

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3
4 SAMUEL HOWARD,

5 Appellant,

6 v.

7 THE STATE OF NEVADA,

8 Respondent.

) Case No. 57469

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10 **RESPONDENT'S ANSWERING BRIEF**

11 **Appeal From Order Denying Fourth Petition for**
12 **Writ of Habeas Corpus (Post-Conviction)**
13 **Eighth Judicial District Court, Clark County**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE(S)..... 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 11

ARGUMENT..... 17

 I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT
DISMISSED APPELLANT’S FOURTH PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION) 17

 II. THE DISTRICT COURT PROPERLY DECLINED TO REACH THE
MERITS OF HOWARD’S PROCEDURALLY-BARRED CLAIMS 24

 III. DEFENDANT FAILS TO DEMONSTRATE ACTUAL INNOCENCE TO
EXCUSE THE DELAY IN BRINGING THESE CLAIMS 27

 IV. THE DISTRICT COURT PROPERLY DECLINED TO CONSIDER THE
NEW MITIGATION EVIDENCE PRESENTED IN SUPPORT OF HOWARD’S
ACTUAL INNOCENCE CLAIM 34

CONCLUSION..... 36

CERTIFICATE OF COMPLIANCE..... 37

CERTIFICATE OF SERVICE 38

TABLE OF AUTHORITIES

Page Number:

Cases

<u>Bejarano v. State,</u> 122 Nev. 1066, 146 P.3d 265 (2006).....	30
<u>Bousley v. State,</u> 523 U.S. 614, 1611, 118 S.Ct. 1604, 1611 (1998).....	28
<u>Bousley v. United States,</u> 523 U.S. 614, 623 (1998).....	23
<u>Brecht v. Abrahamson,</u> 507 US 619, 637, 113 S.Ct. 1710 (1993).....	27
<u>Byford v. State,</u> 116 Nev. 215, 994 P.2d 700 (2000).....	26, 27
<u>California v. Roy,</u> 519 US 2, 117 S.Ct. 337 (1996).....	27
<u>Clem v. State,</u> 119 Nev. 615, 621, 81 P.3d 521, 526 (2003).....	23
<u>Colley v. State,</u> 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).....	23
<u>Crump,</u> 113 Nev. at 295, 934 P.2d at 247	23
<u>Ford v. Warden,</u> 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).....	22
<u>Francis v. Franklin,</u> 471, U.S. 307, 326, 105 S.Ct. 1965 (1985).....	26
<u>Franklin v. State,</u> 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).....	21
<u>Fry v. Pliler,</u> 127 S.Ct. 2321 (2007).....	27
<u>Garner v. State,</u> 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000).....	26
<u>Gonzales v. State,</u> 118 Nev. 590, 53 P.3d 901 (2002).....	19, 23
<u>Hall v. State,</u> 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).....	24

1	<u>Harris v. Warden, Southern Desert Correctional Ctr.</u> , 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).....	23
2	<u>Hathaway v. State</u> , 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).....	23, 30
3	<u>Herrera v. Collins</u> , 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993).....	28
4	<u>Hogan v. Warden</u> , 109 Nev. 952, 860 P.2d 710, (1993).....	22, 23
5	<u>House v. Bell</u> , 547 U.S. 518, 126 S.Ct. 2064 (2006).....	36
6	<u>Howard v. State</u> , 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).....	4, 6, 25
7	<u>Kazalyn</u>	26, 27
8	<u>Leonard v. State</u> , 117 Nev. 53, 75, 17 P.3d 397, 411 (2001).....	26
9	<u>Leslie v. State</u> , 118 Nev. 773, 59 P.3d 440 (2002).....	30
10	<u>Leslie v. Warden</u> , 118 Nev. at 783, 59 P.3d at 440.....	31, 33, 34, 35, 36
11	<u>Lozada v. State</u>	22, 23
12	<u>McClesky v. Zant</u> , 499 U.S. 467, 497-498 (1991)	22
13	<u>McConnell v. State</u> , 120 Nev. 1043, 102 P.3d 606 (2004).....	29, 30, 31, 34, 35
14	<u>McNelson v. State</u> , 115 Nev. 396, 415, 990 P.2d 1263, 1275 (2000).....	24
15	<u>Meadows v. Delo</u> , 99 F.3d 280, 283 (8 th Cir. 1996)	28
16	<u>Murray v. Carrier</u> , 477 U.S. 478 (1986).....	23
17	<u>Nika v. State</u> , 124 Nev. Adv. Op. 103, 198 P.3d 839 (2008)	27
18	<u>Passanisi</u> , 105 Nev. at 63, 769 P.2d at 72.....	23
19	<u>Pellegrini v State</u> , 24 P.3d 519, 529 (2001).....	19, 23, 24, 29, 33, 35

1	<u>Pertgen v. State,</u>	
	110 Nev. 554, 557-58, 875 P.2d 361, 363 (1994).....	24
2	<u>Phelps,</u>	
3	104 Nev. at 656, 764 P.2d at 1303.....	22, 23
4	<u>Polk v. Sandoval,</u>	
	503 F.3d 903, 911 (9th Cir. 2007)	11, 26, 27
5	<u>Powell v. State,</u>	
6	108 Nev. 700, 838 P.2d 921 (1992).....	24
7	<u>Rippo v. State,</u>	
	122 Nev. 1086, 1093, 146 P.3d 279, 284 (2006).....	31
8	<u>Sandstrom v. Montana,</u>	
9	442 U.S. 510, 521 99 S.Ct. 2450 (1979).....	26
10	<u>Sawyer v. Whitely,</u>	
	505 U.S. 333, 112 S.Ct. 2514 (1992).....	24, 28, 29, 33, 34, 35
11	<u>Schulp v. Delo,</u>	
12	513 U.S. 298, 115 S.Ct. 851 (1995).....	24, 29, 36
13	<u>State v. Eighth Judicial District Court,</u>	
	121 Nev. 225, 112 P.3d 1070, 1074 (2005).....	18
14	<u>State v. Haberstroh,</u>	
15	119 Nev. 173, 69 P.3d 675 (2003).....	36
16	<u>State v. Powell,</u>	
	122 Nev. 751, 138 P.3d 453 (2006).....	24
17	<u>Winship,</u>	
18	397 U.S. 358, 364, 90 S.Ct. 1068 (1970).....	26
19	<u>Statutes</u>	
20	NRS 34.726.....	9, 10, 18, 19, 22, 23, 25, 26, 29, 30, 34
21	NRS 34.800.....	9, 10, 18, 20, 22, 25, 26, 29
22	NRS 34.800(1)(a).....	20
23	NRS 34.800(2).....	20
24	NRS 34.810.....	9, 10, 18, 20, 21, 22, 29, 34
25	NRS 34.810(1)(b)	21, 25, 26
26	NRS 34.810(2).....	21, 25, 26
27	NRS 34.810(3).....	22

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Other Authorities

SCR 250..... 34

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- 2
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) Case No. 57469

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1. Whether the district court properly dismissed Appellant's Fourth State Petition as procedurally barred.
2. Whether the district court properly declined to reach the merits of Howard's procedurally-barred claims.
3. Whether Howard proved actual innocence sufficient to excuse the procedural bars.
4. Whether the district court erred in failing to consider the new mitigation evidence in ruling on Howard's actual innocence claims.

