

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BRIAN KERRY O'KEEFE,)
Appellant,)
 -VS-)
THE STATE OF NEVADA,)
Respondent.)

Case No. 69036

Eighth Judicial Dist. Ct. Case No. C250630

Judge M. Villani, Dept No. XVII

● AFFIDAVIT AND DECLARATION

NOTE: EXHIBITS A, B, C and D Appended
 to Motion and hereby are incorporated
 by reference with all authorities.

FILED

JUL 29 2016

TRACIE K. LINDEMAN
 CLERK OF SUPREME COURT
 DEPUTY CLERK

MOTION FOR N.R.C.P. 60 (b) RELIEF OF
THIS COURT'S AFFIRMANCE FILED JUNE 22 2016
FOR UNFILING PROPER, TIMELY NOTICE OF
APPEAL SEEKING U.S. CERTIORARI OF
AFFIRMANCE OF DIRECT APPEAL 61631
THEREBY ISSUING REMITTITUR PREMATURELY
WHICH STARTED THE COLLATERAL CLOCK
BEFORE THE U.S. SUPREME COURT FINISHED
ANNOUNCING CERTIORARI DENIED 10/15/2013.

Comes Now Brian O'Keefe appellate pro se to move this
 Court for an ORDER reversing their AFFIRMANCE, June 22, 2016,
 concluding O'Keefe's collateral petition as untimely.

This very court unfiled a "NOTICE" and "INTENT" to
 "APPEAL" their own AFFIRMANCE of direct appeal 61631
 to the U.S. Supreme Court with the clerk then prematurely
 filing the direct appeal remittitur. O'Keefe sought timely
 U.S. Certiorari review concluding and final on 10/15/2013.

● (SEE EXHIBIT A, MOTION TO STAY REMITTITUR PENDING APPEAL....)

This motion is based upon all the POINTS AND AUTHORITIES
 within, including exhibits incorporated as prima facie evidence.

ACCORD HANES KERNER, 404 U.S. 519, 520 (1972) Submitted Respectfully,
 Dated July 22, 2016 Pursuant NRS 208.165; 28 USC § 1746 Brian F. O'Keefe #90244

RECEIVED
 JUL 28 2016
 ORIGINAL COURT COPY
 TRACIE K. LINDEMAN
 CLERK OF SUPREME COURT
 DEPUTY CLERK

16-23658

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE 2

II. ISSUE(S) PRESENTED IN THIS APPLICATION . . . 3

III. POINTS AND AUTHORITIES / LEGAL ARGUMENT . . . 3-5

IV. CONCLUSION / PRAYER FOR RELIEF 6

V. CERTIFICATE OF SERVICE 7

● DOCUMENTS APPENDED TO MOTION :

DECLARATION ● AFFIDAVIT OF BRIAN O'KEEFE DATED JULY 24, 2016 ;

(2 pgs.) EXHIBIT A "NOTICE" MOTION TO STAY REMITTITUR ;

(2 pgs.) EXHIBIT B SUPREME COURT OF THE U.S. DOCKET NO. 13-6031 ;

(1 pg.) EXHIBIT C SUPREME COURT OF NEVADA REMITTITUR, 61631 ;

(1 pg.) EXHIBIT D SUPREME COURT OF NEVADA DOCKET pg. 3, 61631 .

