No. ______

IN THE

Supreme Court of the United States

BRIAN WILLIAMS, WARDEN, *et al.*,

Petitioners,

v.

REYNALDO AGAVO,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to this Court's Rule 13.5, the Petitioners, Warden Brian Williams[1] and Attorney General for the State of Nevada Aaron Ford, respectfully request a 29-day extension of time, to and including September 29, 2023, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit issued an opinion on April 25, 2023, and denied a petition for rehearing on June 2, 2023. Unless extended, the time within which to file a petition for a writ of certiorari will expire on August 31, 2023. This application has been filed more than 10 days before this date. The jurisdiction of this Court is invoked

[1] In the proceedings below, Warden Calvin Johnson was the named as Respondent Reynaldo Agavo's custodian. Agavo is now incarcerated at High Desert State Prison, and Brian Williams is the Warden at that facility. Accordingly, Warden Williams is automatically substituted for Warden Johnson under Sup. Ct. R. 35(3).

under 29 U.S.C. § 1254(1). A copy of the Ninth Circuit's opinion is attached as Exhibit A, and the order denying rehearing is attached as Exhibit B.

1. This case raises important questions of federal law involving (1) principles of equitable tolling, and (2) application of this Court's jurisprudence on the Confrontation Clause in general and under the limited review imposed by 28 U.S.C. § 2254(d)(1).

2. First, the Ninth Circuit's decision extended its own precedent addressing when attorney misconduct rises to the level of "abandonment" and establishes an extraordinary circumstance for equitable tolling—*Gibbs v. Legrand*, 767 F.3d 879 (9th Cir. 2014). But this extension strained the narrow reasoning of *Gibbs* to the point of failure, highlighting concerns Justice Alito voiced in his concurring opinion in *Holland v. Florida*, 560 U.S. 631, 654 (2010) (Alito, J. concurring), about the need to draw a firm line on when attorney errors are an "extraordinary circumstance." And the Ninth Circuit's extension of *Gibbs* creates a conflict with what the Third, Sixth, and Tenth Circuit have said on the issue. *United States v. Arrowgarp*, 558 Fed. Appx. 824, 825 (10th Cir. 2014) (quoting *Trujillo v. Tapia*, 359 Fed. Appx 952, 955 (10th Cir. 2010) ("Particularly egregious attorney misconduct *may* entitle a petitioner to equitable tolling, 'but an attorney's mere failure to inform a client of the date on which his appeal was denied falls well short of that threshold.'" (emphasis in original)); *Keeling v. Warden*, 573 F.3d 452, 463 (6th Cir. 2012) (citing *Elliott v. Dewitt*, 10 Fed. Appx. 311, 312-13 (6th Cir. 2001)) ("Similarly, this Court has declined to equitably toll the statute of limitations where

a petitioner alleged that the state court and his attorney failed to inform him that a decision had been rendered affirming his conviction."); *LaCava v. Kyler*, 398 F.3d 271, 276 (3d Cir. 2005) ("LaCava fares no better by implying that counsel was derelict in failing to timely notify him of the state court's disposition.").

Agavo concedes that he filed his federal habeas petition late. But the district court and the Ninth Circuit accepted his argument that equitable tolling saves his petition based on "attorney abandonment" because (1) an alleged delay in his attorney informing him of the conclusion of his state habeas appeal, and (2) his attorney's assistant mailed a partially prepared form federal habeas petition to the wrong address. Both points would fail to establish extraordinary circumstances for tolling in the Third, Sixth, and Tenth circuits. And at a minimum, the Ninth Circuit's express reliance on counsel's error in sending a partially completed form petition to the wrong address to support its decision on equitable tolling squarely conflicts with this Court's decision in *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007), which held that attorney mistakes like miscalculating a deadline are not extraordinary circumstances that create a basis for equitable tolling.

3. Second, this case presents a question addressing this Court's decisions applying the Confrontation Clause and what those cases clearly establish for purposes of applying 28 U.S.C. § 2254(d)(1). Here, the Ninth Circuit held that the Nevada courts unreasonably applied clearly established federal law applying the Confrontation Clause because the Nevada courts excluded evidence at trial that Agavo wanted to use to impeach the general credibility of the victim and her mother.

Exhibit A. But the Nevada Supreme Court, citing relevant Nevada case law that cites and applies this Court's confrontation cases, *Kaczmarek v. State*, 91 P.3d 16, 31 (2004), concluded that the trial court did not abuse its discretion in excluding the prior allegations. Citing Nevada's equivalent to Fed. R. Evid. 403—Nev. Rev. Stat. 48.035(1)—the court noted that the prior allegations were never proven to be true or false, which would support concerns that "a large portion of the trial would be consumed with the parties trying to prove or disprove" the prior allegations and provided a proper basis for exclusion "because the 'probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issue or of misleading the jury."