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On May 21, 1981 defendant Samuel Howard (“Howard”) was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. I AA 1-3.¹ With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.

Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office. On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public

¹ “AA” refers to Appellant’s Appendix.

1 defender to Howard's case. Howard's counsel requested a one week continuance to consult with
2 Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial.
3 After discussion, the district court accepted a plea of not guilty and set a trial date of January 6,
4 1983. I AA 4-9. Howard filed a motion in late December asking for his counsel to be removed and
5 substitute counsel appointed. I AA 14-17. Counsel filed a response addressing issues raised in the
6 motion. After a hearing, the district court determined there were no grounds for removing the Clark
7 County Public Defender's Office. I AA 11-13.

8 A Motion for a Psychiatric Expert was filed. At a hearing, the district court inquired if this
9 was for competency and Howard's counsel indicated it was not, but it was to help evaluate
10 Howard's mental status at the time of the events. The district court granted the motion and
11 appointed Dr. O'Gorman to assist the defense. I AA 18-33.

12 At a status check on January 4, 1983, defense counsel indicated the defense could not be
13 ready for the January 10th trial date due to the need to conduct additional investigation and
14 discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard
15 objected to any continuance with knowledge that his attorneys could not complete the investigations
16 by that date. Given Howard's objections, the district court stated the trial would go forward as
17 scheduled. I AA 39-42.

18 On the day of trial, defense counsel moved to withdraw, stating that Mr. Jackson's conflict
19 created mistrust in Howard and he therefore refused to cooperate. This motion was denied.
20 Defense counsel then moved for a continuance as they did not feel comfortable proceeding to trial in
21 this case, given the issues involved, with only six weeks to prepare. After extensive argument and a
22 recess so that counsel could discuss the issue with Howard, the district court granted the continuance
23 over Howard's objections.

24 The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The
25 jury returned a verdict of guilty on all three counts. VI AA 1344-46. The penalty phase was set to
26 begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a
27 scheduling problem. Because the district judge was on vacation, someone referred the juror to the
28 District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved

1 for a mistrial or elimination of the death penalty as a sentencing option based upon this contact.
2 After conducting an evidentiary hearing, the district court denied Howard's motions. Defense
3 counsel made an oral motion to withdraw indicating they had irreconcilable differences with
4 Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses
5 in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard
6 also instructed them not to argue mitigation and they would not follow that directive, but would
7 argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not
8 tell them the substance of his testimony. Finally counsel indicated they had attempted to get military
9 and mental health records but were unsuccessful because the agencies possessing the records would
10 not send copies without a release signed by Howard and Howard refused to sign the releases. The
11 district court canvassed Howard if this was correct and Howard confirmed it was true and that he did
12 not want any mitigation presented. The district court found Howard understood the consequences of
13 his decision and denied the motion to withdraw concluding defense counsel's disagreement with
14 Howard's decision was not a valid basis to withdraw.

15 The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State
16 originally alleged three aggravating circumstances: 1) the murder was committed by a person who
17 had previously been convicted of a felony involving the use of violence - namely robbery with use
18 of a deadly weapon in California, 2) prior violent felony - a 1978 New York conviction in absentia
19 for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a
20 robbery. Howard moved to strike the California conviction because the conviction occurred after
21 the Monahan murder and the New York conviction because it was not supported by a judgment of
22 conviction. The district court struck the California conviction but denied the motion as to the New
23 York conviction, noting that the records reflected a jury had convicted Howard and the lack of a
24 formal judgment was the result of Howard's absconding in the middle of trial. The State presented
25 evidence of the aggravating circumstances and Howard took the stand and related information on his
26 background. During a break in the testimony, Howard suddenly stated he didn't understand what
27 mitigation meant and that he would leave it up to his attorneys to decide what to do. The district
28 court asked Howard if he was now instructing his attorneys to present mitigation and he refused to

1 answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and
2 defense counsel asked for time to prepare which was granted. The jury found both aggravating
3 circumstances existed and that no mitigating circumstances outweighed the aggravating
4 circumstances. The jury returned a sentence of death as to Count 3. VII AA 1570-71. Judgment of
5 Conviction on Count 3 was filed on May 6, 1983. VII AA 1572-73. Judgment of Conviction on
6 Counts 1-2 was filed on September 20, 1983. VII AA 1592.

7 Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on
8 Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of
9 counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of
10 a motion to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary hearing on a
11 motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the
12 jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that
13 Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony
14 robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy
15 instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

16 The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State,
17 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the
18 relationship of two members of the Public Defender's Office with Monahan did not objectively
19 justify Howard's distrust and there was no evidence that those attorneys had any involvement in his
20 case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this
21 basis had no merit. The court further concluded the district court did not abuse its discretion by
22 refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion.
23 The court noted that the record reflected proper Miranda warnings were given and the statements
24 were admitted as rebuttal and impeachment after Howard testified. The court also found that the
25 district court did not error in rejecting the two accomplice instructions; the anti-sympathy language
26 in one of the instructions was not err in light of the totality of the instructions and the record
27 supported the district court's refusal to instruct on certain mitigating circumstances for lack of
28 evidence. The court concluded by stating it had considered Howard's other claims of error and

1 found them to be without merit. Howard filed a petition for rehearing which was denied on March
2 24, 1987. Remittitur was stayed pending the filing of a petition for Writ of Certiorari to the United
3 States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent
4 Howard on the writ petition. The petition was denied on October 5, 1987 and remittitur issued on
5 February 12, 1988.

