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Case No. 56

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1 jury improperly considered an aggravating factor that was invalid pursuant to
2 McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). See Opening Br. at 37-43.
3 The opening and reply briefs comprised fifteen detailed pages. This Court's assertion
4 that it was "conclusory" is totally unsupported by the record.

5 In its order of Affirmance, this Court completely failed to address Mr.
6 Castillo's argument that he could demonstrate actual innocence under Leslie, 118
7 Nev. at 780, 59 P.3d at 445, due to his invalid McConnell aggravator. It was within
8 the McConnell re-weighting context that Mr. Castillo argued that this Court must
9 consider the mitigation evidence during its consideration of whether Mr. Castillo
10 established that he was actually innocent of the death penalty. See Opening Br. at 36-
11 43. Mr. Castillo argued:

12 The robbery and burglary aggravating circumstance must be struck –
13 they failed to constitutionally narrow those persons subject to the death
14 penalty in Nevada. See Bejarano, 122 Nev. at 1078, 146 P.3d 274;
15 McConnell, 120 Nev. at 1066, 102 P.3d at 622. Stated differently, these
16 aggravating circumstances did not "reasonably justify the imposition of
17 a more severe sentence on [Mr. Castillo] compared to others found
18 guilty of murder." McConnell, 120 Nev. at 1067, 102 P.3d at 623. Mr.
19 Castillo is "actually innocent of the invalid aggravating circumstances."
20 Leslie v. McDaniel, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002); see
21 also State v. Haberstroh, 119 Nev. 173, 179, 69 P.3d 676, 680 (2003).

22 Opening Br. 39. After providing the Leslie/McConnell framework, Mr. Castillo
23 argued that "if this Court chooses to reweigh the aggravating and mitigation
24 circumstances in this case, Mr. Castillo contends it must consider all of the mitigating
25 evidence in the record on appeal." Opening Br. 41-42. Mr. Castillo explained in
26 detail that this mitigation evidence consideration was dictated by State v. Haberstroh,
27 119 Nev. 173, 184, 69 P.3d 676, 683-84 and Leslie, 118 Nev. 773, 59 P.3d 440. Id. at
28 42.

Mr. Castillo expanded upon this argument in his reply to the state's answering
brief. See Reply Br. 16-24. Mr. Castillo asked this Court to correct the district court's
error of ruling that a McConnell error never can constitute a fundamental
miscarriage of justice because only legal innocence is involved. Reply Br. 18. (Citing

1 Leslie and its progeny). Finally, Mr. Castillo argued that the jury would not have
2 found him eligible for the death penalty in light of the mitigating evidence. Reply Br.
3 20 (citing repeated physical and emotional abuse, neglect, violence, abandonment,
4 mental illness, and brain injury). Mr. Castillo concluded his argument by
5 demonstrating that several petitioners with far less compelling facts than Mr.
6 Castillo's had received relief after re-weighing mitigating and aggravating
7 circumstances. Reply Br. 22-24.

8 In its opinion, this Court does not mention McConnell or Leslie, and it has
9 completely overlooked Mr. Castillo's factual and legal arguments regarding his actual
10 innocence of the death penalty claim. For the foregoing reasons, Mr. Castillo
11 respectfully requests that this Court grant his petition for rehearing and issue a writ
12 of habeas corpus vacating his conviction and death sentence.

13
14 Dated this 5th day of August, 2013.

15 Respectfully submitted,

16
17 RENE VALLADARES
18 Federal Public Defender

19 Tiffani D. Hurst
20 Assistant Federal Public Defender
21 danielle_hurst@fd.org

22 Gary A. Taylor
23 Assistant Federal Public Defender
24 gary_taylor@fd.org

25
26 Attorneys for Appellant
27
28

1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this petition for rehearing complies with the formatting
3 requirements of N.R.A.P.(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and
4 the type style requirements of N.R.A.P. 32(a)(6) because. I certify that this document
5 has been prepared in a proportionally spaced typeface using WordPerfect Version
6 X5 in 14 font Garamond type style. I further certify that this document complies
7 with the type volume limitations of N.R.A. P. 32(a)(7) because, excluding the parts
8 of the document exempted by N.R.A.P. 32(a)(7)(c), it is proportionately spaced, has
9 a typeface of 14 points or more and contains 771 [less than 4,667] words.

10 I hereby certify that I have read this petition for rehearing, and to the best of
11 my knowledge, information, and belief, it is not frivolous or interposed for any
12 improper purpose. I certify that this document complies with all applicable Nevada
13 Rules of Appellate Procedure, including N.R.A.P 28(e)(1), which requires every
14 assertion in the document regarding matters in the record to be supported by a
15 reference to the page of the transcript or appendix where the matter relied on is to
16 be found. I understand that I may be subject to sanctions in the event that the
17 accompanying document is not in conformity with the requirements of the Nevada
18 Rules of Appellate Procedure.

19 Dated this 5th day of August, 2013

20 Respectfully submitted,

21 Tiffani D. Hurst
22 Assistant Federal Public Defender
23 danielle_hurst@fd.org

24 Attorney for Petitioner/Appellant
25
26
27
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1 **CERTIFICATE OF ELECTRONIC SERVICE**

2 I hereby certify that this document was filed electronically with the Nevada
3 Supreme Court on the 5th day of August, 2013. Electronic Service of the foregoing
4 **APPELLANT'S PETITION FOR REHEARING** shall be made in accordance
5 with the Master Service List as follows:

6 Steve Owens
7 Clark County District Attorney

8
9 Katrina Manzi,
10 An Employee of the Federal Public Defender