//

//

(CASE / OTHER)	TABLE OF AUTHORITIES	(Page No.)
ARTUZ v. Bennett	531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), Fn6.	4
BOWEN v. ROE	188 F.3d 1157, 1159 (9th Cir. 1999)	4
CRAINES v. Eighth Judicial Dist. Ct.	107 Nev. 354, 556-57 (1991)	4
GRIFFITH v. KENTUCKY	479 U.S. 314, 321 n.6 (1987)	5
HAINES v. KERNER	404 U.S. 519, 520 (1972)	COVER(1)
HEALTH & WELFARE TRUST v. HARTFORD FIRE INS. CO.	578 F.3d 1126, 1128	6
HERNANDEZ v. THALER	630 F.3d 420, 425 (2011)	6
MURPHY v. MURPHY	103 Nev. 185, 734 P.2d 738 (1987)	3
PRICE v. DUNN	106 Nev. 100 (1990)	3
SANABRIA v. U.S.	437 U.S. 54, 67 n.21 (1978)	6
TILLEMA v. LONG	253 F.3d 494 (9th Cir. 2001)	4
WRIGHT v. LeGRAND	2014 U.S. Dist. LEXIS 94804 (D. Nev.)	5
F.Rule Civ. P. 5(d)(4)		2, 5
F.R.C.P. 60(b)		3
NRCP 60(b)		1, 3
NRAP 41		2, 3, 4
E.D.C.R. 3.70		4
N.R.S. 34.726(1)		2, 3
N.R.S. 47.140(1)		5
U.S. Supreme Court Rules 10 and 13.1		5
1st US AMENDMENT		5
14th US AMENDMENT		5
28 U.S.C. § 2244(d)(1)(A)		2
NRS 208.165 / 28 U.S.C. § 1746		1, 3, 6, 7

I. STATEMENT OF THE CASE

This Motion for N.R.CivP Rule 60(b)(3) relief is from an AFFIRMANCE ORDER of this Court dated June 22, 2016, which denied appellant's collateral petition ultimately as time-barred pursuant N.R.S. 34.726(1). The AFFIRMANCE ORDER speaks of O'Keefe's collateral petition as being filed correctly on September 15, 2014 as to which was the same date O'Keefe's federal (habeas) collateral action was filed, with the U.S. District Court, Ninth Circuit Court of Appeals and the U.S. Supreme Court all recognizing that the "Doctrine of Finality of Judgments" was by the conclusion of O'Keefe's direct (appeal-6163) review when the U.S. Supreme Court denied certiorari on October 15, 2013.

(SEE EXHIBIT B) (SUPREME COURT OF THE U.S. DOCKET NO. 136031, (2) pages.)
(MAILBOX RULE INVOKED, U.S. Certiorari Petition mailed August 15, 2013.)

Noting that the limitations period is not triggered until the conclusion of direct review and the collateral review clock is the same clock for both state and federal courts.

(• see 28 U.S.C. § 2244(d)(1)(A))

Moreover, the untiling of an application such as a proper timely "NOTICE" of appeal can only be construed as draconian.

• see Ch. Fed. R. Civ. Pro. 5(d)(4) (the rule bars a clerk from refusing to file a paper in defective form, with the 1991 advisory committee notes reflecting that the rule was adopted to eliminate limitations - based dismissals where papers were timely but defective);

see also NRAP 41(3)(b) (SAF OF REMITTUR); Craies v. E.S.D.C., 107 Nev 554, - 556 - 57, 816 P.2d 451 (1991) (Prisoners must be allowed to file appeals.)

II. ISSUE PRESENTED IN THIS APPLICATION

1.) Whether the Court could unfile timely "Notice" to appeal?

2.) Whether the direct-review remittitur could issue starting the collateral clock that differs from certiorari denial?

III. POINTS AND AUTHORITIES / LEGAL ARGUMENT

● NRCP RULE 60(b); FRCP RULE 60(b); FRAUD.

Subsection (b) of this rule granting relief from fraud upon the court allows a party to proceed by motion. see

Murphy v. Murphy, 103 Nev. 185, 734 P.2d 738 (1987). Extrinsic fraud has been held to exist when the unsuccessful party is kept away from the court by such conduct as prevents a real trial upon the ISSUES involved. Price v. Dunn, 106 Nev. 100 (1990).

Here, in the instant case, the Court has prematurely issued the remittitur which started the collateral review clock at 07/24/2013. ● (SEE EXHIBIT C, REMITTITUR - 61631)

Naturally, this would make any state collateral review (habeas) due by 07/24/2014, but this should be 10/16/2014.