6 On October 29, 1987, Howard filed his first State petition for post-conviction relief. VII AA
7 1593-1602. John Graves Jr. and Carmine Colucci originally represented Howard on the petition.
8 They withdrew and David Schieck was appointed. The petition raised the following claims for
9 relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense
10 and Howard’s history of mental illness and commitments; 2) ineffective assistance of trial counsel –
11 penalty phase – failure to present mental health history and documents; failure to present expert
12 psychiatric evidence that Howard was not a danger to jail population; failure to rebut future
13 dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial
14 arguments involving statistics regarding deterrence, predictions of future victims, Howard’s lack of
15 rehabilitation, aligning the jury with “future victims,” comparing victim’s life with Howard’s life,
16 diluting jury’s responsibility by suggesting it was shared with other entities, voicing personal
17 opinions in support of the death penalty and its application to Howard, references to Charles
18 Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance
19 of appellate counsel – failure to raise prosecutorial misconduct issues. An evidentiary hearing was
20 held on August 25, 1988. VII AA 1603-80. George Franzen, Lizzie Hatcher, John Graves and
21 Howard testified. Supplemental points and authorities were filed on October 3, 1988. VII AA
22 1681-92. The district court entered an oral decision denying the petition on February 14, 1989. VII
23 AA 1697-1711. The district court concluded that trial counsel performed admirably under difficult
24 circumstances created by Howard himself. As to the failure to present an insanity defense and
25 present mental health records, the court found that Howard was canvassed throughout the
26 proceedings about his refusal to cooperate in obtaining those records, particularly his refusal to sign
27 releases. Howard knew what was going on, was competent and was trying to manipulate the
28

1 proceedings and that there was no evidence to support an insanity defense, therefore counsel were
2 not ineffective in this regard.

3 On the issue of failure to object to prosecutorial misconduct, the district court found that
4 defense counsel did object where appropriate and the arguments that were not objected to did not
5 amount to misconduct and were a fair comment on the evidence. Even if some of the comments
6 were improper, the district court concluded that they would not have succeeded on appeal as they
7 were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed
8 on July 5, 1989.²

9 The Nevada Supreme Court affirmed the district court's denial of Howard's first State
10 petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter
11 "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised
12 ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues.
13 The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705
14 P.2d 1126 (1985)³: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule
15 argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument
16 without support from evidence that Howard might escape. The court found that counsel were
17 ineffective for failing to object to these arguments but concluded there was no reasonable probability
18 of a contrary result absent these remarks and therefore no prejudice. The court rejected Howard's
19 other contentions of improper argument. With respect the mitigation evidence issues, the Nevada
20 Supreme Court upheld the district court's findings that this was a result of Howard's own conduct
21 and not ineffective assistance of counsel.⁴

22 Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This
23 proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991.

25 ²During the pendency of the first State petition for post-conviction relief, Howard filed his first
26 Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

26 ³ Collier was decided two years after Howard's trial.

27 ⁴ The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because
28 his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore
the court should not sanction counsel for conduct that occurred before the court issued the Collier
opinion. Rehearing was denied February 7, 1991.

Howard then filed a second State petition for post-conviction relief on December 16, 1991. VII AA 1712-16. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error. The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, filed on April 17, 1992, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could proceed in federal court. VII AA 1717-20. The district court denied the petition on July 7, 1992. VII AA 1721-25. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally the district court found the speedy trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. X AA 2348. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a

1 second amended federal petition that contained more than conclusory allegations. Thereafter
2 Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas
3 Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended
4 Federal petition was stayed for Howard to again exhaust his federal claims in state court.

5 Howard filed his third State petition for post-conviction relief on December 20, 2002. VII-
6 VIII AA 1726-82. Patricia Erickson represented him on this petition. The petition asserted the
7 following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel
8 under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and
9 unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from
10 Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and
11 physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of
12 interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony
13 should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions –
14 diluting standard of proof - reasonable doubt, second degree murder as lesser included of first degree
15 murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to
16 clearly define first degree murder as specific intent crime requiring malice and premeditation; 8)
17 improper premeditation instruction blurred distinction between first and second degree murder; 9)
18 improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of
19 extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation
20 by giving only “any other mitigating circumstance” instruction; 13) failure to instruct that mitigating
21 circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering,
22 stating personal beliefs, personal endorsement of death penalty, improper argument regarding
23 rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard
24 to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony
25 robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction;
26 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact
27 California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure
28 to obtain California trial transcripts, failure to review Clark County Detention Center medical

1 records, failure to challenge competency to stand trial, failure to obtain suppression hearing, failure
2 to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting
3 records and call witnesses based upon same, failure to call Pinkie Williams and Carol Walker in
4 penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San
5 Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to
6 adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in
7 closing arguments, failure to refute future dangerousness argument, failure to object to trial court's
8 limitation of mitigating circumstances and failure to object to instructions which allegedly required
9 unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel –
10 failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-
11 conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20)
12 cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and
13 capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death
14 penalty violates evolving standards of decency. The State filed a motion to dismiss Howard's third
15 State petition on March 4, 2001. The State argued that the entire petition was procedurally barred
16 under NRS 34.726(1) (one year limit) and NRS 34.800 (five year laches) and that Howard had not
17 shown good cause for delay in raising the claims to overcome the procedural bars. The State also
18 analyzed each claim and noted what issues had already been raised and decided adversely to Howard
19 or should have been raised and were waived under NRS 34.810.

20 Howard filed an amended third State petition. The amended petition expanded the factual
21 matters under Claim 17 regarding Howard's family background that Howard asserted should have
22 been presented in mitigation. On August 20, 2003, Howard filed his opposition to the State's motion
23 to dismiss his third State petition. VIII AA 1783-1847. As good cause for delay, Howard alleged
24 Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v.
25 State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not
26 apply because any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional
27 and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due
28 process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726,

1 NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply
2 because the State had not shown prejudice and the presumption of prejudice was overcome by the
3 allegations in the petition. The State filed a reply to the opposition on September 24, 2003. The
4 district court issued an oral decision on October 2, 2003 dismissing the third State petition as
5 procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by
6 showing good cause for delay. The district court also independently dismissed the claims under
7 NRS 34.810. Written findings were entered on October 23, 2003. VIII AA 1848-51.

