No. _____

In the Supreme Court of the United States

ROBERT LEGRAND, Warden;
ATTORNEY GENERAL FOR THE STATE OF NEVADA,
Petitioners,

v.

GEORGE W. GIBBS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After Granting a State Habeas Corpus Petitioner 161 Days of Equitable Tolling for the Extraordinary Circumstance of Attorney Abandonment Which Lead to the Expiration of the 1-year Limitation Period, Thereby Restoring the Inmate to His Pre-Abandonment Legal Position, Did the Ninth Circuit Apply a Novel and Unauthorized Standard to Grant a Second Period of Equitable Tolling That Required Neither Extraordinary Circumstances Nor Post-Notice Due Diligence, Creating an Intra-Circuit Split of Authority with *Rudin v. Myles*, 766 F.3d 1161 (9th Cir. 2014), and a Split of Authority Between the Ninth Circuit and Sister Circuits in Decisions That Apply Both Prongs of *Holland v. Florida*, Including the Second, Third, Fifth, Eighth, Tenth and Eleventh Circuits?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Robert LeGrand (Warden) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The circuit court order denying the Warden's petition for rehearing and rehearing en banc (App. 42) is unreported. The opinion of the circuit court reversing the district court (App. 1) is reported at *Gibbs v. LeGrand*, 767 F.3d 879 (9th Cir. 2014). The opinion of the district court is unreported.

JURISDICTION

The Petitioner below filed his petition for writ for habeas corpus under 28 U.S.C. § 2254. The judgment of the court of appeals was entered on September 17, 2014. The order denying the Warden's petition for rehearing was entered on October 23, 2014. The Warden invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2244(d) provides:

> (d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to judgment of a State court. The limitations period shall run from the latest of--
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the

> expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT

In *Holland v. Florida*, 560 U.S. 631 (2010), this court held that equitable tolling may apply to untimely filed federal habeas corpus petitions "in appropriate cases." The standard for equitable tolling has two prongs that the untimely petitioner must demonstrate, extraordinary circumstances and due diligence. In

Maples v. Thomas, ___ U.S. ___, 132 S.Ct. 912 (2012), the Court applied the *Holland* holding to state law procedural defaults under the cause prong of *Coleman v. Thompson*, 501 U.S. 722 (1991). In *Pace v. DiGiglielmo*, 544 U.S. 408 (2005), the Court, in assuming but not holding that equitable tolling applied to habeas corpus cases, suggested that a petitioner has a duty to act diligently both *before and after* he learns of the existence of an impediment or extraordinary circumstance, and the duty at least to file a protective petition to stop the habeas time clock.

In *Gibbs v. LeGrand*, 767 F.3d 879 (9th Cir. 2014), the Ninth Circuit failed to apply this Court's governing law under *Holland*, *Maples* and *Pace* in granting equitable tolling to an untimely federal habeas petition, instead applying a lower standard that omitted the prongs of extraordinary circumstances and due diligence. This decision created both an intra-circuit split of authority within the Ninth Circuit and a split of authority between the Ninth Circuit and Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits in decisions that applied both equitable tolling prongs. The *Gibbs* panel gave the petitioner a windfall in the face of a single extraordinary circumstance when it granted the inmate a *second* period of equitable tolling between December 14, 2010 through January 15, 2011 without requiring the application of either *Holland* prong, after having previously granted to him an earlier period of equitable tolling between July, 2010 and December, 2010, based on the extraordinary circumstance of attorney abandonment that ended on December 14, 2010. During the second period of tolling, there was no extraordinary circumstance in

existence and the circuit panel failed to require Gibbs to demonstrate due diligence.

Gibbs is a Nevada state inmate. On May 3, 2011, he mailed a federal habeas corpus petition from the prison to the federal court in Las Vegas. *Gibbs*, 767 F.3d at 882-83, 884. The state Respondents in the district court moved to dismiss because the petition was untimely under 28 U.S.C. § 2244. *Gibbs*, 767 F.3d at 884. The Nevada Supreme Court had earlier denied the inmate's post-conviction appeal on June 9, 2010, and issued remittitur on July 6, 2010.[1] *Gibbs*, 767 F.3d at 885, n. 4. Gibbs argued in the district court that his post-conviction appeal counsel did not inform him about the appeal, as had happened in *Holland*, so that the untimely filing in federal court was not his fault. App. at 36. The district court granted the state respondents' motion to dismiss relying on *Holland* and *Pace*, finding that Gibbs had not established that his post-conviction counsel was incompetent because Gibbs had established only that he had trouble communicating with counsel and that counsel did not timely inform him of the disposition of the appeal. App. at 38. The district court further found that Gibbs had independent access to the Nevada Supreme Court and was being assisted by his sister, and that Gibbs had not demonstrated that he had been diligent during and after the period of time between the Nevada Supreme Court's issuance of remittitur after the disposition of the post-conviction appeal on July 6, 2010 and Gibbs' actual notice of the disposition of that

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[1] It is not completely clear which date was utilized by the circuit panel in its analysis, although it appears more likely that it utilized the latter date. *See*, *Gibbs*, 767 F.3d at 883, 885, n. 4.

appeal which occurred on December 14, 2010. App. at 38-39. *Gibbs*, 767 F.3d at 883. Judgment was entered. App. at 28-29.

Gibbs appealed, and the Ninth Circuit panel reversed. App. at 1, et seq. It found that as of the date of the disposition of the post-conviction appeal by the Nevada Supreme Court, Gibbs had used up 257 days on the habeas clock, and had 108 days remaining, and that the limitations period would expire on October 22, 2010. *Gibbs*, 767 F.3d at 884-85. Thus, the panel agreed that, absent equitable tolling, Gibbs' federal filing was 193 days late. *Ibid.*

Gibbs' state post-conviction appeal was decided by the Nevada Supreme Court on June 9, 2010, and remittitur issued on July 6, 2010, but counsel did not inform Gibbs of the disposition. This fact was the central argument for equitable tolling. Similar to the facts in *Holland*, Gibbs had suspected a problem with counsel's representation in a case that evidenced earlier such attorney-client problems, *Gibbs*, 767 F.3d at 883-84, 887, and he had written to the Clerk of the Nevada Supreme Court asking for the docket sheet. The docket sheet, showing that the appeal had been disposed of on June 9, 2010, was received by Gibbs on December 14, 2010. *Gibbs*, 767 F.3d at 883. The circuit panel noted that with the receipt of this notice, the extraordinary circumstance of attorney abandonment was "lifted" and thereby ended on that date. *Gibbs*, 767 F.3d at 891; *see*, id., at 885, n. 4. The panel granted Gibbs approximately 161 days of equitable tolling between July 6, 2010 and December 14, 2010 to ameliorate and cure the extraordinary circumstance. *Gibbs*, 767 F.3d at 888. Based on the

finding of abandonment, this action was consonant with *Holland* and *Maples v. Thomas*, ___ U.S. ___, 132 S.Ct. 912 (2012), and was unremarkable. With this grant of tolling, Gibbs had fully recovered his 108 days remaining on statutory time that he originally had on July 6, 2010,[2] and had until approximately April 2, 2011 within which to file his § 2254 petition based on the fully recovered statutory tolling time. In other words, with this grant of tolling, Gibbs was, on December 14, 2010, returned to the position he would have been in on July 6, 2010, had counsel not abandoned him, the extraordinary circumstance having been cured.

Knowing now that the appeal had been rejected and long suspecting a problem in the attorney-client relationship, *Gibbs*, 767 F.3d at 883, Gibbs did not promptly file a federal habeas petition as the petitioner in *Holland* had done when he, too, belatedly learned that his state appeal had been denied. Notably, at this point in time, Gibbs was in possession of the complete set of post-conviction appeal briefing that counsel had sent him. *Gibbs*, 767 F.3d at 889, 891. Further, he had a long history of drafting and filing appellate and post-conviction documents in proper person. *Gibbs*, 767 F.3d at 891. *See*, *Holland*, 560 U.S. at 638-39. And yet, despite having the post-conviction file and being experienced in drafting and filing court documents, Gibbs did not promptly file either a detailed substantive federal habeas petition based on those documents, or a "protective petition", as counseled in *Rudin*, 766 F.3d 1161, 1174 (9th Cir. 2014), citing this

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[2] See footnote 1.

Court's decision in *Pace*, 544 U.S. at 416. On receipt of actual notice of the appeal disposition, rather than file anything in federal court, Gibbs response was to write a letter to counsel who he now knew had abandoned him. *Gibbs*, 767 F.3d at 883-84. After receiving actual notice of the appeal disposition, Gibbs waited approximately five months to file his federal petition.

Despite Gibbs having actual notice of the abandonment and now having been made whole with the grant of 161 days of tolling which allowed him to recover the previously lost 108 days of statutory time, the circuit panel granted Gibbs an unprecedented second period of equitable tolling for 31 days for the time period between December 14, 2010 and January 15, 2011. *Gibbs*, 767 F.3d at 885; 889-92. During this time period, no extraordinary circumstance existed, as it had been lifted and cured. Notably, nothing happened on January 15, 2011 relating to either *Holland* prong. This date appears to have been chosen based on an outcome determinative logic simply because tolling to that date would result in Gibbs' May 3, 2011 habeas petition being timely filed to the day.

The analytical basis for this unprecedented windfall are murky in the decision, but appears to be grounded on three theories. First, in support of decision to grant a second period of tolling, the panel offered several speculative and pretextual theories regarding Gibbs' post-notice diligence, theories that the panel *itself rejected* immediately upon making them, finding, in effect, that it was impossible for Gibbs to timely file a federal petition within his recovered 108 days of

statutory tolling after December 14, 2010. *Gibbs*, 767 F.3d at 888-91.[3]

Second, the panel used the same facts that supported the *first* grant of tolling, abandonment, to justify adding a *second* period of tolling of 31 days, thereby double counting the same facts already ameliorated by the first grant of tolling for a time period when there was no extraordinary circumstance in existence. *Gibbs*, 767 F.3d at 890.

Third, the decision concluded with the remarkable concession that the panel, in fact, did not require Gibbs to show due diligence at all to support the second grant of tolling after December 14, 2010. The circuit panel held that diligence before the impediment was created, and diligence during the course of the impediment (all pre-December 14, 2010 facts) were important parts of the due diligence mix, but that diligence *after* the § 2254 petitioner learned of the extraordinary circumstance was either relatively unimportant or completely irrelevant.

A split of authority occurs when various federal courts consider the same question and yet decide the case differently on an issue of law. *United States v. Comstock*, 560 U.S. 126, 133 (2010). *CSX Transportation, Inc., v. Alabama Dep't of Revenue*, 562

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[3] The panels' comment on page 891 that circuit law did not require a "represented" petitioner to proceed on a dual track with his own petition completely ignores this Court's directive in *Pace* and in *Maples* that at some point the abandoned petitioner has the duty to do so, and it ignores this Court's entire analysis in *Maples* explaining that once abandonment occurs, the relationship ends, and reliance on that former representation also ends.

