier that morning  
19 and she had explained to him there had not been any decisions in his case as of  
20 that day. *Id.* Mrs. Wilson then asked why Wilson's appeal was being listed as

1 closed, which the receptionist answered it merely meant the original case was  
2 closed but not the appeal. *Id.* After ending the call, the receptionist called Mrs.  
3 Wilson back within five (5) minutes and stated the appeal decision had been  
4 rendered in July. *Id.*

5 Oronoz's office mailed a copy of the Order of Affirmance to Mrs. Wilson  
6 on July 14, 2010, which revealed the Order of Affirmance was dated July 7,  
7 2009. *Id.* Mrs. Wilson called Oronoz's office to determine why it had taken a  
8 year to send the Order of Affirmance and left messages on July 19, 21, and 22,  
9 2010, and never received a call back from Oronoz or his office. *Id.* Mrs. Wilson  
10 spoke with Wilson on July 22, 2010, and discussed with him the contact she  
11 had with Oronoz and her discovery of the Order of Affirmance. *Id.*

12 On July 21, 2010, Wilson wrote to Oronoz detailing that his mother had  
13 discovered the Order of Affirmance, of which Wilson stated he had no  
14 knowledge although he had called Mr. Oronoz's office numerous times and had  
15 been told nothing had been determined on the appeal. Wilson thus requested a  
16 copy of his file and all related materials. APP 2242.

17 On July 25, 2010, Wilson wrote to Oronoz and requested his entire file  
18 and all other related materials, including certain pleadings. *Id.* Wilson also  
19 requested transcripts for certain hearings in the matter, which Oronoz had

1 previously requested in the case. *Id.* Wilson requested Oronoz's prompt  
2 response. *Id.*

3 On July 26, 2010, Wilson wrote a letter to the trial court. APP 2242;  
4 2040-2052. Wilson alerted the parties to the fact that he had only been recently  
5 informed of the Order of Affirmance and had yet to receive any response from  
6 Oronoz regarding his concerns. *Id.* Wilson also inquired as to what he was  
7 supposed to do next. *Id.*

8 On July 27, 2010, the docket in the direct appeal indicates it received a  
9 pro per letter regarding counsel and time for filing an appeal. On August 5,  
10 2010, Wilson filed a pro se motion requesting Oronoz be ordered to provide  
11 Wilson with the entire copy of his file, as Oronoz had failed to do so despite  
12 repeated requests. The motion was further based on the fact that Wilson had not  
13 received notice of the disposition of the direct appeal until very recently, despite  
14 the fact the direct appeal had resolved in 2009. APP 2040-2052.

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

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

3 Wilson's pro se motion requesting Oronoz provide him a copy of his file  
4 was heard before the trial court on August 17, 2010, wherein the motion was  
5 granted and Oronoz was directed to provide the files to Wilson. Finally, on  
6 August 19, 2010, Oronoz mailed Wilson's case file to Wilson. APP 2053.

7 On August 27, 2010, Wilson filed his *Application for Extension of Time*  
8 in the Nevada Supreme Court, which requested the extension of the remittitur in  
9 order to file a petition for writ of habeas corpus based on Oronoz's failure to  
10 alert Wilson to the Order of Affirmance in a timely manner. *See*, Case No.  
11 52104. Wilson requested this continuance *pro se*. *See, id.*

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

17 On October 27, 2010, Wilson filed his *Motion to Appoint Post*  
18 *Conviction Relief Counsel*, which was opposed by the State. APP 2076-2081;  
19 2084-2088. The motion was heard on November 30, 2010, and Wilson was not  
20 present. APP 2082. The trial court determined to appoint counsel for Wilson.



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

3 Oronoz never withdrew as counsel from the direct appeal in the appellate  
4 case itself or from the district court case. Brower was appointed as post-  
5 conviction counsel on December 14, 2010; however, Oronoz never formally  
6 withdrew as counsel in the proceedings. *See, id.*

7 The State asserts Wilson has no grounds to attack the ineffective  
8 assistance he received on appeal or the incompetent counsel he received during  
9 post-conviction. The State makes much of the fact that Wilson's copy of his file  
10 was "mistakenly destroyed"; however, the only record evidence of Oronoz  
11 mailing *anything* to Wilson was on December 24, 2008, although Wilson made  
12 numerous requests thereafter. APP 2240. There is no information as to what  
13 was "mistakenly destroyed." Further, Oronoz likely retained notes, investigative  
14 documents, reports, etc., that were never made part of the court record but were  
15 retained by Oronoz, of which Wilson may never have seen. A complete copy of  
16 the attorney file, whether Wilson retained his own copies of pleadings or not, is  
17 essential to Wilson reviewing the entire case file in order to raise claims in post-  
18 conviction proceedings, particularly since ineffective assistance may only be  
19 raised in such proceedings. Thus, Oronoz's attorney file would give great  
20 insight into claims Wilson could raise in post-conviction, which Wilson did not