8 Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the district
9 court's dismissal of the third State petition on December 1, 2004. VIII-IX AA 1993-2002. The
10 High Court addressed Howard's assertions that he had either overcome the procedural bars or they
11 could not constitutionally be applied to him and rejected them. Among its conclusions, the Court
12 noted that the record reflected Howard was aware that all his claims challenging the conviction or
13 imposition of sentence must be joined in a single petition and that Howard had no right to post-
14 conviction counsel at the time of the filing of his first and second State petitions for post-conviction
15 relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.⁵

16 Howard then returned to Federal district court where he filed his Third Amended Petition for
17 Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the
18 Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, a Fourth State Post-
19 Conviction Petition on October 25, 2007. VIII AA 1852-1986. The State filed a motion to dismiss
20 the Fourth State Petition on April 8, 2008. IX AA 2153-2200. The parties agreed to stay this case for
21 several months while Howard sought permission from the Federal District Court to hold his federal
22 petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already
23 filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the
24 Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007). The United States
25 District Court denied Howard's motion for stay and abeyance on January 8, 2009. X AA 2350-54.
26 Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended
27

28 ⁵ See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

Petition on February 24, 2009. IX-X AA 2247-2340. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.⁶ XIII-XIV AA 3213-85. Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. XIV AA 3286-3314. Howard filed supplemental authorities on January 5, 2010. XIV AA 3315-54. Argument on the State's motion to dismiss was heard on February 4, 2010. XIV AA 3355-65. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010 dismissing the Fourth State Petition as procedurally barred. Written findings were entered on November 6, 2010. XIV AA 3366-3401. Appellant's Opening Brief was filed on May 12, 2011.

STATEMENT OF FACTS

On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. I AA 109, 115-17. Kinsey approached Howard and asked him to accompany Kinsey to a security office. I AA 121. Kinsey enlisted the aid of two other store employees. *Id.* Howard was cooperative, alert and indicated there must be some mistake. I AA 122-23. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. I AA 127. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). I AA 128-29. Howard threatened to kill the three men if they followed him and he fled to his car in the parking lot. I AA 131. A yellow gold jewelry ID bracelet was found at the scene and impounded. I AA 168. It was later identified as Howard's. IV AA 827. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.

Dawana Thomas ("Thomas"), Howard's girlfriend, was waiting for him in the car. Howard

⁶ Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010.

1 had told her to wait for him and she was unaware of his intentions to obtain money through a false
2 refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile
3 Cutlass with New York plates 614 ZHQ and sped away from the mall. IV AA 834-42. While
4 escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed
5 Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the
6 window of the Olds and at Houchin's face, telling Houchin to mind his own business. I AA 270-80;
7 IV AA 834-42. Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked
8 the car for a few hours. Thomas and Howard walked about and Howard made some phone calls.
9 Later that evening Howard left for a couple of hours. When he returned he told Thomas that he had
10 met up with a pimp, but the pimps' girls were with him so he couldn't rob him. Howard indicated
11 he had arranged to meet with the "pimp" the next morning and would rob him then. IV AA 846-47,
12 867-68. Howard and Thomas drove to the Western Six motel located on the Boulder Highway near
13 the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard
14 instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card
15 under that name was admitted into evidence and a document examiner compared handwriting on the
16 card with Thomas' and indicated they matched. IV AA 870-72; V AA 1186-90. Around 6:00 a.m.
17 on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast,
18 Thomas dropped Howard off in the alley behind Dr. Monahan's office. This was at approximately
19 7:00 a.m. Thomas returned to the motel room. Approximately an hour later, Howard arrived at the
20 motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen
21 before. Howard told Thompson that he was tired of Las Vegas and to pack up their things as they
22 were leaving for California. IV AA 873-80.

23 Dr. George Monahan was a dentist with a practice located on Desert Inn Road within
24 walking distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and
25 would park the van in the parking lot of the mall, near the Desert Inn and Maryland intersection and
26 the Sears store and then walk to his office. The van had a sign in it listing Dr. Monahan's home and
27 business phone numbers and the business address. II AA 308-12. About 4:00 p.m. on March 26,
28 1980, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about

1 the van. The caller was a male who identified himself as “Keith” and stated he was a security guard
2 at Caesar’s Palace. He indicated he was interested in purchasing the van and wanted to know if
3 someone could meet him at Caesar’s during his break time at 8:00 p.m. Mrs. Monahan indicated the
4 caller would have to talk to her husband who was expected home shortly. A second call was made
5 around 4:30 p.m. and Dr. Monahan made arrangements to meet “Keith” at Caesar’s later that night.
6 II AA 312-16. The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met
7 “Keith” that evening at the appointed time and place. Howard was identified as the man who called
8 himself “Keith”. Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr.
9 Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch
10 the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a
11 test drive. The Monahan’s left Caesar’s and parked the van at Dr. Monahan’s office before returning
12 home in another vehicle. II AA 317-331. The next day, March 27, 1980, Dr. Monahan left his home
13 at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title.
14 When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a
15 patient was waiting for him. Dr. Monahan’s truck was in the parking lot to the rear of the office.
16 Dr. Monahan had not entered the office. II AA 334-39. A black man wearing a radio or walkie-
17 talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and
18 stating that he had an appointment with the doctor. II AA 494-95. Mrs. Monahan called Caesar’s
19 Palace and learned no “Keith” fitting the description she gave worked security. After obtaining this
20 information, Mrs. Monahan called the police to report her husband as a missing person. This
21 occurred at about 9:00 a.m. II AA 342-44.

22 Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder
23 Highway, just a few blocks from Dr. Monahan’s office and almost across the road from the Western
24 Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the
25 Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver’s
26 side and saw no one. He asked patrons if they knew anything about the van and no one spoke up.
27 Marino remained at the business until the early afternoon. The van was still there and had not been
28 moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had

1 been found in the van. III AA 507-18. In response to television coverage, the police learned the
2 Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found
3 under an overturned table and some coverings. II AA 394-95. He had been shot once in the head.
4 III AA 582. The bullet went through Dr. Monahan's head and a projectile was recovered on the
5 floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so
6 badly damaged; forensic analysis could not establish an exact match. It was determined that the
7 bullet could have come from certain makes and models of revolvers, Howard's included. IV AA
8 973-81. The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet
9 were missing. II AA 394-95. A fingerprint recovered from one of the van's doors matched
10 Howard's. III AA 552.

11 Homicide detectives were aware of the Sears robbery that had occurred on March 26th. The
12 description of the Sears suspect matched that given by Mrs. Monahan of the man calling himself
13 Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession
14 of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been
15 parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement
16 agencies describing the suspect and the car used in the Sears' robbery.