U.S. 277, ___, 131 S.Ct. 1101, 1106 (2011). In holding that a federal habeas court can grant equitable tolling without requiring the petitioner to demonstrate extraordinary circumstances and due diligence, the Ninth Circuit panel in *Gibbs* failed to apply the *Holland* standard, and instead applied a lower standard for the application of equitable tolling, and thereby created an intra-circuit split of authority within the Ninth Circuit, and a split of authority between the Ninth Circuit and six of its sister circuits that require the application of both extraordinary circumstances and due diligence, including *Rudin v. Myles*, 766 F.3d 1161, 1174 (9th Cir. 2014), and *Harper v. Ercole*, 648 F.3d 132 (2d Cir. 2011), *Sigala v. Bravo*, 656 F.3d 1125, 1128-29 (10th Cir. 2011), *United States v. Thomas*, 713 F.3d 165, 174 (3d Cir. 2013), *Melson v. Comm'r, Alabama Dep't of Corrections*, 713 F.3d 1086, 1089-90 (11th Cir. 2013), *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013), and *Muhammad v. United States*, 735 F.3d 812, 815 (8th Cir. 2013). In each of these cases, the courts strictly applied both prongs of the equitable tolling standard—extraordinary circumstances and due diligence—without any diminution of either of its conjunctive prongs. As analyzed herein, the *Gibbs* decision stands alone in rejecting the application of both of these conjunctive prongs in granting equitable tolling.

REASONS FOR GRANTING THE PETITION

After Granting a State Habeas Corpus Petitioner 161 Days of Equitable Tolling for the Extraordinary Circumstance of Attorney Abandonment Which Lead to the Expiration of the 1-year Limitation Period, Thereby Restoring the Inmate to His Pre-Abandonment Legal Position, the Ninth Circuit Applied a Novel and Unauthorized Standard to Grant a Second Period of Equitable Tolling That Required Neither Extraordinary Circumstances Nor Post-Notice Due Diligence, Creating an Intra-Circuit Split of Authority with *Rudin v. Myles*, 766 F.3d 1161 (9th Cir. 2014), and a Split of Authority Between the Ninth Circuit and Sister Circuits in Decisions That Apply Both Prongs of *Holland v. Florida*, Including the Second, Third, Fifth, Eighth, Tenth and Eleventh Circuits.

The question in this case involves the application of equitable tolling to an untimely federal habeas corpus petition, and the Ninth Circuit Court of Appeals' abuse of that remedy when it applied its own novel standard to grant tolling rather than this Court's governing standard.

The Legal Context.

In *Holland v. Florida*, 560 U.S. 631, 645, 130 S.Ct. 2549, 2560 (2010), this Court held that the statutory limitations period under 28 U.S.C. § 2244(d) for the filing of a federal habeas corpus petition may, "in appropriate cases," be equitably tolled based on extraordinary circumstances. There, the issue was

post-conviction counsel's failure to notify the state inmate-petitioner of the disposition of his post-conviction appeal. *Holland*, 560 U.S. at 638-39. The appeal was decided in November, 2005. Mandate issued on December 1, 2005. Statutory tolling ended on December 13, 2005. Id. The inmate discovered that the appeal had been denied while working in the prison law library on January 18, 2006. Holland, 560 U.S. at 639. Based on counsel's failure to communicate, the inmate, who had just 12 days remaining on his habeas time clock once statutory tolling ended, filed his § 2254 petition on January 19, 2006. The Court held that equitable tolling based on two prongs--extraordinary circumstances and due diligence--was available in § 2254 proceedings "in appropriate cases", *Holland*, 560 U.S. at 645, and remanded the case because more proceedings were necessary. *Holland*, 560 U.S. at 653. Regarding due diligence, this Court noted that the district court's finding that the petitioner in *Holland* had not shown any was incorrect, as he had demonstrated due diligence *before* he received actual notice of the (probable) abandonment by his constant communication with counsel, the courts and the bar, and immediately *after* he received that notice by preparing and filing a habeas petition the very next day. *Holland*, 560 U.S. at 653.

In *Maples v. Thomas*, ___ U.S. ___, 132 S.Ct. 912 (2012), the Court held, relying on *Holland*, that attorney abandonment can, in appropriate cases, constitute cause under *Coleman v. Thompson*, 501 U.S. 722 (1991) to excuse a state law default in a § 2254 case. Under *Holland* and *Maples*, the analysis of extraordinary circumstances and cause to overcome a default based on attorney abandonment are distinct,

but closely intertwined issues. In footnote 7 in *Maples*, the Court noted that the distinction between attorney negligence and attorney abandonment holds in both contexts. *Maples*, 132 S.Ct. at 923. The default in *Maples* was occasioned by out-of-state post-conviction counsel's failure to file a notice of appeal from the denial of relief by the Alabama post-conviction court where Maples' New York attorneys had left the firm and had not noticed the Alabama court or the petitioner of that fact, where local counsel was not functioning as active counsel, and where the notice sent to the New York firm was returned by the mailroom to the court unopened. Local counsel did not act on the notice he received. *Maples*, 132 S.Ct. at 919-921. While attorney negligence is not external to the petitioner, and does not constitute cause to excuse a default, under well-settled principles of agency law, a markedly different situation occurs when attorney abandonment takes place because abandonment severs the attorney-client relationship when the principle-agent relationship ends. *Maples*, 132 S.Ct. at 922-23. After the relationship is severed, the acts of the attorney no longer are attributable to the client. *Id*. Formal steps to terminate the relationship are unnecessary for these agency rules to apply to sever the relationship. *Id*., citing *Porter v. State*, 339 Ark. 15, 16-19, 2 S.W. 3d 73, 74-76 (1999). The Court found that Maples had been abandoned. *Maples*, 132 S.Ct. at 924-27. Like *Holland*, however, the case was remanded for further findings, here on the issue of prejudice. *Maples*, 132 S.Ct. at 927-28.

In *Rudin v. Myles*, 766 F.3d 1161 (9th Cir. 2014) a different Ninth Circuit panel held, one week before *Gibbs,* that the petitioner was entitled to equitable

tolling due to attorney abandonment constituting extraordinary circumstances[4] for the period of time during which the state post-conviction attorney had abandoned her up to the time she actually learned of the abandonment, strictly applying both *Holland* prongs. *Rudin*, 766 F.3d at 1173-74. The court then required the petitioner to demonstrate due diligence for the time period after she had received actual notice of the extraordinary circumstance, and found that the petitioner was not diligent post-notice, noting, *inter alia*, that she could have, but did not, file a protective petition under *Pace*. *Rudin*, 766 F.3d at 1174.[5]

The Attorney Abandonment.

In the case below, *Gibbs v. LeGrand*, 767 F.3d 879 (9th Cir. 2014), the inmate's post-conviction appeal attorney did not consistently communicate with him. After filing the post-conviction appeal in the Nevada Supreme Court in 2009, *Gibbs*, 767 F.3d at 883, inmate-petitioner George Gibbs' state court post-conviction appeal attorney did not communicate with him further, and failed to inform him that the Nevada Supreme Court decided the appeal on June 9, 2010, and issued remittitur on July 6, 2010. *Gibbs*, 767 F.3d at 886-87. Similar to the facts in *Holland*, Gibbs learned of the disposition of the appeal on December 14, 2010, when, after having written to the Clerk's Office of the Nevada Supreme Court, he received the

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[4] The act of abandonment was post-conviction counsel's failure to file anything in the post-conviction proceeding, and let the statute of limitations expire. 766 F.3d at 1172-74.

[5] The petitioner in *Rudin* filed a petition for rehearing on September 24, 2014.

docket sheet informing him of the disposition. *Gibbs*, 767 F.3d at 883. At this time Gibbs was on actual notice that the state appeal was completed.

The Ninth Circuit panel granted *two* periods of equitable tolling to Gibbs despite the existence of only *one* extraordinary circumstance, the second grant occurring after that circumstance had been lifted and fully cured by the first grant of *Holland*-type tolling. This double-counting of the tolling remedy constituted an unwarranted cumulative windfall to the petitioner where the second period of equitable tolling was unrelated to either prong of the *Holland* standard, either extraordinary circumstances or due diligence. Second, the panel did not require the petitioner to demonstrate post-notice due diligence, and thereby declined to apply either extraordinary circumstances or due diligence to the second grant of tolling in violation of *Holland*.

Notice and Cure of the Extraordinary Circumstance.

According to the circuit panel, the notice Gibbs received on December 14 2010 "lifted" the extraordinary circumstance of attorney abandonment. Id. at 891. This finding is consonant with *Holland*. The issue before the circuit court based on these facts was to formulate the appropriate remedy. The panel granted to Gibbs approximately 161 days of equitable tolling based on the abandonment that occurred between July 6, 2010 and December 14, 2010. *Gibbs*, 767 F.3d at 887-88. This grant of tolling was unremarkable and not improper under *Holland*, based on the finding of abandonment.

Because of Gibbs' discovery of the disposition of the appeal and the circuit court's grant of tolling between July 6, 2010 and December 14, 2010, as of the latter date, the extraordinary circumstance of attorney abandonment had ended and it was cured. With this grant of tolling, Gibbs was, on December 14, 2010, returned to the same position he would have been in on July 6, 2010, had counsel not abandoned him. As of July 6, 2010, the panel agreed that Gibbs had 108 days of time remaining on the one-year federal habeas time clock. *Gibbs*, 767 F.3d at 884. As a result of the grant of tolling to December 14, 2010, Gibbs had his 108 days of statutory time fully restored to him as of that date, and he was made whole. *Gibbs*, 767 F.3d at 884; 887-88. The Petitioner Warden herein does not contest the finding of the circuit court that post-conviction appeal counsel had abandoned Gibbs between July 6, 2010 and December 14, 2010, and that he should have been awarded equitable tolling during that period under *Holland*.

Here the panel's tolling analysis should have ended, the only question remaining being whether Gibbs filed his § 2254 petition within 108 days of December 14, 2010. However, at this point in the analysis, the Ninth Circuit panel departed from established law of this Court, the Ninth Circuit, and six sister circuits, by granting to Gibbs an unprecedented and unwarranted *second* period of tolling without applying either of the *Holland* requirements—extraordinary circumstances or due diligence.

The circuit panel's first categorical error was to grant the second period of tolling without requiring Gibbs to demonstrate the existence of an extraordinary

circumstance after December 14, 2010. In fact, there was none. Rather than apply the *Holland* standard to this second period of time, the circuit panel instead applied its own novel standard that forgave Gibbs from demonstrating extraordinary circumstances. Doing so directly contravened *Holland* and *Maples*. Although acknowledging the correct standard in the decision, *Gibbs*, 767 F.3d at 884-85, the panel then departed from governing law and rejected this Court's *Holland* standard, instead applying a reduced standard that required no showing of extraordinary circumstances. It applied that unprecedented standard to make circuit law in a published decision that contravened *Holland*.

In applying its altered standard for equitable tolling for its second grant of tolling *after* the extraordinary circumstance of attorney abandonment had been lifted and cured, the Ninth Circuit panel applied three identifiable rationales.