1 receive from Oronoz until Oronoz mailed the file on August 19, 2010;  
2 approximately fifteen (15) days after the deadline to file a habeas corpus  
3 petition. APP 2053. Moreover, the State's faulting of Wilson for not retaining  
4 his own copy of his file falls short since the State cites to no place in the record  
5 where it is indicated how much of the record Wilson had in his possession.

6 Wilson had a constitutional right to Oronoz's effective assistance in the  
7 direct appeal, which did not include abandonment after briefing was completed  
8 but rather through determination, notification of which he should have provided  
9 to Wilson. *Kirksey* at 998. Instead, Oronoz abandoned his duties without  
10 notifying Wilson or this Court so that he could be personally notified as to the  
11 outcome of his appeal.

12 Wilson was at least minimally entitled throughout all the proceedings to  
13 competent representation from his attorneys, but particularly Oronoz. NEV. R.  
14 PROF. CONDUCT 1.1. At the conclusion of Oronoz's representation, Oronoz was  
15 required "to take steps to the extent reasonably practicable to protect" Wilson's  
16 interests, particularly by "surrendering papers and property to which the client  
17 is entitled". NEV. R. PROF. CONDUCT 1.16(d). Wilson did everything he could  
18 by repeatedly requesting the documents from Oronoz throughout the pendency  
19 of the appeal; however, Oronoz did not surrender the attorney file until ordered

1 by the trial court to do so on August 19, 2010, which was after the deadline for  
2 Wilson to file a habeas petition.

3 Wilson was required to appear with counsel in the direct appeal. NRAP  
4 46A(b)(1). However, Oronoz never formally withdrew from any of the  
5 proceedings or otherwise alerted Wilson that Oronoz was no longer  
6 representing him. *See*, SCA 46. Although Oronoz failed to inform Wilson the  
7 appeal had been determined and further failed to provide Wilson with the  
8 needed materials in order to file a post-conviction petition, the State believes  
9 that Wilson is without recourse and good cause cannot exist to excuse an  
10 untimely petition.

11 In arguing that attorney abandonment does not apply because Wilson  
12 cited to federal authority in his opening brief, the State overlooks that habeas  
13 corpus is constitutionally based and thus is a federal argument with ties to state  
14 law. *See*, NRS 34.724. Wilson was convicted of a crime and under a sentence of  
15 imprisonment has claimed the sentence imposed is in violation of the  
16 Constitution of the United States or the Nevada Constitution and thus filed a  
17 post-conviction petition for a writ of habeas corpus in order to obtain relief  
18 from the sentence. *Id.* When faced with questions respecting habeas corpus, this  
19 Court correctly looks to the United States Supreme Court for guidance in order  
20 to interpret and apply the law. *See, Hill and Foster.*

1       The procedural deadline in filing for federal and state habeas is similar:  
2 such a petition must be filed within a year after a final determination has been  
3 made in the lower tiered court of competent jurisdiction. 28 U.S.C.A. §  
4 2244(d); 2254; NRS 34.726(1). A federal petition's untimely filing may be  
5 equitably tolled and, similarly, a Nevada petition may be untimely filed on a  
6 showing of "good cause". *See, Gibbs*; NRS 34.726(1)(a)&(b).

7       When the Nevada elements of "good cause" are compared to a federal  
8 analysis of equitable tolling for a tardy habeas petition, the similarities are  
9 parallel to one another. Under Nevada law, Wilson is required to show the delay  
10 was not his fault and the dismissal of the untimely petition would unduly  
11 prejudice him. NRS 34.726(1)(a)&(b). The first element of "good cause"  
12 requires Wilson to demonstrate an impediment external to his defense  
13 prevented him from complying with the state procedural default rules. *Huebler*  
14 at 95. Federal authority requires a petitioner to show he has been pursuing his  
15 rights diligently and some extraordinary circumstance stood in his way and  
16 prevented timely filing. *Gibbs* at 884-885. The elements of the federal  
17 "extraordinary circumstance" and Nevada's "impediment external to the  
18 defense" are quite similar.