However, NRS 34.726 reads:

1) ... a petition that challenges ... the judgment ... must be filed within 1 year after entry of judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction, pursuant the rules ... [NRAP 41 (3)], issues its remittitur.

1 NRAP 41 (3) governs motions of NOTICE and INTENT to appeal.
2 NRAP 41(b) STAY OF REMITTUR includes (3) Application for
3 Certiorari to the United States Supreme Court. See particularly
4 41(b)(3)(A): A party "may" file a motion to stay remittur
5 pending application to the Supreme Court of the U.S. for
6 a Writ of Certiorari. Emphasis, O'Keefe did this.
7 • (See EXHIBIT A, MOTION to stay Remittur pending certiorari...)

8
9 41(b)(3)(B): ... a notice sent from the Clerk of SCOTUS...
10 • (See EXHIBIT D, Supreme Court of Nevada docket sheet page 3).

11
12 41(b)(3)(D): The clerk... shall issue the remittur...
13 when SCOTUS denies petition for certiorari...
14

15 This very Court noted in Craiges v. E.J.D.C., 107 Nev 354, 356-557,
16 816 P2d 451 (1991), that all prisoners must be allowed to file "NOTICES"
17 of appeal. see also Lippis v. Peter, 112 Nev 1008, 921 P.2d 1248, 1249-50 (1996).
18 E.D.C.F. 3.70 also does not bar Notices in proper person.

19
20 According to Tillema v. Long, 253 F.3d 894 (9th Cir. 2001) two points
21 discussed relate exactly somewhat to the instant case.

22 • ONE: The U.S. Supreme Court issued its decision in
23 Artuz v. Bennett, 531 U.S. 4, 121 S.Ct 361, 148 L.Ed 2d 213 (2000), 476.

24 "Properly filed" refers to requirements for filing solely, ...
25 "an application is filed, ... when it is delivered and accepted...

26 • TWO: All parties agree that Tillema's conviction became final...
27 when his time expired to seek U.S. Certiorari. see Bowen v. ROE,
28 188 F.3d 1157, 1159 (9th Cir. 1999).

1 Additional authority issued in Wright Jr. v. LEGRAND, 2014 U.S. Dist -
2 LEXIS 94804, July 10, 2014 Filed District of Nevada, Las Vegas.
3 suggests that a pro se litigant who timely files a viable claim
4 for relief in a procedurally defective manner "must not suffer a
5 limitations-based dismissal. Cf. Fed Rule Civ. Pro 5(d)(4)
6 (the rule bars a clerk from refusing to file a paper in defective
7 form, ...)

8 Most troublesome is the fact that NRS 47.140(1)
9 clearly states the LAWS subject to judicial notice are:

10 1.) The Constitution and Statutes of the United States...

11 The First Amendment allows me to petition the government.
12 The FOURTEENTH AMENDMENT guarantees due process and equal protection.

13 The Supreme Court of the U.S. specifically pursuant
14 Rule 10 and 13.1 allows review by certiorari and
15 allows the decision of a state supreme court, affirmance
16 of direct review 6631, to be reviewed on appeal if sought
17 within 90 days.

18 Only then, if sought, does the
19 "Doctrine of Finality of Judgments" end by the conclusion
20 of direct review, certiorari denial, with the collateral clock,
21 for habeas or p.c.r., to begin. (see 28 USC § 2244(d)(1)(A)).

22 (● see also Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987))

23 The most important fact is now twice, the Ninth
24 Circuit Court of Appeals has claimed my petitions to
25 hold the same colorable federal constitutional claim,
26 namely, a double jeopardy violation which bolstered the
27 right to pursue U.S. Certiorari of this Court's
28 Affirmance of my third trial held in want of jurisdiction.

IV. (#69036) CONCLUSION / PRAYER FOR RELIEF

The fundamental right to appeal is absolutely undisputed! Moreover, my NOTICE to STAY, pending pro se appeal, was clear and lawful. The law says,

"The intent to appeal from a specific ruling can fairly be inferred by probing the NOTICE and the other party was not misled or prejudiced."