First, the panel offered speculative hypothetical arguments that the panel *itself* immediately *rejected* regarding its view that Gibbs could not possibly file a federal petition within the 108 days after December 14, 2010 that he had left on the habeas clock. It first speculated that Gibbs "may reasonably have believed that Figler was going to assist him in federal court." *Gibbs*, 767 F.3d at 889. Undoubtedly because no fact or evidence supported this theory, *the panel itself rejected it* in the very next paragraph of the decision. *Id*. The panel then cited circuit authority holding that a petitioner cannot be expected to file a "meaningful" petition on his own when he has a "complete lack of access" to his legal file. *Gibbs*, 767 F.3d at 889. This statement not only contradicts the law of this Court,

but is factually erroneous. First, it ignored the counsel of *Pace* (and the Ninth Circuit's own decision in *Rudin*) that Gibbs should have filed a short protective petition containing one or two claims shortly after December 14, 2010 that would have stopped the federal habeas clock. Second, this conclusion assumed, wrongly, that Gibbs had no access to his legal files. Once again, immediately after offering this rationale, the *panel conceded that it was wrong*—here, Gibbs *had the file* that was provided by post-conviction counsel, as well as his own pro se briefs filed earlier:

> The Warden rejects the lack of files as a relevant consideration, pointing to evidence that Figler sent Gibbs copies of the state post-conviction briefs in May, 2010. But, as Gibbs's federal habeas petition indicates, the claims in the federal habeas petition are not identical to the post-conviction claims Gibbs pursued in state court. For instance, the federal petition includes a due process claim not present in the state post-conviction petition… Moreover, the Warden is mistaken that, '[I]t would have been a ten-minute exercise' for Gibbs to simply slap a new cover sheet on either his own pro se brief from 2006 or Figler's brief to the Nevada Supreme Court 'and submit it as a § 2254 petition.' ***Even if Gibbs had access to these materials and was 'fully informed of the precise legal issues to be raised in a 2254 petition,' as the Warden contends, converting a state court brief to a federal habeas petition is not an automatic undertaking…***

Gibbs, 767 F.3d at 889, 891 (emphasis added). Here, the panel rejects its own admittedly erroneous argument regarding the file immediately upon raising it, and ignored this Court's counsel in *Pace*.[6] It is astounding, indeed, that the panel found that even if Gibbs was fully versed in the "precise" claims to be raised in a federal petition, he did not need to file a federal petition within the remaining 108 days. This Court, having seen thousands of pro se petitions, knows that the panel's description of the supposed sheer impossibility of filing a § 2254 petition within the remaining 108 days post-abandonment-notice, while being in possession of the post-conviction file and his own earlier-drafted appellate briefing, is nothing short of pretextual exaggeration. The panel's argument based on the cited need to "remove references to state case law" from earlier filings before converting them to a § 2254 petition, the need to "alleg[e] exhaustion of

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[6] The panel appears to have believed that Gibbs would require, of necessity, a lengthy, months-long period of time to be able to file any § 2254 petition. The panels' analysis at page 891 regarding the difficulties facing Gibbs in preparing a petition would have been the same in June as they were in December, 2010. Because he had the file, nothing cited by the panel here provides a basis for tolling had counsel not been remiss, and had Gibbs timely learned of the disposition of the appeal in June. When Gibbs received tolling to December 14, 2010, he was returned to his former position and made whole. Because Gibbs had 108 days remaining on the clock when it began to tick again, whether that was in June or in December, 2010, the timeframe, (and the challenges to petition preparation) is exactly the same. Congress decided that 365 days was enough to do the job. After having restored Gibbs to his former position—having made him whole, the panel was without any authority to, in effect, manipulate the statutory 365 day time period under § 2244.

state remedies," and the need to use the preprinted form available in the prison law library, *Gibbs*, 767 F.3d at 891 is legally irrelevant under *Pace* and factually mistaken based on actual, real world habeas corpus practice. In light of Gibbs' having possession of all of the post-conviction appeal beefing for seven months, it was also pretext that the panel found that Gibbs needed almost five months to the file the § 2254 petition after receiving notice of the post-conviction appeal because he may have wanted to add a single due process claim not included in the post-conviction briefing. The inference that Gibbs could not file a *perfect* petition in the remaining 108 days that he had on December 14, 2010 ignores *Pace*. He did not need to since due diligence required only that he act reasonably to file an imperfect one to stop the clock. The briefing he had had for seven months allowed that and much more in a short period of time. In fact, that is exactly what most pro se § 2254 habeas litigants do, and automatic leave to amend is provided for in the district court's standard scheduling orders. Once again rejecting its own proffered argument, the panel noted that such perfect petitions never have to be filed, and even an attorney's filing an imperfect petition does not constitute abandonment:

> These cases stand in stark contrast to *Towery*,[7] where the attorney's alleged negligence did not rise to the level of abandonment or egregious misconduct because he actually represented his client and filed a habeas petition, albeit an

[7] *Towery v. Ryan*, 673 F.3d 933 (9th Cir. 2012).

> imperfect one…although omitting a colorable constitutional claim…

Gibbs, 767 F.3d at 887. If the omission of colorable claims by counsel in an amended petition does not constitute misconduct sufficient to constitute abandonment, it is difficult to understand why Gibbs could not file a short *Pace*-type protective petition that was less than perfect to stop the clock. Here, the panel seems to want it both ways—it recognized that perfect petitions never need to be filed even by counsel, yet it concluded that Gibbs was impeded from a timely filing because he somehow could not file (a wholly unnecessary) perfect petition within 108 days of December 14, 2010. Had he filed an *imperfect* one within thirty days, or even sixty days, of the lifting of the extraordinary circumstances, the clock would have stopped. In light of this Court's counsel in *Pace*, the panel's suggestion is groundless.

Each and every one of the challenges cited by the panel is routinely faced by every federal habeas petitioner nationwide. Having been made whole with the first grant of tolling, none of the panel's cited factor constitutes an extraordinary circumstance allowing it to again lengthen the § 2254 filing period. Because petitioners face various challenges to timely filing in federal court, Congress provided for a 365 day limitation period. Absent actual extraordinary circumstances, they are permitted no additional time.

Further pretextual is the panel's finding that Gibbs could reasonably delay the movement of the case by writing to counsel after the December 14, 2010 notice, and cause further delay by doing nothing until counsel was formally removed from the case as occurred in

February, 2011. *Gibbs*, 767 F.3d at 888-89. These conclusions ignore this Court's holding and analysis in *Maples* that abandonment by the attorney terminates the attorney-client relationship, and the holding in *Holland* that the petitioner must be diligent. The attorney-client relationship here ended in or before June, 2010, and Gibbs had actual knowledge of that fact on December 14, 2010. The severance theory is the entire underpinning *Maples*, yet was disregarded by the *Gibbs* panel when it found that Gibbs could reasonably wait for two months before formally terminating the already-severed relationship through a court motion before taking any action to file anything in federal court, several additional months later, knowing all the while that he had been abandoned. Here, again, the panel disregarded the entire *Maples* analysis which informed Gibbs that the proper course of action was to proceed ahead to protect his rights once he discovered the abandonment. On December 14, 2010, Gibbs had all of the "warning," "suspicion," "reason to believe," or "clue" of the abandonment that created the duty to act to file a petition. At this time Gibbs was no longer represented, the relationship being severed, and he had the affirmative duty promptly to protect his own rights and press ahead *pro se*. *Maples*, 132 S.Ct. at 917; 924-25, 927.

The next pretextual argument raised by the panel related to the rejection of the *Pace* requirement to file a protective petition when, citing *Doe v. Busby*, 661 F.3d 1101, 1015 (9th Cir. 2011), the panel found that Gibbs did not need to proceed "on a dual track" with his own petition, *Gibbs*, 767 F.3d at 891, *see*, 661 F.3d at 1014. According to *Maples*, Gibbs was unrepresented after December, 2010 (and maybe earlier in July, 2010)

and fully aware of the fact of abandonment so that a pro se federal filing would not represent a "dual track" as explained in *Maples*. A fair reading of that decision requires a petitioner who suspects abandonment by counsel to act to protect his own interests. It requires a petitioner to act upon suspicion of abandonment, yet the Gibbs panel required no such action on Gibbs' part. Likewise, under *Pace* Gibbs' duty to act to protect his rights arose on December 14, 2010. He had the very duty the panel simply disregarded. Proceeding on that alternative "track" is exactly what this Court counseled in *Pace*.

Each of the panel's pretextual theories offered to legitimize Gibbs' late federal filing ignored the fact that after December 14, 2010, the extraordinary circumstance had been lifted and cured. On that Date Gibbs was returned to his pre-abandonment position where he had 108 days remaining on the clock. Each of the claimed challenges to a timely filing would have existed on July 6, 2010, so that none, either singly or cumulatively, constitute an extraordinary circumstance.

The second rationale offered by the panel for its unprecedented grant of a second tolling period between December 14, 2010 and January 15, 2011, was its reapplication of the same facts of the attorney abandonment that supported the *first* grant of tolling between July 6, 2010 and December 14, 2010 to support the grant of the *second* tolling period between December 14, 2010 and January 15, 2011. In granting a second period of tolling *after* December 14, 2010, the panel explicitly cited to facts that existed *before* December 14, 2010:

> Figler therefore should have been protecting Gibbs' interests, including preserving his right to seek federal habeas review of his conviction. Not only did Figler *not* protect Gibbs' right to have his conviction reviewed, Figler's failure to notify Gibbs of his change in firms, lack of response to Gibbs's inquiries, and retention of Gibbs's legal files, obstructed Gibbs's ability to timely file his petition.

Gibbs, 767 F.3d at 889. Not only is the reference to retained files factually wrong as shown above, Gibbs having had the post-conviction briefing since May, 2010, *Gibbs*, 767 F.3d at 889, 891, but each one of these facts was used to justify the original grant of tolling prior to December 14, 2010. Here the panel reuses multiple pre-December 14, 2010 facts a second time again to justify the second grant of tolling after December 14, 2010, and after the attorney abandonment circumstance was both lifted and cured. Under this double-dipping theory, a single extraordinary circumstance could be artificially extended after its lifting for an indefinite period of time, thereby allowing the tolling exception to devour the rule of the one-year limitation period, overriding at whim Congressional decision-making on the limitations period. By this process, the panel granted Gibbs a second period of tolling on facts that justified only the first through a process of double-counting previously used facts.

Waiver of the Due Diligence Requirement.

The circuit panel's second categorical error was to grant the second period of tolling without requiring Gibbs to demonstrate post-notice due diligence, diligence after December 14, 2010 by waiving that requirement. In doing so, the panel disregarded governing law of this Court, instead applied its own novel standard that forgave the requirement of due diligence, in violation of *Holland*, *Maples* and *Pace*, and in derogation of *Rudin* and the decisions of numerous sister circuits. As was true with the extraordinary circumstances prong, in eliminating the *Holland* requirements, the panel eliminated any burden on Gibbs to justify tolling.

Holland and *Pace* both explicitly considered post-notice due diligence as a core governing factor in the standard for equitable tolling. Here, the panel's view of this requirement fluctuated between suspicion and hostility. The second period of tolling ran from December 14, 2010 through January 15, 2011. *Gibbs*, 767 F.3d at 888. Remarkably, however, nothing related to either *Holland* prong occurred on January 15, 2011, and the decision to reject the *Holland* standard and to replace it with a less onerous one of the panel's making appears to have been nothing other than the result of an outcome-determinative rationale of the panel where the 161 days of tolling originally provided to Gibbs, in combination with the arbitrary additional 31 days of tolling coincided exactly with the number of days Gibbs needed to timely file his May 3, 2011 petition. Were this not the case, the second grant

of tolling would not have ended precisely on the exact day needed by Gibbs to accomplish a timely filing with not one day to spare.

While again acknowledging the *Holland* standard in its grant of a second period of tolling, the panel evidenced its rejection of the post-notice due diligence requirement at length and its desire to avoid that requirement. Had the panel not intended to reject the due diligence requirement of *Holland*, its entire analysis on the final three pages of the decision would be wholly unnecessary surplusasge. It was, in fact, an analysis singularly dedicated to criticizing, minimizing, and ultimately nominalizing the due diligence requirement. The panels' rejection of the *Holland* standard explains the panel's willingness to engage in a lengthy, serial exercise in offering, and then rejecting, its own numerous pretextual theories claimed to support the second unprecedented grant of tolling discussed above. Nothing else could explain this lengthy self-rejecting exercise. As shown above, the panels' arguments regarding Gibbs' actions after December 14, 2010 evidence a palpable pretextuality *in toto* in their unfounded assumptions of fact, citation to irrelevant case law, and the instant rejection of these theories by the panel itself immediately upon being proffered. No other published circuit decision analyzing and applying *Holland* engages in this circuitous exercise, and this decision stands alone in this regard. The panel's analysis demonstrates that it was antagonistic to a post-abandonment-notice requirement of diligence, and that it applied its own novel and unauthorized standard that substantially lowered Gibbs' burden of proof where diligence was eliminated from the mix.