At least eight circuits—including the Ninth Circuit in *Hughes v. Raines*, 641 F.2d 790, 793 (9th Cir. 1981)—have recognized that this Court's decisions applying the Confrontation Clause draw a distinction between cross-examination to attack general credibility and impeachment on bias, motivation to fabricate, and prejudice. *See Abram v. Gerry*, 672 F.3d 45, 51–52 (1st Cir. 2012); *Quinn v. Haynes*, 234 F.3d 837, 845-46 (4th Cir. 2000); *Mills v. Estelle*, 552 F.2d 119, 122–23 (5th Cir. 1977); *Boggs v. Collins*, 226 F.3d 728, 739-41 (6th Cir. 2000); *Cookson v. Schwartz*, 556 F.3d 647, 654-55 (7th Cir. 2009); *United States v. Bartlett*, 856 F.2d 1071, 1088–89 (8th Cir. 1988); *United States v. A.S.*, 939 F.3d 1063, 1074–75 (10th Cir. 2019). With the exception of the *Mills* decision from the Fifth Circuit, each of those cases specifically focused on the same legal issue presented here—exclusion of prior allegations of sexual abuse that the defendant wanted to use for purposes of impeachment on

general credibility when the defendant had not proven those prior allegations to be false. *Id*. And they all concluded—whether on *de novo* review or applying AEDPA deference—that the trial court's exclusion of the evidence did not violate the right to confrontation. *Id*. With this abundance of authority supporting the Nevada Supreme Court's decision—including controlling authority from within the Ninth Circuit—it defies credulity for the Ninth Circuit to conclude that the Nevada Supreme Court's ruling "was so lacking in justification there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

4. Counsel of record in this case has been extremely busy since the Ninth Circuit issued its order denying rehearing. In addition to the day-to-day press of business, counsel spent an extensive amount of time drafting an answer to a 316-page petition for writ of habeas corpus in *McConnell v. Gittere*, No. 3:10-cv-00021-GMN-CSD (D. Nev.); preparing for, and appearing at, oral argument in *Berry v. Olsen*, 21-16943 (9th Cir.); preparing for, and appearing at, argument in *Sullivan, P.E. v. Lincoln County Water District*, No. 84739 (Nev); drafting an answering brief in *Bloodgood-Loper v. Loper*, No. 23-15109 (9th Cir.), and assisting with drafting time-sensitive post-judgment motions and related issues in *Howard v. Cox*, No. 2:17-cv-01002-JAD-BNW (D. Nev.).

In light of the foregoing, Petitioners are seeking a 29-day extension. Counsel for Respondent, Assistant Federal Defender Jeremy C. Baron, indicated Respondent

does not oppose Petitioners' request for additional time to file the petition for writ of certiorari.

Accordingly, Petitioners respectfully request the entry of an order extending their time to file a petition for writ of certiorari by 29 days, to and including Friday, September 29, 2023.

Respectfully submitted this 18th day of August, 2023.

/s/ Jeffrey M. Conner
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EXHIBIT A

EXHIBIT A

NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REYNALDO AGAVO, Petitioner-Appellee, v. CALVIN JOHNSON; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellants.	No. 21-16908 D.C. No. 2:13-cv-01741-JCM-DJA MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted November 17, 2022
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and SESSIONS,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

Respondents Calvin Johnson and the Attorney General for the State of Nevada (collectively "the State") appeal the district court's order conditionally granting Reynaldo Agavo's petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 1291, and affirm the district court's decision for the reasons set forth below.

1. *Equitable Tolling*. Agavo filed his federal habeas corpus petition less than one month late. The district court applied equitable tolling on the basis of attorney abandonment and allowed the petition to proceed. We review the timeliness question de novo. *Flemming v. Matteson*, 26 F.4th 1136, 1138 (9th Cir. 2022). "Unless the facts are undisputed, we review the district court's findings of fact underlying a claim for equitable tolling for clear error." *Rudin v. Myles*, 781 F.3d 1043, 1053 (9th Cir. 2015).