19       This case is directly akin to the circumstances in *Gibbs*. While his direct  
20 appeal was pending, Wilson wrote to Oronoz but Oronoz never responded after

1 December of 2008. Before the Order of Affirmance entered in July of 2009,  
2 Wilson wrote to Oronoz requesting a copy of the opening brief, appendix, and  
3 sentencing documents. Before the time had lapsed in which to file his state  
4 petition, Wilson also requested a copy of his file, which Oronoz never provided  
5 until court-ordered to do so after the procedural deadline for a petition had  
6 passed.

7 This particular type of egregious attorney misconduct has been  
8 recognized in federal authority to establish the necessary extraordinary  
9 circumstance justifying equitable tolling. *Gibbs* at 885. The failure of the  
10 attorney to communicate about a key development in his client's case can  
11 constitute attorney abandonment and an extraordinary circumstance. *Id.* at 885-  
12 886. Oronoz failed to communicate to Wilson that the direct appeal had been  
13 denied, failed to send him the Order of Affirmance or Remittitur, and failed to  
14 provide Wilson with the attorney file in order for Wilson to file a timely habeas  
15 petition.

16 It is “absolutely critical” that Wilson had trouble communicating with  
17 Oronoz, which is evidenced by the flurry of pleadings Wilson filed as a pro per  
18 person as soon as he discovered the Order of Affirmance. *Id.* at 886. Similar to  
19 *Gibbs*, if Oronoz had effectively abandoned him, Wilson cannot be charged  
20 with the knowledge that the Nevada Supreme Court denied his appeal. *Id.*

1 Wilson was abandoned by Oronoz because Oronoz failed to inform Wilson that  
2 the appeal had been decided. The Order of Affirmance and Remittitur  
3 implicated Wilson's ability to bring further proceedings. *Id.* Oronoz abandoned  
4 Wilson by not following up on Wilson's appeal after briefing and argument,  
5 with Oronoz's office informing Wilson's mother in July of 2010 that the  
6 decision was still pending. *Id.* Oronoz was generally required to perform  
7 reasonably competent legal work, to communicate with Wilson, to implement  
8 Wilson's reasonable requests, and to keep Wilson informed of key  
9 developments in the case. *Id.* Similar to Gibbs' attorney, Oronoz minimally  
10 failed on all but the first count. *Id.*

11 The State argues that, since Wilson knew in July of 2010 of the Order of  
12 Affirmance, he still had time to file a habeas petition by August 4, 2010. This is  
13 completely disingenuous to habeas corpus law because Wilson could not have  
14 filed just anything; rather, he was required to present sound, credible claims in  
15 order to obtain habeas corpus relief or at least further proceedings. Thus,  
16 Wilson should be entitled to the filing of the tardy petition because it effectively  
17 amounts to equitable tolling and good cause under Nevada law. *See, Gibbs* at  
18 888. Moreover, while it may have technically been possible for Wilson to have  
19 filed the petition by August 4, 2010, Wilson would have likely been unable to

1 do so without a complete attorney file or the necessary time in which to write a  
2 procedurally acceptable petition. *Id.*

3         Wilson was highly diligent in pursuing his own interests in this case,  
4 despite Oronoz's failure to protect Wilson's interests. *Gibbs* at 890. Once  
5 Wilson discovered the "extraordinary circumstance" or "impediment external to  
6 the defense", Wilson took action. *Id.* at 892. Wilson pursued his interests  
7 before, during, and after the entry of the Order of Affirmance and Remittitur  
8 and thus, it would be unduly prejudicial to him if the tardy filing of the First  
9 Petition could not be excused. *Id.* Moreover, Wilson was pursuing his claims  
10 within a reasonable period of time even before the external impediment became  
11 known. *Id.*

12         Summarily, Wilson established good cause below for the late filing of the  
13 Petitions. Wilson was first entitled to effective assistance on direct appeal and,  
14 while it is true there is no such requirement in post-conviction proceedings,  
15 Wilson was entitled to competent representation in post-conviction. *See,*  
16 *Kirksey* at 998; *McKague* at 162; NEV. R. PROF. CONDUCT 1.1. Wilson was not  
17 afforded effective assistance on direct appeal, having been abandoned by  
18 Oronoz, and, even though the First Petition was filed untimely, good cause  
19 existed to excuse the procedural bar due to the abandonment. Additionally,  
20 Oronoz was required to protect Wilson's interests even if he had withdrawn as

1 appellate counsel in the direct appeal. NEV. R. PROF. CONDUCT 1.16(d). Oronoz  
2 did not alert Wilson to his change of address and failed to alert Wilson of the  
3 Order of Affirmance and Remittitur while also failing to provide Wilson with  
4 his attorney file in order for Wilson to pursue habeas corpus relief. Wilson was  
5 required to be represented by Oronoz in the direct appeal; however, Oronoz  
6 abandoned him without notifying Wilson to enable Wilson to work towards  
7 post-conviction proceedings in a timely fashion. NRAP 46A(b)(1); *see*, SCA  
8 46. Oronoz's egregious misconduct in this matter establishes an "extraordinary  
9 circumstance" and "good cause" to excuse the procedural deadline in this case  
10 and therefore, the Dismissal Order should be reversed.