The panel began its final analysis by diminishing the diligence requirement, and ended up rejecting it at the end of the decision. This Court in *Holland* took pains to note that due diligence is a *sine qua non* for equitable tolling. There, the Court expressly noted the petitioner's due diligence after he received notice of his own appeal by drafting and mailing a § 2254 petition the very next day. *Holland*, 560 U.S. at 639. It may be argued that the filing of that petition within 24 hours after notice of the abandonment constituted more than *due* diligence on the part of the petitioner. Clearly the circuit panel thought so. *Gibbs*, 767 F.3d at 891. But this Court's noting of the *Holland* petitioner's diligence *after* notice to the petitioner of the disposition of the appeal, along with the general holding in that case, impose a duty of due diligence *up to the point the federal petition is filed*, to promptly act once he receives actual notice of the impediment.

This Court in *Pace* went even further. It explicitly noted [8] that the petitioner there did not meet the standard for equitable tolling because he had failed to meet the requirement of post-notice diligence:

> Even if we were to accept petitioner's theory [of a legal trap] he would not be entitled to relief because he has not established the requisite diligence…Had petitioner advanced his claims within a reasonable time of their availability, he

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[8] The *Pace* court noted in footnote 8 on page 418 that the availability of equitable tolling in a 2254 case had not yet been established, and was there assumed. *Holland* made that ruling, and the Court's logic quoted here from *Pace* takes on new resonance.

> would not now be facing any time problem, state or federal. And not only did petitioner sit on his rights for years *before* he filed his PCRA petition, but he also sat on them for five more months *after* his PCRA proceedings became final before deciding to seek relief in federal court…

Pace, 544 U.S. at 419 (emphasis in original). The petitioner in *Pace*, just like Gibbs, waited approximately five months after he knew of the conclusion of the post-conviction appellate proceeding before he filed a § 2254 petition in federal court. This Court said that Pace failed to show post-notice due diligence. *Pace* explicitly examined the due diligence prong of the tolling standard in two separate and distinct time periods: (1) that *before* the alleged extraordinary circumstance arose—there argued to be the "trap" of circuit law that required exhaustion and state law that suggested the petitioner might gain relief, *Pace*, 544 U.S. at 418, and (2) that *after* the lifting of that (supposed) extraordinary circumstance and up to the time of the federal filing. The conclusion that the *Pace* petitioner was not diligent after the lifting of the extraordinary circumstance, *governs* here post-*Holland* where equitable tolling was found to apply to § 2254 cases, and yet the panel expressed palpable hostility to the requirement.

The *Gibbs* panel began its final analysis of the case with language openly expressing suspicion and skepticism of the relevance of post-notice diligence:

> We note some tension between examining a petitioner's diligence *after* the lifting of an obstacle to timely filing, and the stop-clock rule established by an en banc panel of this Court in

> *Socop-Gonzalez*, 272 F.3d at 1195-96. *Socop-Gonzalez* rejected the approach to equitable tolling wherein courts consider whether a claimant should have been expected to file his lawsuit within the amount of time left in the statute of limitations, after an extraordinary circumstance barring filing was lifted. Id. Instead, 'the event that 'tolls' the statute simply stops the clock until the occurrence of a later event that permits the statute to resume running.' Id. at 1195…***Requiring a degree of diligence after an extraordinary circumstance ceases when that degree of diligence would not otherwise have been required risks infringing the statutory right to habeas corpus review; it also 'arguably usurps congressional authority…by substituting [the court's] own subjective view of how much time a plaintiff reasonably needed to file suit…***

Gibbs, 767 F.3d at 892. This cited "tension" between this Court's *Holland* diligence prong and the circuit's *Socop-Gonzalez* decision—a non-§ 2254 case applying a *different* tolling regimen—should have alerted the panel to the conclusion that *Holland* governed the question and that *Socop-Gonzalez* did not.[9] Instead, the result of this "tension" was the panels' decision to force its novel interpretation of a non-§ 2254 case utilizing a different tolling standard to lower the standard that Gibbs was required to show to gain

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[9] *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001).

equitable tolling. By this exercise, the panel rejected *Holland* and *Pace*.

If there be any lingering doubt that the *Gibbs* panel waived the requirement of post-notice diligence, further proof of its rejection can be found at the end of the decision where the panel held that it was not required to apply post-notice diligence at all, and that it would not do so:

> Courts may, however, consider a petitioner's diligence, after an extraordinary circumstance has been lifted, as one factor in a broader diligence assessment…If the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstance began, the link of causation between the extraordinary circumstances and the failure to file is broken…Because it is most relevant to the causation question, we are primarily concerned with whether a claimant was diligent in his efforts to pursue his appeal at the time his efforts were being thwarted. In other words, diligence during the existence of an extraordinary circumstance is the key consideration. Also relevant is whether petitioners pursued their claims within a reasonable period of time before the external impediment came into existence.

Gibbs, 767 F.3d at 892 (internal citations omitted). While recognizing the diligence requirement, the panel marginalized that requirement by holding that a habeas court *may*, but does not have to, consider diligence after the lifting of an impediment, and held

that diligence before and during an impediment to timely filing is relevant and probative, but that diligence occurring after the lifting of the impediment is not. Here the panel relegates post-notice diligence to a subservient, nominalized position that exists in name only. Under this theory, a federal habeas court may accept or reject at will a requirement that "may" either be applied or ignored.

Finally, again relying on *Socop-Gonzalez*, the panel concludes with its belief that it need not consider the factor at all, and that it, in fact, did not:

> Diligence after an extraordinary circumstance is lifted may be illuminating as to overall diligence, but is not alone determinative. This conclusion draws not only on the obvious inference that diligence after the fact is less likely to be probative of the question of whether the extraordinary circumstance caused the late filing, but also from *Socop-Gonzalez's* recognition that court's should not take it upon themselves to decide how much time a claimant needs to file a federal case.

Gibbs, 767 F.3d at 892.

This language evidences the panels' relegation of the post-impediment diligence requirement to an unwanted option, a factor that may be considered or may be ignored at the discretion of a federal habeas court. This willingness to disregard the entire diligence analysis for the entire post-notice time period stands in direct opposition to the *Pace* requirement that post-notice due diligence is neither less relevant or less "probative" than pre-notice diligence, nor wholly

irrelevant as the panel suggests. The irony of the rejection of the *Holland* standard evidenced in this language is that the panel did, in fact "take it upon [it]self[ ] to decide how much time" Gibbs needed to file his federal petition. Congress mandated a 365 day limitation period under 28 U.S.C. § 2244(d), and the panel decided that the remaining 108 days left on the habeas clock as of December 14, 2010 was too short a period of time. It therefore rejected the Holland standard and applied its own novel standard gleaned from a non-§ 2254 case to reduce the governing standard for tolling. Once the attorney abandonment was lifted and cured, Gibbs was required to file a federal petition within 108 days of December 14, 2010. He failed to do so. Throughout its final analysis, the panel moved steadily from discrediting the diligence requirement to delegitimizing its application. The panel was not at liberty to supplant its reduced standard for that of this Court.

CONCLUSION

The *Gibbs* panel granted a second period of equitable tolling after the extraordinary circumstance of attorney abandonment had been fully lifted and fully cured. It did so by applying a diminished standard for the application of equitable tolling that did not require the petitioner to demonstrate extraordinary circumstances and due diligence up to the time of the filing of the federal petition. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-16859

D.C. No. 2:11-cv-00750-KJD-CWH

[Filed September 17, 2014]

GEORGE W. GIBBS, *Petitioner-Appellant*,	)
v.	)
ROBERT LEGRAND, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, *Respondents-Appellees*.	)

OPINION

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, Senior District Judge, Presiding

Argued and Submitted
March 13, 2014—San Francisco, California

Filed September 17, 2014

Before: Sidney R. Thomas, Raymond C. Fisher, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

SUMMARY*

Habeas Corpus

The panel reversed the district court's order dismissing a habeas corpus petition as untimely, and remanded for consideration of the petition on the merits.

The panel held that the petitioner's attorney's misconduct was an extraordinary circumstance which directly caused the petitioner not to learn that the time for him to file his federal habeas petition had begun until the time was over – where counsel did not inform the petitioner that state post-conviction proceedings had ended, even though counsel had pledged to do so, even though the petitioner wrote to his counsel repeatedly for updates, and even though the time in which to file a federal habeas petition was swiftly winding down. The panel also held that the petitioner exercised reasonable diligence in pursuit of his post-conviction rights both before and after learning of the Nevada Supreme Court's denial of the appeal of his state post-conviction petition.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Megan C. Hoffman (argued), Debra A. Bookout, and Ryan Norwood, Assistant Federal Public Defenders, Las Vegas, Nevada, for Petitioner-Appellant.

Victor-Hugo Schulze, II (argued), Senior Deputy Attorney General, Las Vegas, Nevada, for Respondents-Appellees.

OPINION

BERZON, Circuit Judge:

This case arises from a prisoner's vigorous pursuit of post-conviction review in the face of egregious misconduct from his court-appointed lawyers. We focus here on one serious episode of attorney misconduct: The failure, despite prisoner-petitioner George Gibbs's repeated inquiries, to inform Gibbs that the Nevada Supreme Court denied the appeal of his state post-conviction petition. By the time Gibbs learned the fate of his appeal, he had already missed the one-year deadline for filing a federal habeas corpus petition.

We hold that the attorney's conduct amounted to client abandonment, and that the district court erred by not recognizing that such abandonment can, in certain circumstances, constitute an extraordinary circumstance warranting equitable tolling of the federal filing deadline. Accordingly, we reverse the district court's dismissal of Gibbs's petition and remand for consideration of the petition on the merits.

I.

Gibbs was convicted by a Nevada jury for crimes ranging from manufacture of a controlled substance to possession of child pornography and received a life sentence with the possibility of parole. The Nevada Supreme Court affirmed his conviction on June 3, 2003. Two instances of attorney misconduct, not directly relevant here, prevented Gibbs from properly filing his state petition for post-conviction relief ("PCR petition") until 2007.[1] That petition was rejected on the merits, and Gibbs appealed to the Nevada Supreme Court. Dayvid Figler was appointed to represent Gibbs on the PCR appeal.

Relations between Gibbs and Figler quickly soured. In November and December of 2008, Gibbs sent a series of letters to Figler noting his frustration with Figler's failure to communicate with him. Figler did not respond to Gibbs's letters, and Gibbs lodged a complaint against Figler with the Nevada State Bar. The State Bar forwarded the complaint to Figler's law firm, Bunin & Bunin, prompting Figler to reach out to Gibbs. Gibbs, in turn, alerted the State Bar that Figler

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[1] First, Gibbs's attorney on direct appeal refused to hand over Gibbs's files. Then, new counsel agreed to file Gibbs's PCR petition but never did so. Gibbs was not aware that PCR counsel did not file the promised petition until the state court ruled that any further petitions were barred as untimely because the first PCR petition was never filed. Gibbs appealed the state court's untimeliness ruling pro se, arguing that his attorney's misconduct constituted good cause to overcome the state procedural bar. The Nevada Supreme Court agreed and, in November 2006, vacated the state court's judgment and remanded for consideration of Gibbs's petition on the merits.

was now "on board." The Bar dismissed the complaint, informing Gibbs that the "matter has been resolved."