17 On March 27, 1980, while the police were searching for Dr. Monahan, Howard and
18 Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way
19 they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and
20 photos in it. Howard went to the gas station rest room and when he returned he no longer had the
21 wallet. IV AA 880-82. On March 28, 1980, Howard and Thomas went to a Sears in San Bernadino,
22 California. Once again Howard left Thomas in the car while he entered the Sears, picked up
23 merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security
24 badge in the attempt. The Sears personal were suspicious and left Howard at the register while they
25 called Las Vegas. When they returned Howard had left. Howard returned to the car and Thomas
26 and Howard ducked down when the people from Sears stepped outside to view the parking lot. IV
27 AA 883-88.

1 On or about April 1, 1980, Howard robbed a car salesman in San Bernadino.⁷ Later that day,
2 at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He
3 entered a jewelry store and talked to a security agent, Manny Velasquez (“Velasquez”). Another
4 agent in the store, Robert Slater (“Slater”), who also worked as a police officer in Downey, saw
5 Howard and noticed the grip of a gun under Howard’s jacket. Slater talked to Velasquez and
6 decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall
7 near a Thrifty Drugstore. III AA 706-15. Downey Police officers observed Howard walking up and
8 down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was
9 stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he
10 carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver
11 and the walkie-talkie and Sears’ security badge stolen from Kinsey. III AA 715-31.

12 Howard was arrested for carrying a concealed weapon and then identified and booked for the
13 San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed
14 evidence was presented regarding his response and whether he invoked his right to silence. Based
15 on information in the all-points bulletin, the California authorities contacted the Las Vegas
16 Metropolitan Police Department about Howard. On April 2, 1980, Detective Alfred Leavitt went to
17 California and, after reading Howard his Miranda rights, which Howard indicated he understood,
18 interviewed Howard regarding the Sears robbery and Dr. Monahan’s murder. Howard did not
19 invoke his right to remain silent or to counsel at this time. V AA 1155-62; 1167-68. Howard told
20 Detective Leavitt he recalled being at the Sears department store but no details about what happened
21 and that he did not remember anything about March 27, 1980, he could have killed Dr. Monahan but
22 he doesn’t know.⁸ V AA 1155-62.

23 To establish identity, motive, lack of mistake and modus operandi, the State, after a
24 Petrocelli hearing, introduced the testimony of Ed Schwartz (“Schwartz”). Schwartz was working as
25 a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00
26

27 ⁷ The jury did not hear evidence of this crime as the district court struck the aggravator relating to it.
28 ⁸ Howard’s statements were not admitted in the State’s case-in-chief. They were admitted to rebut
and impeach Howard’s testimony in the defense case-in-chief.

1 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a
2 New York driver's license and checkbook and told Schwartz that he worked for a security firm in
3 New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a
4 few blocks while Howard was the passenger. Howard asked if he could drive the car and the men
5 switched seats. After driving for a short time, Howard pulled over and pointed an automatic pistol at
6 Schwartz. Schwartz was told to get down on the floor of the car and remove his shoes and pants.
7 Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car
8 when ordered to do so and Howard drove off. The car was later found abandoned. V AA 1029-
9 1050.

10 Howard called witnesses who testified they saw the Monahan van being driven by a black
11 man who did not match Howard's description, in particular the man had a large afro and Howard
12 had short hair. John McBride stated that he saw the van around 8:30 to 8:45 a.m. in his apartment
13 complex which is located about five miles from Desert Inn and Boulder Highway. V AA 1087-83.
14 Lora Mallek was employed at a Mobile gas station at the corner of DI and Boulder Highway and she
15 stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek
16 testified that a black man with a large afro was driving, a black woman who did not match Thomas'
17 description was in the passenger seat and a white man was sitting in the back. V AA 1093-1108.

18 Howard testified over the objection of counsel. V AA 1066. He indicated he did not recall
19 much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at
20 one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large
21 afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been
22 telling the truth about the Sears store. Howard indicated he wasn't sure because when the Sears
23 people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard
24 said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did
25 not meet Dr. Monahan, rob or kill him as he couldn't be that callous.⁹ V AA 1137-55. On cross-
26 examination, Howard admitted he left New York in the middle of his robbery trial and was asked
27

28 ⁹ Howard had no explanation for his fingerprint on the door of the van.

1 about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of
2 aliases including Harold Stanback. Howard indicated he was taking the blame for Dawana and her
3 brother Lonnie. Id.; 4/22/83, V AA 1193-1200. Dawana Thomas was called in rebuttal and
4 indicated her brother Lonnie had not been in Las Vegas in March of 1980. V AA 1169-79.

5 In the penalty phase, the State presented evidence on the details of Howard's 1979 New York
6 conviction for robbery. A college nurse who knew Howard, Dorothy Weisband (Weisband"),
7 testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet
8 and demanded she removed her clothes. She refused and he left. After the robbery, Howard called
9 Weisband trying to get more cash from her in return for her car and threatening her. VI AA 1401-
10 16. Howard testified regarding his military, family and mental health histories. Howard discussed
11 his military service and stated he had suffered a concussion and received a purple heart.¹⁰ Howard
12 also stated he was on veteran's disability in New York.¹¹ He said he was in various mental health
13 facilities in California including being housed in the same facility as Charlie Manson. He testified
14 he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering.
15 When asked about his childhood, Howard became upset. He indicated he didn't want to talk about
16 the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was
17 doing at all times. VI AA 1449-66.

18 ARGUMENT

19 I

20 **THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED** 21 **APPELLANT'S FOURTH PETITION FOR WRIT OF HABEAS CORPUS** 22 **(POST-CONVICTION)**

23 Appellant appeals the district court's denial of his fourth Petition for Writ of Habeas Corpus
24 (Post-Conviction) which he filed over 24 years after his conviction and almost 20 years after the
25 Nevada Supreme Court issued remittitur on his direct appeal, in violation of the one-year time bar
26 under NRS 34.726. Additionally, Appellant's petition was his fourth attempt at post-conviction

27 ¹⁰ The military records attached to the Fourth Petition do not reflect any such injury or award.

28 ¹¹ Howard's military records do not support this and there is nothing in the record substantiating any
admission to a veteran's hospital. The record reflects Howard was never actually admitted to a
hospital in New York because it required identification and he could not identify himself due to
existing warrants for his arrest.