(HERNANDEZ v. THALER, 630 F.3d 420, 425 (2011) citing Sandria v. U.S., 437 U.S. 54, 67 n.21 (1978); Health & Welfare Trust v. Hartford Fire Co., 578 F.3d 1126, 1128 (9th Cir. 2009))

Humbly, petitioner prays this Court will nunc pro tunc the remittitur date for direct appeal 61631 to the date that the U.S. Supreme Court denied this Court's AFFIRMANCE, October 15, 2013.

This then would make, naturally, the petition O'Keefe submitted on September 15, 2014 timely as is the date the Federal courts received their petition noting the Federal courts already recognize conclusion of direct review as the date certiorari was denied on October 15, 2013.

Ultimately, remand back to department 17 as a timely collateral action and allows all claims to be argued on the merits rightfully so.

Dated this 23rd day of July 2016.

Pursuant NRS 208.165; 28 USC § 1746

Respectfully Submitted,
Dr. Dr. O'Keefe 90244

● DECLARATION AND
AFFIDAVIT OF Brian K. O'Keefe

STATE OF NEVADA)
) SS:
COUNTY OF Pershing)

S.C.N. case No. 69036
E.D.C. case No. C250630

I, Brian Kerry O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe.

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3.) I mailed a "NOTICE WITH INTENT TO APPEAL" my direct appeal, No. 61631 on July 8, 2013 which was accepted, filed on July 12, 2013;

4.) I mailed a Petition for U.S. Certiorari on August 15, 2013 with the mailbox rule invoked;

5.) U.S. Certiorari, case No. 13-6031, to Nevada's AFFIRMANCE 61631, was filed on August 19, 2013 and docketed August 26, 2013 with the Solicitor General of Nevada Filing waiver on 9/13/2013;

6.) Direct review final by certiorari denial on October 15, 2013;

7.) O'Keefe filed timely collateral review (habeas) on Sept. 15, 2014.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 24th day of July, 2016

Brian K. O'Keefe #90244
Brian K. O'Keefe

EXHIBIT "A"

PROPER PERSON
RECEIVED/ENTERED

BRIAN KERRY O'KEEFE
#90244 / In Propria Personam
Post Office Box 650 [HDSP]
Indian Springs, Nevada 89018

JUL 12 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA
DISTRICT COURT
CLARK COUNTY, NEVADA

RETURNED
UNFILED

JUL 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

BRIAN KERRY O'KEEFE
APPELLANT ~~Plaintiff~~,

vs.

THE STATE OF NEVADA
RESPONDENT

Case No. 61631

Dept. No.

Docket

E.J.D.C. NO. C250630

MOTION TO STAY MANDATE, IN THE S.C.N., PENDING
APPELLATE'S PETITION FOR CERTIORARI TO THE
UNITED STATES SUPREME COURT

COMES NOW, BRIAN KERRY O'KEEFE, herein above respectfully
moves this Honorable Court for a STAY OF MANDATE PENDING MY AUTOMATIC
GUARANTEED RIGHT TO APPEAL BY FILING APPELLANT'S PETITION FOR
CERTIORARI TO THE U.S. SUPREME COURT UNDER THE U.S. 6th, 14th Amendments.

This Motion is made and based upon the accompanying Memorandum of Points and Authorities.

DATED: this 8th day of JULY, 2013.

RECEIVED
JUL 11 2013
ALSO
28 U.S.C. § 2101(c);
RULE 6.1, SUPREME COURT RULES

BY:

Brian Kerry O'Keefe
BRIAN KERRY O'KEEFE #90244
Defendant/In Propria Personam

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

EXHIBIT A (#69036)

App. A-9

B-20522

CERTIFICATE OF SERVICE BY MAILING

I, BRIAN KERRY O'KEEFE hereby certify, pursuant to NRCP 5(b), that on this 8th
 day of JULY, 2013, I mailed a true and correct copy of the foregoing, "MOTION TO
STAY MANDATE IN THE S.C.N., PENDING APPELLATE'S PETITION FOR CERTIORARI"
TO THE UNITED STATES SUPREME COURT"
 by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
 addressed as follows:

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. CARSON ST., SUITE 201
CARSON CITY, NEVADA
89701

CC:FILE

NOTE: REQUEST CLERK TO UTILIZE CM/ECF
 SYSTEM FOR PARTICIPANTS IN THIS CASE
 WHO ARE REGISTERED, TO SERVE UPON.