Figler filed Gibbs's state PCR appeal with the Nevada Supreme Court on August 12, 2009. On May 25, 2010, he wrote to Gibbs on the letterhead of a new firm, Bailus, Cook & Kelesis, promising to forward him "*any receipt of notice from [the] Supreme Court*" (emphasis in original) and inviting him to "send written correspondence to the above address if you have any questions or concerns." The letter also stated, erroneously, that "the time for you to file post-conviction relief has not yet started"; in fact, Gibbs was in the midst of pursuing post-conviction relief.

In June 2010, the Nevada Supreme Court affirmed the denial of Gibbs's PCR petition. Despite his pledge to do so, Figler did not forward Gibbs the notice from the Nevada Supreme Court that the petition had been denied. In both June and October of 2010, unaware that the Nevada Supreme Court had issued its decision, Gibbs wrote to Figler expressing his renewed frustration with the attorney's lack of communication and offering suggestions about how to present his case to the Nevada Supreme Court. "I have not heard from you in over 8 months," Gibbs complained. "I never got a response from you, asking you to add the Melendez case to my opening brief. It was a big concern to me that you look it over and respond to your thoughts of all my effort. Figler did not reply.

On December 3, Gibbs wrote to the Nevada Supreme Court requesting the docket sheet and explaining, "I can not find my attorney of record." On December 11, he wrote to the Nevada State Bar in search of Figler's address, phone number and bar

number.[2] Two days later, on December 13, he wrote a third letter to Figler, with suggestions for possible oral argument. The next day, December 14, Gibbs received the docket sheet from the court and discovered that his appeal had been rejected six months earlier.

Gibbs promptly took pen to paper to express his "amazement" at Figler's unethical conduct. "I have done everything in my power to locate you to no avail. The concern [be]came very serious so I wrote the Supreme Court for a Docket Sheet." He asked, "what do I do now[?]" and requested that Figler address his concerns "with simple communication." Figler did not respond. On December 20, Gibbs wrote to the Supreme Court again, requesting copies of its order affirming the denial of his petition and the remittitur.

Finally, on February 7, 2011, Gibbs wrote to Figler terminating him as counsel and requesting that he return Gibbs's documents within five days.[3] "By failing to inform me you have put me in a terrible position," Gibbs wrote. "[U]nskilled in law" and with "little access to a full law library service," he explained that he now faced the "daunting task" of preparing his own federal habeas petition. Three weeks later, on February 28,

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[2] The current record does not indicate whether or when the State Bar provided Gibbs Figler's address, nor whether the December 13 letter was correctly addressed.

[3] The record does not indicate how Gibbs discovered that Figler had again switched law firms — he was now, apparently, at J.S.L. Law Firm. Presumably by this point, the State Bar had provided the address in response to Gibbs's request. In any case, the record suggests that Figler's change of firms, without notice to Gibbs, made it particularly difficult for Gibbs to contact him.

Gibbs's sister acquired a "banker's box" of files from Figler. Gibbs mailed his federal habeas petition on May 3, 2011, approximately sixty-five days after his sister procured his files from Figler.

The Warden moved to dismiss, arguing that Gibbs's petition was untimely. Gibbs countered that his attorney's misconduct entitled him to equitable tolling such that the petition was timely. The district court granted the motion to dismiss, ruling that equitable tolling was not merited because Gibbs had "not demonstrated that his counsel was . . . incompetent," but only that "he had trouble communicating with the attorney and that he was not timely informed that his appeal had been decided." After the district court issued a certificate of appealability on the equitable tolling question, Gibbs brought this appeal.

II.

We review de novo the dismissal of a federal habeas petition as untimely. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "If the facts underlying a claim for equitable tolling are undisputed, the question of whether the statute of limitations should be equitably tolled is also reviewed de novo. Otherwise, findings of fact made by the district court are to be reviewed for clear error." *Id.* (citation omitted) (citing *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999)).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner ordinarily has one year from the date his state conviction becomes final to file a habeas corpus petition in federal court. 28 U.S.C. § 2244(d)(1)(A). By statute, the limitations period is tolled while a properly filed

state post-conviction petition is pending. *Id.* § 2244(d)(2).

Excluding the statutorily tolled period when Gibbs's post-conviction petition was before the Nevada courts, both parties, and the district court, agree that Gibbs accrued 257 untolled days before the Nevada Supreme Court denied his PCR appeal. Absent equitable tolling, then, Gibbs had 108 days to file his federal habeas petition, with the limitations period expiring October 22, 2010. Gibbs did not file his federal petition until May 3, 2011, 193 days late.

AEDPA's one-year statute of limitations is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 649 (2010). A litigant seeking equitable tolling bears the burden of establishing two elements: (1) "'that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

For Gibbs's petition to be timely, he has to establish equitable tolling through at least January 15, 2011.[4] In considering whether he had done so, we address the

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[4] At oral argument, the Warden objected for the first time to the district court's finding that statutory tolling ceased when the Nevada Supreme Court's remittitur issued on July 6, 2010, claiming instead that it ceased when the decision was reached, on June 9, 2010. If equitable tolling is warranted, it is warranted for the time period when, due to Figler's abandonment, Gibbs was unaware that the Nevada Supreme Court had reached its decision. Thus, whether statutory tolling ended on June 9 or July 6 is irrelevant to our disposition of this appeal; either date would be within the equitable tolling period if one is warranted.

two *Holland* requirements for equitable tolling in reverse order, as the facts of this case lend themselves better to that treatment.

A. Extraordinary Circumstances

Courts take a flexible, fact-specific approach to equitable tolling. "[S]pecific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* at 650; *see also Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc).

Consistent with the flexible approach, attorney conduct compromising the filing of a timely federal habeas petition can constitute the requisite "extraordinary circumstance" in some circumstances but not others. *Holland* held that "garden variety claim[s] of excusable neglect" — such as "simple miscalculation" of time limits — do not constitute an extraordinary circumstance. 560 U.S. at 651–52 (internal quotation marks omitted). But attorney misconduct *can* be so egregious as to create an "extraordinary circumstance," justifying equitable tolling. *Id.* at 652. In a concurring opinion, Justice Alito explained his understanding of the logic behind this framework, reasoning that, "the principal rationale for disallowing equitable tolling based on ordinary attorney miscalculation is that the error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control." *Id.* at 657 (Alito, J., concurring).

Maples v. Thomas clarified *Holland*'s distinction between "garden variety" attorney negligence and egregious attorney misconduct, drawing on Justice

Alito's *Holland* concurrence and casting the distinction in terms of agency principles.[5] 132 S. Ct. 912, 923–24 (2012). *Maples* explained that while agency law binds clients, including federal habeas petitioners, to their attorneys' negligence, "a client cannot be charged with the acts or omissions of an attorney who has abandoned him." *Id.* at 924. An attorney's failure to communicate about a key development in his client's case can, therefore, amount to attorney abandonment and thereby constitute an extraordinary circumstance. *Maples*, 132 S. Ct. at 923–24; *see also Towery v. Ryan*, 673 F.3d 933, 942–43 (9th Cir. 2012).

1.

So, contrary to the district court's analysis of the circumstances here, it was absolutely critical that Gibbs "had trouble communicating with [his] attorney" and "was not timely informed that his appeal had been decided": If Gibbs's attorney effectively abandoned him, Gibbs cannot be charged with the knowledge that the Nevada Supreme Court had denied his appeal.

Failure to inform a client that his case has been decided, particularly where that decision implicates the

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[5] *Maples* involved cause for procedural default rather than entitlement to equitable tolling, but the Supreme Court saw "no reason" why the distinction between attorney negligence and attorney abandonment should not hold in both contexts. 132 S. Ct. at 924 n.7. Because we hold that Figler's conduct amounted to abandonment of his client under the standard announced in *Maples*, we do not have occasion to consider whether attorney misconduct which stops short of effective abandonment could, in appropriate instances, constitute an extraordinary circumstance supporting equitable tolling.

client's ability to bring further proceedings *and* the attorney has committed himself to informing his client of such a development, constitutes attorney abandonment. *See Mackey v. Hoffman*, 682 F.3d 1247, 1253 (9th Cir. 2012). Attorneys are generally required to "perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, [and] to keep their clients informed of key developments in their cases." *Holland*, 560 U.S. at 652–53. Gibbs's attorney failed on all but the first count.[6]

Our case law confirms that Figler's behavior in failing to notify Gibbs of the Nevada Supreme Court's decision constituted abandonment, and thereby created extraordinary circumstances sufficient to justify equitable tolling. *Busby*, for example, held that extraordinary circumstances existed where counsel failed to timely file his client's habeas petition despite having promised to do so, even though the petitioner hired him over a year before the AEDPA deadline, paid him $20,000, gave him his files and repeatedly inquired about his case. 661 F.3d at 1012. Likewise, *Spitsyn*

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[6] After reciting these general standards, *Holland* remanded as to whether there were extraordinary circumstances, because the district court had not reached the issue. But *Holland* identified as "serious instances of attorney misconduct" possibly constituting extraordinary circumstances, several factors: that Holland's attorney "failed to file Holland's federal petition on time"; did not "do the research necessary to find out the proper filing date"; "failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case"; and "failed to communicate with his client over a period of years," despite Holland's repeated communications and requests that his lawyer do all of these things. 560 U.S. at 652.

held that an attorney's failure to file a habeas petition at all, despite being hired almost a year before the AEDPA deadline, was sufficiently egregious to constitute extraordinary circumstances, where Spitsyn contacted him three times and filed two complaints with the state bar. 345 F.3d at 798, 801.

Relatedly, we recognized in *Ramirez v. Yates* that, "'a prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter.'" 571 F.3d 993, 997 (9th Cir. 2009) (quoting *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001)). Although that case dealt with a pro se petitioner who should have received notification directly from the court, it is instructive here. If Gibbs had been proceeding pro se, he would have been entitled to notification from the court, and the court's failure to mail him notice of its denial of his PCR petition would have been an extraordinary circumstance justifying equitable relief. "Because [Figler] failed to notify the court of his intention to withdraw, [Gibbs] was deprived of the opportunity to proceed *pro se* and to personally receive docket notifications from the court." *Mackey*, 682 F.3d at 1253. Here, Gibbs's lack of actual notice was occasioned by the breach and abandonment of his attorney, but the result was the same: Gibbs did not know that the federal limitations clock had started ticking. Furthermore, as counsel had expressly promised Gibbs that he would forward him the court's notice of decision, it is as true here as it was in *Ramirez* that the petitioner's "ignorance of the limitations period was caused by circumstances beyond the party's control."

Socop-Gonzalez v. INS, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc).

These cases stand in stark contrast to *Towery*, where the attorney's alleged negligence did not rise to the level of abandonment or egregious misconduct because he actually represented his client and filed a habeas petition, albeit an imperfect one. *See* 673 F.3d at 936. We reasoned that Towery's attorney "diligently pursued habeas relief on Towery's behalf, although omitting a colorable constitutional claim from Towery's amended petition." *Id.* at 942. As the attorney continued as Towery's legal representative, even if his performance was inadequate, his conduct did not constitute abandonment of his client and did not justify the conclusion that extraordinary circumstances existed. *Id.*

In contrast, here, Figler failed to communicate with Gibbs "over a period of years," despite repeated efforts by Gibbs to engage him. *Holland*, 560 U.S. at 652. That Figler briefly reappeared after the Nevada State Bar forwarded him Gibbs's formal complaint and did bring Gibbs's PCR appeal does not excuse his prolonged absence and, most critically, his failure to inform Gibbs when the state PCR proceedings concluded.