11 **II. DUE TO ORONOSZ'S EGREGIOUS MISCONDUCT, WILSON**  
12 **HAS REBUTTED ANY PREJUDICE TO THE STATE PURSUANT**  
13 **TO NRS 34.800.**

14  
15 This Court has held as follows respecting NRS 34.800 and prejudice to  
16 the State based on the untimely filing of a post-conviction petition:

17 NRS 34.800(1) provides that a court may dismiss a petition if delay in  
18 its filing either prejudices the State "in responding to the petition,  
19 unless the petitioner shows that the petition is based upon grounds of  
20 which he could not have had knowledge by the exercise of reasonable  
21 diligence" before the prejudice arose, or prejudices the State "in its  
22 ability to conduct a retrial of the petitioner, unless the petitioner  
23 demonstrates that a fundamental miscarriage of justice has occurred."  
24 If the pertinent period of delay exceeds five years, as in this case, it  
25 leads to "a rebuttable presumption of prejudice to the State."



1 *State v. Eighth Judicial Dist. Court ex rel. County of Clark*, 121 Nev. 225, 112  
2 P.3d 1070, 1075 (2005); *see also, Emil v. Warden*, -- Nev. --,\*2, 281 P.3d 1170  
3 (2009).

4 In *State v. Powell*, this Court determined prejudice to the State pursuant  
5 to NRS 34.800 did not exist, even though fifteen (15) years had passed from the  
6 original penalty hearing to the determination of habeas corpus. *Ibid.*, 122 Nev.  
7 751, 138 P.3d 453, 458 (2006). *Powell* determined that, “[t]he record indicates  
8 that Powell has not inappropriately delayed this case. The State is therefore not  
9 entitled to relief under NRS 34.800.” *Id.*

10 In this case, any prejudice that could be attributed to the State pursuant to  
11 NRS 34.800 is rebutted by Oronoz’s egregious misconduct and ineffectiveness.  
12 Oronoz was prevented from filing the First Petition until 2011, which is based  
13 in argument *supra*, and that petition was not resolved until 2014 through the  
14 advice of court-appointed post-conviction counsel Brower. Accordingly, the  
15 Supplemental Petition is based upon grounds of which Wilson could not have  
16 had knowledge by the exercise of reasonable diligence due to the circumstances  
17 and procedural history of this case. *State v. Eighth Judicial Dist.* at 1075. Even  
18 though nearly seven (7) years have passed from the entry of the Judgment of  
19 Conviction to date, Wilson has not, on his own, inappropriately delayed this  
20 case. *Powell* at 458. This case has been tied up in appeals, briefing schedules,

1 and argument for several years and thus the State is not entitled to relief at all  
2 under NRS 34.800. Accordingly, the Dismissal Order should be reversed.

3 **CONCLUSION**  
4

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

8 RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of March, 2016.

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1 **CERTIFICATION OF COMPLIANCE**

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

5  
6 This Reply Brief has been prepared in a proportionally spaced typeface  
7 using Microsoft Word 2003 in 14 point Times New Roman font.  
8

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

12  
13 Proportionately spaced, has a typeface of 14 points or more, and contains  
14 5,320 words (7,000 max.).  
15

16 3. Finally, I hereby certify that I have read this Reply Brief, and to the best  
17 of my knowledge, information, and belief, it is not frivolous or  
18 interposed for any improper purpose. I further certify that this brief  
19 complies with all applicable Nevada Rules of Appellate Procedure, in  
20 particular NRAP 28(e)(1), which requires every assertion in the brief  
21 regarding matters in the record to be supported by a reference to the page  
22 and volume number, if any, of the transcript or appendix where the  
23 matter relied on is to be found. I understand that I may be subject to  
24 sanctions in the event that the accompanying brief is not in conformity  
25 with the requirements of the Nevada Rules of Appellate Procedure.  
26

27 DATED this 17<sup>th</sup> day of March, 2016.

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