The habeas corpus limitations period is subject to equitable tolling if the petitioner demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal citation omitted). The record supports Agavo's claim that he pursued his rights diligently. Whether alone or through his family, Agavo worked vigilantly to communicate with defense counsel through the course of collateral proceedings. Despite those efforts, counsel failed to notify Agavo promptly when the state court issued a final

decision on post-conviction review. Agavo's counsel's office also made a mailing error, further delaying Agavo's submission, which was only corrected on account of Agavo's family's request. Upon receiving counsel's belated notification, Agavo moved swiftly to submit his federal habeas corpus petition.

Counsel's failures amount to abandonment and thus, constitute an extraordinary circumstance. *See Gibbs v. Legrand*, 767 F.3d 879, 885 (9th Cir. 2014). Although "garden variety claim[s] of excusable neglect" do not constitute extraordinary circumstances, *Holland*, 560 U.S. at 651–52 (internal citation omitted), "a client cannot be charged with the acts or omissions of an attorney who has abandoned him," *Maples v. Thomas*, 565 U.S. 266, 283 (2012). Here, counsel was retained with the prospect of representing Agavo in both state and federal collateral proceedings, yet failed to maintain contact with his client and keep him properly informed. The "[f]ailure to inform a client that his case has been decided, particularly where that decision implicates the client's ability to bring further proceedings *and* the attorney has committed himself to informing his client of such a development, constitutes attorney abandonment." *Gibbs*, 767 F.3d at 886. We therefore agree with the district court's application of equitable tolling.[1]

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[1] The State also challenges the district court's conclusion that Ground 7 of the petition, alleging overpayment of a witness, was timely filed. Because the district court subsequently dismissed Ground 7 as moot, we decline to address that issue.

2. *Habeas Corpus*. The district court found a violation of Agavo's rights under the Confrontation Clause and conditionally granted his petition for habeas corpus under 28 U.S.C. § 2254. We review a ruling on a habeas corpus petition de novo, and any underlying factual findings for clear error. *See Martinez v. Cate*, 903 F.3d 982, 991 (9th Cir. 2018). "The district court's application of [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] to the last reasoned state court decision is a mixed question of law and fact which we review de novo." *Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016).

Pursuant to the AEDPA, we may grant habeas relief on a claim adjudicated on the merits in state court only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1)–(2).

In barring any reference to the California allegations, the Nevada courts unreasonably applied clearly established federal law. The United States Supreme Court has long held that the Confrontation Clause prohibits a trial court from completely barring cross-examination that a jury might reasonably find undermines the credibility of a key witness. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see also Olden v. Kentucky*, 488 U.S. 227, 232 (1988). Because the

California allegations would have reasonably called into question the credibility of both the child and her mother, Agavo had a right under the Confrontation Clause to engage in reasonable cross-examination. *Id.*

The Supreme Court has acknowledged that if a trial court is concerned about matters such as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," the court can "impose reasonable limits." *Van Arsdall*, 475 U.S. at 679. Here, the Nevada Supreme Court speculated that the trial court may have had such concerns. The Nevada Supreme Court did not address the possibility of reasonable limits on the proposed testimony. Given that the trial court also failed to address such considerations, we conclude that the absolute prohibition of cross-examination was "beyond reason." *Olden*, 488 U.S. at 232.

We further find that the Confrontation Clause violation was harmful. *See Fry v. Pliler*, 551 U.S. 112, 121–22 (2007) (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)); *Van Arsdall*, 475 U.S. at 684. The Nevada Supreme Court acknowledged that "this was a very close case." *Agavo v. State*, 281 P.3d 1148 (Nev. 2009); *see Olden*, 488 U.S. at 233 (finding harm where "the State's case against petitioner was far from overwhelming"). The prosecution asserted in its closing argument that the case "boil[ed] down to" a credibility battle between the child and Agavo. The State also portrayed the mother as believing her daughter's

allegations. The proposed cross-examination would undoubtedly have provided the jury a different perspective on both witnesses. *See Van Arsdall*, 475 U.S. at 679. In sum, the outcome of this case depended largely on the credibility of the primary witnesses, and defense counsel's inability to use the California allegations to potentially undermine that credibility had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

AFFIRMED.

EXHIBIT B

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

REYNALDO AGAVO, Petitioner-Appellee, v. CALVIN JOHNSON; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellants.	No. 21-16908 D.C. No. 2:13-cv-01741-JCM-DJA District of Nevada, Las Vegas ORDER

Before: McKEOWN and PAEZ, Circuit Judges, and SESSIONS,* District Judge.

Judges McKeown, Paez, and Sessions voted to deny the petition for rehearing and recommend denying the petition for rehearing en banc.

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, Dkt. No. 46, is **DENIED**.

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* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.