Moreover, Figler went out of his way to *guarantee* Gibbs that he would update him about the case: "*Upon any receipt of notice from Supreme Court on your case we will forward it to you by mail*. Please send written correspondence to the above address if you have any questions or concerns." (Emphasis in original). Gibbs had questions and concerns and wrote to Figler several times at the address provided. But Figler did not respond, nor did he alert Gibbs that the Nevada

Supreme Court had denied his appeal. In fact, Figler had moved to a new firm; his failure to provide Gibbs with an updated address hampered Gibbs's ability to communicate with him. Such egregious conduct is not analogous, as the Warden would have it, to the conduct in *Towery*, and is amenable to only one conclusion: Figler was not serving as Gibbs's agent "in any meaningful sense of that word." *Maples*, 132 S. Ct. at 923 (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring)) (internal quotation marks omitted).

The Warden contends that Gibbs "attempts . . . to lower the governing standard" because, overall, Gibbs's attorney was less negligent than Holland's. This argument misconstrues *Holland*. Nothing in that case suggests that the Court intended Holland's attorney's performance to serve as a floor for the extraordinary circumstances prong of equitable tolling. The only guidance the Court gave as to what would not satisfy that prong was that courts should exclude "garden variety claim[s] of excusable neglect" such as a "simple miscalculation." *Holland*, 560 U.S. at 651 (internal quotation marks omitted). That Figler may have acted less egregiously than Holland's counsel does not compel the conclusion that Figler's behavior was not egregious, or that his negligence was "garden variety."

We therefore conclude that Figler's egregious conduct amounted to client abandonment, such that Gibbs is not responsible for the fact that he did not learn of the Nevada Supreme Court's decision until December 14, 2010. *See Rudin v. Myles*, No. 12-15362,

slip op. at 25 (9th Cir. Sept. 10, 2014).[7] We next consider whether Figler's effective abandonment and Gibbs's resulting lack of notice of the Nevada Supreme Court's decision caused Gibbs to miss the federal filing deadline. *See Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013).

2.

By the time Gibbs learned that his state post-conviction proceeding was complete, the federal deadline had passed. Although it was technically possible for Gibbs to write to the Nevada Supreme Court daily to ask about the status of his state PCR petition, he had no obligation or reason to do so, given that he was represented and had, moreover, been specifically promised by his lawyer prompt notice of any decision. "[This court has] granted equitable tolling in circumstances where it would have technically been possible for a prisoner to file a petition, but a prisoner would have likely been unable to do so." *Harris v.*

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[7] We note a striking feature of *Rudin*: the very same attorney who abandoned Gibbs, Dayvid Figler, also abandoned Rudin. *See Rudin*, No. 12-15362, slip op. at 10, 24. The court in *Rudin* found equitable tolling warranted on that basis, just as we do. *Id*. at 25. *Rudin*'s ultimate holding, that even tolling the entire period of Figler's involvement was not sufficient to render the federal habeas petition timely in that case, relied on its conclusion that Rudin was not diligent in pursuing her rights once counsel had been appointed to replace Figler. *See id*. at 27-28. Because Gibbs was diligent during and after Figler's involvement in this case, our analysis is entirely consistent with *Rudin*. Figler's abandonment of both Gibbs and Rudin is deeply troubling, to say the least.

Carter, 515 F.3d 1051, 1054 n.5 (9th Cir. 2008).[8] By failing to notify Gibbs of the Nevada Supreme Court's decision, Figler created a situation in which Gibbs, despite his diligence in tracking down Figler, was extremely unlikely, acting perfectly reasonably, to meet the AEDPA deadline. Our case law requires nothing more to establish that the extraordinary circumstance caused the failure to meet the federal deadline. *See Sossa*, 729 F.3d at 1236; *Harris*, 515 F.3d at 1054 n.5.

Thus, as a direct result of Figler's abandonment, Gibbs did not learn that the state PCR process was over until after the federal statute of limitations expired. This effective abandonment, resulting in lack of actual notice, satisfies the "extraordinary circumstances" prong of equitable tolling at least through December 14, 2010, when Gibbs learned of the Nevada Supreme Court's decision.

To establish that his petition was filed timely, Gibbs must demonstrate that Figler's conduct continued to stand in his way and prevent timely filing for at least

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[8] "After *Holland*, we have continued to rely on our previous equitable tolling cases in which we held that equitable tolling is available only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time and the extraordinary circumstances were the cause of the prisoner's untimeliness." *Sossa*, 729 F.3d at 1229 (alterations, emphasis and internal quotation marks omitted). Consistent with *Holland*, our cases have applied this 'impossibility' standard leniently, rejecting a literal interpretation. *See id*. at 1236; *Harris*, 515 F.3d at 1054 n.5; *Lott v. Mueller*, 304 F.3d 918, 924–25 (9th Cir. 2002); *see also Rudin*, No. 12-15362, slip op. at 23 (applying impossibility standard to a circumstance in which timely filing was not literally impossible).

an additional month, through January 15, 2011. We conclude that he has done so.

First, until Gibbs definitively terminated the attorney-client relationship in February 2011, Gibbs may reasonably have believed that Figler was going to assist him in federal court. Gibbs intended to file a federal habeas petition and relied on Figler for advice as to how to do so despite the timeliness bar he now faced, indicating that Figler may have given Gibbs reason to believe that Figler would represent him in federal proceedings. The same day Gibbs learned of the Nevada Supreme Court's decision, he wrote to Figler, asking "what do I do now[?]" and requesting that Figler "please address [his] concerns with simple communication." It was not until Figler *again* failed to respond that Gibbs sent Figler correspondence officially terminating Figler as his representative and demanding return of his legal files.

Second, even if Gibbs did not reasonably believe that Figler's representation would continue, an attorney who ceases to represent a client has certain continuing obligations to his client, including taking "steps to the extent reasonably practicable to protect a client's interests." Nev. R. Prof. Conduct 1.16(d). Figler therefore should have been protecting Gibbs's interests, including preserving his right to seek federal habeas review of his conviction. Not only did Figler *not* protect Gibbs's right to have his conviction reviewed, Figler's failure to notify Gibbs of his change in firms, lack of response to Gibbs's inquiries, and retention of Gibbs's legal files, obstructed Gibbs's ability to timely file his petition. As to the last factor, "we have previously held that a complete lack of access to a legal file may

constitute an extraordinary circumstance, and that it is 'unrealistic to expect a habeas petitioner to prepare and file a meaningful petition on his own within the limitations period without access to his legal file.'" *Ramirez*, 571 F.3d at 998 (quoting *Espinoza-Matthews v. California*, 432 F.3d 1021, 1027–28 (9th Cir. 2005)). And the Nevada professional rule which required Figler to take "steps to the extent reasonably practicable to protect a client's interests," indicates that one such step may be "surrendering papers to which . . . the client is entitled." Nev. R. Prof. Conduct 1.16(d).

The Warden rejects the lack of files as a relevant consideration, pointing to evidence that Figler sent Gibbs copies of the state post-conviction briefs in May 2010. But, as Gibbs's federal habeas petition indicates, the claims in the federal habeas petition are not identical to the post-conviction claims Gibbs pursued in state court. For instance, the federal petition includes a due process claim not present in the state post-conviction petition.

Moreover, while Gibbs knew that the Nevada Supreme Court had denied his petition, he did not know if they did so in a reasoned decision. Promptly after receiving the docket reflecting that his petition was denied, Gibbs wrote to the Nevada Supreme Court to request copies of its order affirming the denial of his petition. It is not clear from the record when the Court responded by sending a copy of its order to Gibbs. However, until it did so, Gibbs could not realistically file a federal petition. Thus, Figler's abandonment continued to affect Gibbs for this reason, as well.

For these reasons, we conclude that Gibbs has established that Figler's abandonment was an extraordinary circumstance obstructing his ability to file his federal petition through at least January 15, 2011. We next consider whether Gibbs has acted with diligence in attempting to bring this habeas petition to federal court.

B. Diligence

Holland reaffirmed that the standard of diligence required of a petitioner seeking equitable tolling is "reasonable," not "maximum feasible" care. 560 U.S. at 653 (internal quotation marks omitted). "[R]easonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief." *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011). Rather, "[i]t requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Id.*

The district court found that Gibbs was not sufficiently diligent to merit equitable tolling, because Gibbs: (1) "could have, but did not, contact" the Nevada Supreme Court regarding his case between May and December of 2010; (2) "could have, but apparently did not, begin to prepare his federal habeas petition once he received copies of his post-conviction appellate briefs" in May of 2010; (3) unnecessarily "waited two months" after learning that his appeal had been denied before requesting that Figler return his files; (4) "could have, but apparently did not, have his sister pick up his files from the attorney's office" in less than three weeks from his request; and (5) could have filed his habeas petition sooner after learning of the state court decision. We address each reason in turn.

1. As to the first point, Gibbs reasonably relied on his attorney during this period, and so was adequately diligent. *Holland*, *Maples*, *Spitsyn* and *Busby* all illustrate the basic principle that a petitioner's reasonable reliance on an attorney should not prejudice his opportunity to file a habeas petition.[9]

In *Busby*, where the attorney promised — and then failed — to file a habeas petition on his client's behalf, and the client relied on his absent attorney for four years before eventually filing a late petition pro se, this court held the petitioner's reliance reasonable. 661 F.3d at 1009–10, 1015. "Even had [the petitioner] known his attorney had not handled a habeas petition before, his reliance would still have been reasonable," the court held. *Id.* at 1015. "[A] reasonable litigant in [the petitioner's] situation who is represented by experienced counsel, if asked about the status of his or her lawsuit, would be justified in replying, 'My lawyer is handling it.'" *Id.* So, too, here.

After Figler wrote to him in May 2010, Gibbs wrote to Figler three times before contacting the Nevada Supreme Court in December of that year. He had no reason to contact the court earlier. Figler had assured him that he would perform the simple task of forwarding the Nevada Supreme Court's notice upon receipt. And although Figler had abandoned Gibbs for periods before, he had also stepped up to the plate in time to fulfill his legal duties when contacted by the State Bar. Moreover, it was Figler's ethical duty to take "steps to the extent reasonably practicable to protect

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[9] Of course, reliance on an attorney must be "reasonable." *See LaCava v. Kyler*, 398 F.3d 271, 277–78 (3d Cir. 2005).

[Gibbs's] interests" if he had ceased representing him, Nev. R. Prof. Conduct 1.16(d), and, if so, to notify the court so that the court would send its disposition to Gibbs rather than Figler, Nev. R. App. P. 3C(b)(3). *See Mackey*, 682 F.3d at 1253. In light of these circumstances, we have no trouble concluding that Gibbs acted with reasonable diligence in discovering, albeit after the untolled federal filing deadline had run, the Nevada Supreme Court's denial of his petition.

2. The notion that Gibbs should have prepared his own habeas petition between June and December 2010, even while he believed his Nevada Supreme Court case was still pending and many of his federal claims therefore unexhausted, is no stronger. To expect Gibbs to have done so improperly raises the standard from "reasonable" to "maximum feasible" diligence. *Holland*, 560 U.S. at 653 (internal quotation marks and citations omitted).