DATED: this 8th day of JULY, 2013.

Brian Kerry O'Keefe
BRIAN KERRY O'KEEFE # 90244
 /In Propria Personam
 Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

(#69036)

EXHIBIT "B"

SON # 69036



SUPREME COURT OF THE UNITED STATES

Visiting the Court | Touring the Building | Exhibitions

Search: ☒ All Documents ☐ Docket

Advanced Search

Enter Search Text:

Search

Help

[Home](#) | [Search Results](#)

No. 13-0031

Title: Brian Kerry O'Keefe, Petitioner

v.

Nevada

Docketed: August 26, 2013

Lower Ct: Supreme Court of Nevada

Case Nos.: (61631)

Decision Date: April 10, 2013

Rehearing Denied: June 13, 2013

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Aug 19 2013 Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed.  
(Response due September 25, 2013)

Sep 13 2013 Waiver of right of respondent Nevada to respond filed.

Sep 26 2013 DISTRIBUTED for Conference of October 11, 2013.

Oct 15 2013 Petition DENIED.

EXHIBIT "B"

PAA 0022

~~~Name~~~

~~~Address~~~

~~~Phone~~~

EXHIBIT "B"

SEN # 69036

Attorneys for Petitioner:

Brian K. O'Keefe

#90244

P.O. Box 650

Indian Springs, NV 89070-0650

Party name: Brian Kerry O'Keefe

Attorneys for Respondent:

C. Wayne Howle

Counsel of Record

Solicitor General

(775) 684-1261

Office of Attorney General

State of Nevada

100 N. Carson Street

Carson City, NV 89701-4717

WHowle@ag.nv.gov

Party name: Nevada

December 14, 2015 | Version 2014.1

[Home](#) | [Help](#) | [Site Map](#) | [Contact Us](#) | [About Us](#) | [FAQ](#) | [Jobs](#) | [Links](#) | [Building Regulations](#)
[Website Policies and Notices](#) | [Privacy Policy](#) | [USA.GOV](#)

Supreme Court of the United States

EXHIBIT "B"

PPAH 0023

EXHIBIT "C"

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 61631
District Court Case No. C250630

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: July 23, 2013

Tracie Lindeman, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc (without enclosures):

Hon. Michael Villani, District Judge
Clark County District Attorney
Attorney General/Carson City
Bellon & Maningo, Ltd.

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on _____.

District Court Clerk

EXHIBIT "C"

EXHIBIT "D"

Nevada Supreme Court Docket Sheet

Docket: 61631 O'KEEFE (BRIAN) VS. STATE

Page 3

| | | |
|----------|--|----------|
| 07/23/13 | Remittitur Issued/Case Closed | |
| 08/01/13 | Filed Motion To Withdraw as Counsel. | 13-22673 |
| 08/02/13 | Filed Remittitur. Received by District Court Clerk on July 26, 2013. | 13-21571 |
| 08/05/13 | Filed Order. On August 1, 2013, appellant's counsel filed a motion to withdraw as counsel in this appeal. Because appellant's counsel has fulfilled his obligations in this appeal and nothing remains pending in this court, no action will be taken on the motion. | 13-22844 |
| 09/04/13 | Filed Notice from US Supreme Court/Certiorari Filed. A petition for a writ of certiorari was filed 8/19/13 and placed on the docket as Case No. 13-6031. | 13-26049 |

EXHIBIT "D"

Thursday, July 21, 2016 02:08 PM