1 relief and is barred as a successive petition pursuant to NRS 34.810. The State also affirmatively
2 pled laches at the district court level and invoked the five-year time bar of NRS 34.800. Without a
3 showing of good cause and prejudice to overcome each of these bars, the district court had no choice
4 but to dismiss Appellant's petition. Further, most of Appellant's issues were already raised in earlier
5 proceedings and addressed on their merits, and as such, they are barred by the doctrine of the law of
6 the case. Accordingly, the district court, as required, properly applied the procedural bars and
7 dismissed Appellant's fourth petition.

8 **A. Appellant's Petition Was Properly Dismissed as Time-Barred Pursuant to NRS**
34.726(1).

9 "Application of the statutory procedural default rules to post-conviction habeas petitions is
10 mandatory." State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, 1074 (2005).
11 Post-conviction habeas petitions that are filed several years after conviction unreasonably burden the
12 criminal justice system. Id. "The necessity for a workable system dictates that there must exist a
13 time when a criminal conviction is final." Id.

14 The mandatory provisions of NRS 34.726 state:

15 1. Unless there is good cause shown for delay, **a petition that challenges the**
16 **validity of a judgment or sentence must be filed within 1 year after entry of the**
17 **judgment of conviction or, if an appeal has been taken from the judgment,**
18 **within 1 year after the supreme court issues its remittitur.** For the purposes of
19 this subsection, good cause for delay exists if the petitioner demonstrates to the
20 satisfaction of the court:

- 21 (a) That the delay is not the fault of the petitioner; and
22 (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

23 (Emphasis added).

24 NRS 34.726 has been strictly applied. In Gonzales v. State, 118 Nev. 590, 53 P.3d 901
25 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant
26 to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the
27 importance of filing the petition with the district court within the one year mandate, absent a
28 showing of "good cause" for the delay in filing. Id. at 593, at 902. Here, this Court issued Remittitur
on February 12, 1988, affirming Appellant's Judgment of Conviction and sentence of death.
Therefore, absent a showing of good cause, Appellant's window for filing any petitions for post-
conviction relief unequivocally expired on February 12, 1989. Appellant's fourth petition filed on
October 25, 2007 was filed over 18 years past the deadline and was procedurally barred

1 However, because the Nevada Supreme Court issued Remittitur from Howard's direct appeal
2 before the provisions of NRS 34.726(1) became effective on January 1, 1993, the one year time limit
3 is extended and begins to run from the effective date of the statute. Pellegrini v State, 24 P.3d 519,
4 529 (2001). Therefore, the statutory time limit to file a petition for post-conviction relief would
5 have commenced on January 1, 1993, and expired on December 31, 1993. Howard filed the present
6 petition on October 25, 2007, well after the one-year deadline. Therefore, Howard's petition was
7 still time-barred and the district court properly dismissed it as such.

8 This procedural bar included any claims which Appellant has known of but delayed raising
9 in state court due to his pursuit of federal remedies. Because Appellant could not show good cause
10 to overcome the procedural bars, as discussed *infra*, the district court did not abuse its discretion
11 when it dismissed Appellant's fourth petition.

12 **B. Appellant's Petition Was Properly Dismissed Pursuant to NRS 34.800 – Five Year Laches Rule.**

13 NRS 34.800 creates a rebuttable presumption of prejudice to the State if “[a] period
14 exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of
15 imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition
16 challenging the validity of a judgment of conviction....” Where the prejudice involves the State's
17 ability to respond to the petition, the defendant must demonstrate that he could not, through the
18 exercise of reasonable diligence, have known of the grounds for his petition until after the
19 circumstances constituting prejudice occurred. NRS 34.800(1)(a). If the prejudice involves the
20 State's ability to conduct a retrial, then a defendant must show that a fundamental miscarriage of
21 justice has occurred in the proceedings leading to his conviction. To invoke the presumption, the
22 statute requires the State plead laches in its motion to dismiss the petition. NRS 34.800(2). The
23 State did plead laches in its Motion to Dismiss Defendant's Amended Petition for Writ of Habeas
24 Corpus and Reply to Opposition. XIII-XIV AA 3213-85.

25 Many of the claims in Howard's petition are mixed questions of law and fact that would
26 require the State to prove or rebut facts that are 30 years old. Howard's Judgment of Conviction was
27 entered on May 3, 1983 and Remittitur issued on the denial of his direct appeal on February 12,
28 1988. Howard's 20-year delay in filing his fourth petition was four times longer than the five years

1 required for a presumption of prejudice to arise under NRS 34.800. NRS 34.800 was enacted, and a
2 rebuttal presumption of prejudice was created, for this very reason – to prevent the State from
3 having to go back years later to re-litigate matters that have become ancient history. If courts
4 required evidentiary hearings for long delayed petitions as in the instant matter, the State would have
5 to call and find long lost witnesses whose once vivid recollections have faded and re-gather evidence
6 that in many cases has been lost or destroyed because of the lengthy passage of time. Howard has
7 offered no rebuttal to this presumption and dismissal of his petition was permissible based on this
8 procedural bar alone. Because Howard failed to rebut the presumption of prejudice, as discussed
9 *infra*, the district court did not abuse its discretion by dismissing Howard’s petition as procedurally
10 barred under NRS 34.800.

11 **C. Appellant’s Petition Was Properly Dismissed as Successive Pursuant to NRS 34.810.**

12 NRS 34.810 contains three provisions that apply to Appellant’s fourth petition. The first is
13 NRS 34.810(1)(b), the waiver provision, which bars consideration of issues that could have been
14 raised in previous proceedings. The second and third provisions are found in NRS 34.810(2). That
15 subsection bars successive petitions which raise grounds for relief that have been previously denied
16 on the merits or petitions that raise new or different grounds for relief that constitute an abuse of the
17 writ.

18 Appellant’s petition was properly dismissed pursuant to NRS 34.810 as it is successive. The
19 relevant portion of NRS 34.810 states:

20 1. The court shall dismiss a petition if the court determines that:

21

22 (b) The petitioner’s conviction was the result of a trial and the grounds for the
23 petition could have been:

24 (1) Presented to the trial court;

25 (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or
26 post-conviction relief; or

27 (3) Raised in any other proceeding that the petitioner has taken to secure relief
28 from his conviction and sentence,
unless the court finds both cause for the failure to present the grounds and
actual prejudice to the petitioner.