Moreover, the Warden is mistaken that, "[i]t would have been a ten-minute exercise" for Gibbs to simply slap a new coversheet on either his own pro se brief from 2006 or Figler's brief to the Nevada Supreme Court "and submit it as a § 2254 petition." Even if Gibbs had access to these materials and was "fully informed of the precise legal issues to be raised in a 2254 petition," as the Warden contends, converting a state court brief to a federal habeas petition is not an automatic undertaking. Besides the obvious necessity of removing references to state case law and authority, and the federal requirement of alleging exhaustion of state remedies, it appears that local rules required Gibbs, now a pro se litigant, to file his petition on a form provided by the district court. D. Nev. LSR V.3-1,

available at www.nvd.uscourts.gov (last visited 7/30/2014). In light of the changes of form and substance Gibbs had to make to convert his state pleadings to a proper federal petition, the Warden's argument is inapt.

In sum, *Busby* specifically rejected the suggestion that a "represented petitioner [should] proceed on a dual track with his own petition." 661 F.3d at 1014. The Warden offers no good reason why this case compels a shift in course.

3. Nor, for reasons already discussed, was it unreasonable for Gibbs to wait two months before demanding Figler return his files. Gibbs wrote to Figler the day he learned his PCR appeal had been denied, asking for counsel. Gibbs begged Figler to respond and assist him; when Figler did not do so, Gibbs terminated him and insisted on the return of his files.

4. & 5. Finally, the Warden contends that Gibbs is not entitled to equitable tolling, because it took his sister three weeks to pick up his files from Figler and because, by taking so long to file his federal petition after learning of the Nevada Supreme Court's decision, he failed to act diligently. We disagree with this assessment based on the undisputed facts in the record, and also because of the outsized importance the Warden attributes to Gibbs's actions after the extraordinary circumstance occasioned by Figler's misconduct was lifted.

Holland did stress the petitioner's remarkable diligence in filing his habeas petition the day after he learned that he had missed the AEDPA deadline. 560 U.S. at 639. Similarly, in *Busby*, the court deemed the

petitioner diligent where, after four years of reliance on his attorney and a six-month delay in recovering his files, he submitted his habeas petition in ten days. 661 F.3d at 1015. In *Spitsyn*, the court remanded on the question of diligence because it was not clear why the petitioner waited over 170 days after receiving his files to submit his petition. 345 F.3d at 802. And in *Lott*, the court remanded on the extraordinary circumstances prong, but noted that the petitioner might have been able to file within the statute of limitations despite the obstacle to filing. 304 F.3d at 923. Finally, in *Pace*, the Supreme Court denied the petitioner's request for equitable tolling, in part on the basis of a five-month delay in filing the federal petition *after* the state post-conviction proceedings became final. 544 U.S. at 419.

We note some tension between examining a petitioner's diligence *after* the lifting of an obstacle to timely filing, and the stop-clock rule established by an en banc panel of this Court in *Socop-Gonzalez*, 272 F.3d at 1195–96. *Socop-Gonzalez* rejected the approach to equitable tolling wherein courts consider whether a claimant should have been expected to file his lawsuit within the amount of time left in the statute of limitations, after an extraordinary circumstance barring filing was lifted. *Id.* Instead, "the event that 'tolls' the statute simply *stops the clock* until the occurrence of a later event that permits the statute to resume running." *Id.* at 1195.

The *Socop-Gonzalez* rule is fully in line with AEDPA's aim of encouraging the exhaustion of state remedies without eliminating federal habeas relief. *See Holland*, 560 U.S. at 648–49. Requiring a degree of diligence *after* an extraordinary circumstance ceases

when that degree of diligence would not otherwise have been required risks infringing the statutory right to habeas corpus review; it also "arguably usurps congressional authority . . . by substituting [the court's] own subjective view of how much time a plaintiff reasonably needed to file suit." *Socop-Gonzalez*, 272 F.3d at 1196. *Socop-Gonzalez*'s "stop-clock" holding remains the law in our circuit and applies here. That rule prohibits courts from constraining litigants to a judicially imposed filing window, and warns against imposing additional diligence requirements on recipients of equitable tolling.

Courts may, however, consider a petitioner's diligence, after an extraordinary circumstance has been lifted, as one factor in a broader diligence assessment. *See, e.g.*, *Pace*, 544 U.S. at 419. By requiring those seeking equitable tolling to show they exercised reasonable diligence, we "ensure that the extraordinary circumstances faced by petitioners . . . were the cause of the tardiness of their federal habeas petitions." *Lampert*, 465 F.3d at 973. "'[I]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken.'" *Spitsyn*, 345 F.3d at 802 (alteration in original) (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)).

Because it is most relevant to the causation question, we are *primarily* concerned with whether a claimant was "diligent in his efforts to pursue his appeal *at the time his efforts* were being thwarted." *Lampert*, 465 F.3d at 970–71 (emphasis in original). In

other words, diligence *during* the existence of an extraordinary circumstance is the key consideration. Also relevant is whether petitioners "pursued their claims within a reasonable period of time *before* the external impediment . . . came into existence." *Id.* at 972; *see also Pace*, 544 U.S. at 419.

Diligence *after* an extraordinary circumstance is lifted may be illuminating as to overall diligence, but is not alone determinative. This conclusion draws not only on the obvious inference that diligence after the fact is less likely to be probative of the question of whether the extraordinary circumstance caused the late filing, but also from *Socop-Gonzalez*'s recognition that courts should not take it upon themselves to decide how much time a claimant needs to file a federal case.

Examining the record in view of the weight afforded these considerations, we observe that Gibbs's diligence dates back for a decade. He sought out counsel, appealed pro se the denial of his state PCR petition on timeliness grounds, wrote to his attorneys frequently regarding his appeals, and when necessary, wrote directly to the State Bar and the Nevada Supreme Court. The Warden refers to Gibbs as "hysterical[]" because, at one point in 2008, he sent four letters to Figler over several weeks. Given the circumstances — Gibbs's awareness that he stood to lose his opportunity to challenge a life sentence — this behavior is more aptly characterized as "diligent."

Most importantly, Gibbs was diligent during the time that Figler's abandonment and failure to inform him of a critical development in his case created an extraordinary circumstance keeping him from filing a

timely federal petition. One month after Figler wrote to assure Gibbs all was well with his case, Gibbs wrote to Figler, asking him to supplement the briefing with new case law and to stay in touch. Several months later Gibbs wrote to Figler again, asking why Figler did not respond to his last letter and expressing a desire to discuss strategy for oral argument before the Nevada Supreme Court. Gibbs also reached out to both the State Bar and state Supreme Court.

After he learned of the state court decision, Gibbs immediately wrote to Figler. He promptly asked the Nevada Supreme Court for a copy of the order denying his PCR appeal. After he did not hear back from Figler, he fired him and demanded return of his files. And even without knowing anything about what went on during the three weeks it took Gibbs's sister to retrieve the files from Figler, three weeks is a reasonable time in which to have contacted Figler, ascertained his availability, and arranged to pick up the files.

After terminating Figler and receiving his files, Gibbs filed a pro se habeas petition in sixty-five days' time. In *Espinoza-Matthews*, we granted equitable tolling because the petitioner "had only slightly over a month with his legal file to try to prepare a proper petition." 432 F.3d at 1028. That Gibbs took slightly more than two months to prepare his federal habeas petition — his "single opportunity for federal habeas review of the lawfulness of his imprisonment" — after diligently pursuing his rights for ten years, does not undercut his overall record of diligence. *Holland*, 560 U.S. at 653.

Taken as a whole, the record provides ample evidence of Gibbs's persistent diligence over a period of

ten years, often in the face of utter disregard by those charged with representing him. We therefore conclude that Gibbs acted with reasonable diligence both before and after learning of the Nevada Supreme Court's decision, thereby satisfying the first prong of the *Holland* equitable tolling inquiry.

III.

Gibbs's counsel did not inform him that state post-conviction proceedings had ended, even though counsel had pledged to do so, even though Gibbs wrote to his counsel repeatedly for updates, and even though time in which to file a federal habeas petition was swiftly winding down. As a direct result, Gibbs did not learn that the time for him to file his federal petition had begun until the time was over. We conclude that his attorney's misconduct was an extraordinary circumstance which caused Gibbs's inability to timely file his federal petition. We are also satisfied that Gibbs exercised reasonable diligence in pursuit of his post-conviction rights.

For these reasons, the judgment of the district court is **REVERSED** and the matter **REMANDED** for proceedings not inconsistent with this opinion.

APPENDIX B

AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
_____ DISTRICT OF __NEVADA__

Case Number: 2:11-CV-0750 KJD-CWH

[Filed July 24, 2012]

George W. Gibbs	)
	)
Petitioner	)
	)
V.	)
	)
Robert LeGrand et al	)
	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and decision has been rendered.

☐ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

that Respondents' Motion to Dismiss is GRANTED. Judgment is entered for Respondents and against Petitioner.

July 24, 2012
Date

/s/ Lance S. Wilson
Clerk

/s/ Eileen Sterba
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

2:11-cv-00750-KJD-CWH

[Filed July 23, 2012]

GEORGE W. GIBBS,)
)
Petitioner,)
)
vs.)
)
ROBERT LEGRAND,)
)
Respondent.)

ORDER

This is an action on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is represented by counsel. Before the Court is respondents' Motion to Dismiss the petition (ECF No. 41), petitioner's Opposition (ECF No. 44) and respondents' Reply (ECF No. 46).[1] The matter is fully briefed and ready for review by the Court.

[1] "ECF No. __" denotes the Electronic Court File number.

I. Procedural History

Petitioner and two co-defendants were charged with numerous drug and sex offenses in an Information filed on January 22, 2001. Exhibit 6.[2] The case proceeded to trial on November 19, 2001, and concluded with guilty verdicts on November 20, 2001. Exhibits 20, 22 and 25. Petitioner was sentenced on May 7, 2002. Exhibit 25. He filed an appeal and the conviction was affirmed on June 3, 2003. Exhibit 34. The remittitur issued on July 1, 2003. Exhibit 35.

On April 26, 2004, petitioner was visited in prison by David Schieck, an attorney. Exhibit 65 at G. On or about May 3, 2004, Mr. Schieck sent petitioner a post-conviction petition for writ of habeas corpus for his signature and return to Schieck for filing with the state court. Oppo. Exhibit 1. While petitioner signed the petition on May 14, 2004, and returned it to Mr. Schieck, Schieck apparently failed to file the petition. Exhibit 65, at H, I, and N; Exhibit 84, pp. 3-5.

Petitioner filed a proper person motion for appointment of counsel in the state court on May 20, 2004. Exhibit 39. That motion was denied, as petitioner was informed by Mr. Schieck. Exhibit 41; Exhibit 65 at L. On December 17, 2004, petitioner requested a copy of the petition he believed had been filed on his behalf. Exhibit 65 at M. At that point, petitioner was informed

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[2] The exhibits referenced in this Order were submitted by petitioner in support of his amended petition, found at ECF Nos. 29-40 (referred to in this Order as "Exhibit __") or in support of his Opposition to the Motion to Dismiss, found at ECF No. 45 (referred to in this Order as "Oppo. Exhibit ___").

by the clerk of the court that no petition was on file. *Id*. at N.

Early the next year, petitioner obtained Andrew Wentworth as his attorney (exhibit 42) and on June 17, 2005, Wentworth filed a motion to file supplemental points and authorities in support of the petition for post-conviction relief. Exhibit 43. Because there was no petition actually on file with the state court, this motion was opposed by the State. Exhibit 50. A hearing was conducted by the court on July 7, 2005, wherein the court construed the supplemental petition as the original petition, and found it time-barred. Exhibit 57. The petition was dismissed. *Id.*, *see also* Exhibit 58.

This dismissal was appealed and the Nevada Supreme Court remanded the matter. Exhibits 63 and 77. The state high court found that attorney Schieck's failure to file the post-conviction petition on petitioner's behalf constituted good cause to overcome the one-year limitations procedural bar and directed the trial court to conduct an evidentiary hearing on the matter. *Id.* The required evidentiary hearing was conducted on February 9, 2007, with attorney Schieck testifying that he had, in fact, promised and then failed to file the petition. Exhibit 84. Thereafter, on May 24, 2007, petitioner filed an his amended supplemental briefing in support of the post-conviction petition. Exhibit 88.

On August 14, 2007, the trial court conducted a hearing and then denied the petition. Exhibit 92. A written decision was entered on October 18, 2007. Exhibit 94. This decision was appealed. Exhibit 93. The Nevada Supreme Court affirmed the denial in an order entered on June 9, 2010, with remittitur being issued on July 6, 2010. Exhibits 126 and 127. The instant

federal petition was submitted for mailing on May 3, 2011. ECF No. 1.

II. Discussion

The respondents move to dismiss the petition, arguing it was not filed in compliance with 28 U.S.C. § 2244(d) and that ground one of the petition is not cognizable under the holding of *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037 (1976). Petitioner argues that he is entitled to equitable tolling of the one-year limitation period and that he was not provided with a full and fair opportunity to litigate his Fourth Amendment claim in state court. These arguments are addressed below.

A. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year statute of limitations on the filing of federal habeas corpus petitions. 28 U.S.C. § 2244(d). The one year time limitation runs from the date on which a petitioner's judgment becomes final by conclusion of direct review, or upon the expiration of the time for seeking direct review. 28 U.S.C. § 2244(d)(1)(A). The Ninth Circuit Court of Appeals has held that the "time for seeking direct review" under 28 U.S.C. §2244(d)(1)(A) includes the ninety-day period within which a petitioner who was unsuccessful on direct appeal can file a petition for a writ of certiorari from the United States Supreme Court under Supreme Court Rule 13, whether or not the petitioner actually files such a petition. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). *See also, Gonzalez v. Thaler,* 132 S.Ct. 641, 653 -654 (2012).

Furthermore, a properly filed petition for state post-conviction relief can toll the period of limitations. 28 U.S.C. § 2244(d)(2). The triggering date for the recommencement of the AEDPA limitations period is the Nevada Supreme Court's *issuance* of the remittitur, rather than the date it is received in the district court, or filed in the Nevada Supreme Court. *Duncan v. Walker,* 533 U.S. 167, 178, 121 S.Ct. 2120 (2001); *see Gonzales v. State of Nevada*, 118 Nev. 590, 593, 53 P.3d 901, 902 (2002); *see also Glauner v. State*, 107 Nev. 482, 813 P.2d 1001 (1991).

In calculating the elapse of time against petitioner's one-year limitation period, the Court gives petitioner the benefit of the equitable tolling granted to him by the Nevada Supreme Court and calculates the number of days between the date his conviction became final on September 1, 2003, and the date that he mailed his signed post-conviction petition to his counsel for filing; May 14, 2004. This period of time expired 257 days of his 365. The time was tolled during the pendency of his state post-conviction proceedings, which concluded on the issuance of the remittitur in his appeal of the denial of his petition on July 6, 2010. Petitioner submitted his federal petition for mailing on May 3, 2011, as indicated on the petition, itself.[3] This period of time encompasses a total of 301 days. As a result,

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[3] While the federal petition was not received and filed with this Court until May 11, 2010, petitioner is entitled to the benefit of the mailbox rule set forth in *Houston v. Lack,* 487 U.S. 266, 276,108 S.Ct. 2379, 2385 (1988); which is applicable to both state and federal post-conviction cases. *See Huizar v. Carey,* 273 F.3d 1220, 1223 (9th Cir. 2001). Under *Lack*, the petition is considered filed on the date it is handed to prison officials for mailing to the court.

petitioner expired a total of 558 days between the time his conviction became final and the time he filed his federal petition, a fact undisputed by petitioner.

The petition is untimely. Thus, unless petitioner can demonstrate that he is entitled to equitable tolling of the limitation period, this petition must be dismissed.

B. Equitable Tolling

"When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *see also Calderon v. United States Dist. Court (Kelly)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court*, 163 F.3d 530 (9th Cir. 1998) (en banc) (petitioner entitled to equitable tolling where petitioner's counsel withdrew and left replacement counsel with unusable work product that made timely filing impossible); *Kelly*, 163 F.3d at 541-42 (petitioner entitled to equitable tolling because the district court ordered a stay preventing petitioner's counsel from filing a timely habeas petition and because petitioner was allegedly mentally incompetent). The availability of equitable tolling was recently confirmed by the United States Supreme Court in *Holland v. Florida,* 130 S.Ct. 2549, 2562-63 (2010), when it recognized the basic presumption that " 'equitable principles' have traditionally 'governed' the substantive law of habeas corpus" and declined to construe 28 U.S.C. § 2244(d) to "displace courts' traditional equitable authority absent the 'clearest command.'" *Id.* at 2560 (citations omitted).

However, the Court went on to hold that a petitioner is "entitled to equitable tolling" only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Id.* at 2562 quoting *Pace v. DiGuglielmo,* 544 U.S. 408, 418, 125 S.Ct. 1807 (2010).The Ninth Circuit Court of Appeals has also made clear that equitable tolling is unavailable in most cases. *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). "Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.'" *Miranda*, 292 F.3d at 1066 (*quoting United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.), *cert. denied*, 531 U.S. 878 (2000)).

The petitioner in *Holland*, a death-penalty case, successfully argued that his counsel was incompetent because he failed to file Holland's petition on time and did not even know when the limitations period for doing so expired, despite his client's numerous letters inquiring about the matter and offering the attorney the applicable rules. Holland's counsel further failed to inform his client when his appeal had been decided and refused to communicate with him "over a period of years." *Holland,* 130 S.Ct. at 2564. The Court concluded that the attorney's conduct was "far more than 'garden variety' or 'excusable neglect.'" *Id.*

Petitioner argues that he is entitled to equitable tolling because his counsel, too, was incompetent where he failed to notify petitioner when the Nevada Supreme Court had decided his post-conviction appeal and then failed to return petitioner's files to him in time to

prepare and file a federal habeas corpus petition before the deadline. Petitioner further argues that he was reasonably diligent in pursuing his rights as evidenced by the numerous letters he wrote to his attorney asking for information. *See* Oppo. Exhibits 3-6, 11, 13, 15-17 and 21. He contends that he diligently sought release and return of his files, even sending his sister to pick them up from the attorney's office. *See* Oppo. Exhibit 27. He contends that the fact that he filed his federal petition within sixty-five days of obtaining the files evidences his diligence, arguing he could not have prepared his petition without the files.

Respondents argue to the contrary, noting that petitioner's own letters to his attorney indicate his ability to obtain information about his case through sources other than his attorney, citing to Oppo. Exhibit 9. In that letter, dated May 5, 2009, petitioner indicated that he had seen "the status check from the Supreme Court" and that his sister was and had been assisting him in pursuit of his rights. Respondents also point to Oppo. Exhibit 13 which indicates that petitioner had received copies of all the appellate briefs filed in his post-conviction appeal in May of 2010, and Oppo. Exhibit 17, which indicates petitioner had been in communication with the Nevada Supreme Court in December 2010, to obtain a copy of the docket sheet. Finally, respondents argue that because petitioner had copies of all of the briefs filed in the state court, he could have prepared his federal habeas petition anytime after May of 2010. These facts, they assert, demonstrate that petitioner did not face extraordinary circumstances beyond his control which prevented him from timely filing his federal petition and that he was

not sufficiently diligent in pursuing his rights. The Court agrees.

In *Holland*, the United States Supreme Court determined that the petitioner's counsel had been incompetent in his handling of Holland's case.[4] The Court further held that Holland had been "reasonably diligent" through his letters to the attorney, his repeated contacts with the state courts and court clerks, and because, "the *very day* that Holland discovered that his AEDPA clock had expired" he prepared and promptly filed his own federal petition. *Holland*, 130 S.Ct. at 2565 (emphasis in the original).

Here, petitioner has not demonstrated that his counsel was, in fact, incompetent. Rather, he has merely established that he had trouble communicating with the attorney and that he was not timely informed that his appeal had been decided. Moreover, there is evidence which suggests that petitioner had the regular support and assistance of his sister and that, through her or by other means, he was able to communicate with the Nevada Supreme Court to obtain information about the status of his case. He has not demonstrated that he was diligent in his pursuit of his appellate rights. For example, he could have, but did not, contact the court for information about his case during the six

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[4] It is of note that the *Holland* Court did not find that counsel's incompetence was an extraordinary circumstance sufficient to warrant equitable tolling. While the Court did conclude that the district court was wrong in determining that petitioner had not been diligent, it remanded the matter for the appellate court to more carefully examine the record to determine whether it was sufficient to establish the requisite extraordinary circumstances or would require further proceedings.

months after he received the briefs and the matter was submitted for decision. He could have, but apparently did not, begin to prepare his federal habeas petition once he received copies of his post-conviction appellate briefs. He waited two months after he knew his appeal had been denied before he contacted his attorney to obtain his files. He could have, but apparently did not, have his sister pick up his files from the attorney's office sooner than the three weeks she waited after petitioner requested the files. Finally, petitioner should have, but did not, file his federal petition within a reasonable time of learning of the denial of his state appeal. A wait of six months is not reasonable given the information and resources petitioner had at the time the appeal was decided and neither is the sixty-five days he allowed to pass after receiving his files while purportedly preparing his federal petition.

C. Fourth Amendment Claim

Respondents also argue that ground one of the petition is not cognizable in these federal proceedings under *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976). This issue need not be decided given the Court's determination that the petition is untimely and must be dismissed.

III. Conclusion

Petitioner has not demonstrated that he is entitled to equitable tolling of his statute of limitations. His petition is untimely and must be dismissed pursuant to 29 U.S.C. § 2244(d).

Should petitioner wish to appeal this decision, he must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*

Ornoski, 435 F.3d 946, 950-951 (9th Cir. 2006); s*ee also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. *Id.;* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.*

Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has considered the issues before the Court related to the timeliness of the petition, with respect to whether they satisfy the standard for issuance of a certificate of appealability, and determines that reasonable jurists could find the determination of the issue of equitable tolling "debatable or wrong" in light of the holding of *Holland v. Florida,* 130 S.Ct. 2549 (2010). The Court will therefore grant petitioner a certificate of appealability.

IT IS THEREFORE ORDERED that the Motion to Dismiss (ECF No. 41) is **GRANTED.** The petition is **DISMISSED WITH PREJUDICE** as untimely.

IT IS FURTHER ORDERED that a Certificate of Appealability **IS GRANTED.** The Clerk shall enter judgment accordingly.

DATED: July 23, 2012

/s/Kent J. Dawson
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-16859

D.C. No. 2:11-cv-00750-KJD-CWH
District of Nevada, Las Vegas

[Filed October 24, 2014]

GEORGE W. GIBBS,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
ROBERT LEGRAND, Warden;	)
ATTORNEY GENERAL FOR	)
THE STATE OF NEVADA,	)
	)
Respondents - Appellees.	)
	)

ORDER

Before: THOMAS, FISHER, and BERZON, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing.

Judge Thomas and Judge Berzon have voted to deny the petition for rehearing en banc, and Judge Fisher so recommends. The full court has been advised of the

petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the petition for rehearing en banc is rejected.