2. A second or successive petition must be dismissed if the judge or justice
determines that it fails to allege new or different grounds for relief and that the prior
determination was on the merits or, if new and different grounds are alleged, the
judge or justice finds that the failure of the Defendant to assert those grounds in a
prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
(b) Actual prejudice to the petitioner.

Id.

This Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*" Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added). Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3).

In Lozada v. State, the Nevada Supreme Court stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Id. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).

Howard filed three previous state petitions for post-conviction relief, on October 28, 1987, December 16, 1991 and December 20, 2002. All of Howard's claims in his fourth Petition could have been asserted either on direct appeal or in his first petition, let alone his second and third petitions. Accordingly, raising such claims that Appellant could have raised in a prior petition, but did not, constitutes an abuse of the writ and need not be considered. See Valerio v. State, 112 Nev. 383, 915 P.2d 874, (1996). Moreover, Appellant has not demonstrated good cause for the failure to raise these issues in his initial petition, nor has he shown actual prejudice. As explained *infra*, to avoid procedural default under NRS 34.810(2), Appellant has the burden of pleading and proving specific facts that demonstrate both good cause for his failure to present his claims in earlier proceedings and actual prejudice. NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710,

1 (1993); Phelps, 104 Nev. at 656, 764 P.2d at 1303. The district court, relying on substantial
2 evidence, properly determined that NRS 34.810 applied, thereby precluding any further inquiry into
3 his claims.

4 **D. Appellant did not demonstrate good cause sufficient to overcome the application of**
5 **procedural bars.**

6 It is clear that the State presented, and the court relied on, substantial evidence that the
7 procedural bars apply. Appellant failed to show good cause and prejudice to overcome the
8 procedural bars contained in NRS 34.726, NRS 34.800 and NRS 34.810.

9 “In order to demonstrate good cause, a petitioner must show that an impediment external to
10 the defense prevented him or her from complying with the state procedural default rules.” Hathaway
11 v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); (citing Pellegrini v. State, 117 Nev. 860, 886-
12 87, 34 P.3d 519, 537 (2001)); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994);
13 Passanisi, 105 Nev. at 63, 769 P.2d at 72; see also Crump, 113 Nev. at 295, 934 P.2d at 247; Phelps
14 v. Director, Dep’t Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988). An external impediment
15 might exist where “the factual or legal basis for a claim was not reasonably available to counsel, or
16 [where] ‘some interference by officials’ made compliance impracticable.” Hathaway, 119 Nev. at
17 252, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478 (1986)); see also, Gonzales v. State,
18 118 Nev. 590, 595, 53 P.3d 901, 904 (2002), (citing Harris v. Warden, Southern Desert Correctional
19 Ctr., 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998)). Any delay in filing of the petition must
20 not be the fault of the petitioner. NRS 34.726(1)(a).

21 “[A]ppellants cannot attempt to manufacture good cause[.]” Clem v. State, 119 Nev. 615,
22 621, 81 P.3d 521, 526 (2003). To find good cause there must be a “substantial reason; one that
23 affords a legal excuse.” Hathaway, 119 Nev. at 252, 71 P.3d at 506, (quoting Colley v. State, 105
24 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Absent a showing of good cause for the delay and
25 undue prejudice, only a fundamental miscarriage of justice may excuse a time-barred claim. A
26 fundamental miscarriage of justice occurs “where a constitutional violation has probably resulted in
27 the conviction of one who is actually innocent.” Murray v. Carrier, 477 U.S. 478, 488 (1986).
28 Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States,
523 U.S. 614, 623 (1998). A defendant claiming actual innocence of the crime must demonstrate

1 that it is more likely than not that no reasonable juror would have convicted him absent a
2 constitutional violation. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3rd 519, 537 (2001). Actual
3 innocence is a stringent standard designed to be applied only in the most extraordinary situations.

4 Where the petitioner has argued that the procedural default should be ignored because he is
5 actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for
6 a constitutional error, no reasonable juror would have found him death eligible. Hogan v. Warden,
7 109 Nev. 952, 960, 860 P.2d 710, 716 (1993), citing Sawyer v. Whitely, 505 U.S. 333, 112 S.Ct.
8 2514 (1992). True claims of actual innocence are “extremely rare” and found only in the most
9 “extraordinary cases.” Schulp v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995). As argued in
10 Section III *infra*, Howard’s Petition failed to demonstrate actual innocence sufficient to overcome
11 the 20-year delay in bringing his post-conviction claims. Accordingly, his claims were procedurally
12 barred and the district court did not err in dismissing these claims.

13 **E. Appellant’s claims are further precluded by the Law of the Case Doctrine.**

14 Where an issue has already been decided on the merits by the Nevada Supreme Court, the
15 Court’s ruling is law of the case, and the issue will not be revisited. McNelson v. State, 115 Nev.
16 396, 415, 990 P.2d 1263, 1275 (2000), (citing Pertgen v. State, 110 Nev. 554, 557-58, 875 P.2d 361,
17 363 (1994), abrogated on other grounds by Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001)).
18 “The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused
19 argument subsequently made after reflection upon the previous proceedings.” Hall v. State, 91 Nev.
20 314, 315, 535 P.2d 797, 798 (1975); see also McNelson, 115 Nev. at 415, 990 P.2d at 1275. Nearly
21 every claim raised by Howard in his Fourth State Petition was previously raised on appeal or in one
22 of his first three petitions. These claims, discussed below, have been addressed by this Court and
23 found to be without merit. Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992); State v. Powell, 122
24 Nev. 751, 138 P.3d 453 (2006). Accordingly, this Court’s ruling on these claims is the law of the
25 case and they should not be revisited. Hall v. State, 91 Nev. 315, 315, 535 P.2d 797, 798 (1975).

II
THE DISTRICT COURT PROPERLY DECLINED TO REACH THE MERITS OF
HOWARD'S PROCEDURALLY-BARRED CLAIMS

Howard's opening brief improperly frames the issues in an undisguised attempt to re-litigate the merits of each individual claim and sub-claim. However, the only proper analysis on appeal is whether the district court properly denied Howard's Fourth State Petition as procedurally barred, which the State submits it did, as argued *supra*. Because Howard's claims were denied by the district court as procedurally barred, they were not addressed on their merits below and will not be addressed on their merits in the instant brief. If this Court finds that a particular claim is not procedurally barred due to a showing of good cause and prejudice, the appropriate remedy is to remand to allow the district court to address the merits of the claims.

A. Actual Innocence

Howard argues that he is actually innocent of the death penalty in light of the "new" mitigation evidence set forth in his Petition and based on his claim that the aggravators relied upon to sentence him to death were invalid. This is not a separate substantive claim, but rather an allegation made to show good cause and prejudice for overcoming the procedural bars applicable to this claim. This claim is addressed in Section III, *infra*.

C. Ineffective Assistance of Counsel

Howard alleges that trial counsel was ineffective for conducting an inadequate investigation for the penalty phase of his trial. According to Howard, had trial counsel conducted a mitigation investigation, the jury would not have sentenced him to the death penalty.

This claim was raised in the First State Petition for post-conviction relief and denied, the denial of which was upheld on appeal. This Court made the following findings in relation to this claim in Howard's First Petition:

First, there is evidence that Howard did not want mitigating evidence presented to the jury. Second, the court found that Howard frustrated his attorneys' attempts to present mitigating evidence.

Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). This claim was also raised in the Third State Post-Conviction Petition, found procedurally barred and that finding was upheld on appeal. VIII-IX AA 1993-2002. The claim is therefore governed by the law of the case doctrine,

1 new arguments are waived under NRS 34.810 (1)(b), and it is successive and abusive under NRS
2 34.810(2). To the extent this is a claim based on new information, it could have been presented
3 through due diligence in the previous proceedings. The claim is therefore waived under NRS
4 34.810(1)(b), successive and abusive under NRS 34.810(2), time-barred by NRS 34.726 and barred
5 by laches under NRS 34.800. Accordingly, the district court properly dismissed this claim because
6 to rule otherwise would run counter to the legislative intent of Nevada's post-conviction statutes
7 which are designed to encourage an appellant to bring all his or her claims once and to bring them
8 early on in the proceedings. Appellant has demonstrated no reason why he could not have raised the
9 instant challenge to his counsel in his first petition.

10 **C. Jury Instructions on Premeditation and Deliberation.**

11 Defendant alleges that the first-degree murder instruction (the "Kazalyn" instructions)
12 improperly blurred the distinction between first and second degree murder. Howard again
13 incorrectly frames this claim in order to argue its merits; however, the correct analysis is whether the
14 district court properly dismissed this claim as procedurally barred. This claim was previously raised
15 in Howard's Third State Petition, was found to be procedurally barred, and that finding was upheld
16 on appeal. VIII-IX AA 1993-2002. Therefore, the district court properly dismissed this claim in
17 Howard's fourth petition as waived under NRS 34.810 (1)(b), successive and abusive under NRS
18 34.810(2), time-barred by NRS 34.726 and barred by laches under NRS 34.800.

19 Howard argues that he overcame the procedural bars by claiming as good cause the
20 retroactive application of the ruling in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). The
21 Court in Byford set forth a new jury instruction in first degree murder cases, requiring that the jury
22 be specifically instructed regarding premeditation and deliberation. In Garner v. State, 116 Nev.
23 770, 789, 6 P.3d 1013, 1025 (2000) and again in Leonard v. State, 117 Nev. 53, 75, 17 P.3d 397, 411
24 (2001), the court held that Byford only applied prospectively. Contrary to the Nevada Supreme
25 Court's holding in Garner and Leonard, the Ninth Circuit in Polk v. Sandoval, 503 F.3d 903, 911
26 (9th Cir. 2007) held that Byford applied retroactively. Howard relies on the ruling in Polk to support
27 his argument that Byford must be applied retroactively to his case. However, Howard's reliance on
28 Polk is misplaced. Even assuming Polk were controlling, the basis for the Ninth Circuit's ruling, as

1 stated in Polk, was that a defendant is deprived of due process if a jury instruction relieves the State
2 of the burden of proof as to the defendant's state of mind. See Sandstrom v. Montana, 442 U.S. 510,
3 521 99 S.Ct. 2450 (1979); Francis v. Franklin, 471, U.S. 307, 326, 105 S.Ct. 1965 (1985), In re
4 Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970) (cases relied upon in Polk to justify the Ninth
5 Circuit's jurisdiction in the matter). As such, the underlying argument and authority relied upon in
6 Polk has always been available to the defense and, therefore, does not the provide Howard with any
7 new claim.

8 Further, the Nevada Supreme Court rejected the holding of Polk as a matter of state law in
9 Nika v. State, 124 Nev. Adv. Op. 103, 198 P.3d 839 (2008). The Nika Court held that Byford is
10 only retroactive to cases not yet final when Byford was decided. As the Nika Court explained,
11 Byford does not apply retroactively because the Court did not hold that the Kazalyn instruction was
12 constitutional error, but rather announced a change in Nevada law. Nika, 198 P.3d at 849-50. Thus,
13 defendants whose convictions were final before the Byford decision issued on February 28, 2000 are
14 not entitled to a new trial based upon an invalid jury instruction. Howard's conviction was final on
15 February 12, 1988, upon issuance of remittitur following his direct appeal. Thus, Byford does not
16 apply and his challenges to the Kazalyn instruction remain procedurally barred. Even if Byford and
17 the new definition of murder were to apply to Howard's case, any error in the Kazalyn instruction
18 would be harmless beyond a reasonable doubt. A defendant would not be entitled to relief for a
19 constitutional error unless that defendant can show that "the error had a substantial and injurious
20 effect or influence in determining the jury's verdict." Polk, citing Brecht v. Abrahamson, 507 US
21 619, 637, 113 S.Ct. 1710 (1993) (internal quotation marks and citation omitted); see also Fry v.
22 Pliler, 127 S.Ct. 2321 (2007); California v. Roy, 519 US 2, 117 S.Ct. 337 (1996).

23 Here, even if this Court were to find that Howard was entitled to the revised premeditation
24 and deliberation jury instruction, the district court's denial of Howard's Fourth State Petition should
25 nevertheless be affirmed because the evidence in this case supports beyond a reasonable doubt
26 deliberation and premeditation. In Byford, the Nevada Supreme Court set forth the following
27 definition for deliberation:
28

1 Deliberation is the process of determining upon a course of action
2 to kill as a result of thought, including weighing the reasons for
and against the action and considering the consequences of the
action.

3 A deliberate determination may be arrived at in a short period of
4 time. But in all cases the determination must not be formed in
passion, or if formed in passion, it must be carried out after there
5 has been time for the passion to subside and deliberation to occur.
A mere unconsidered and rash impulse is not deliberate, even
though it includes the intent to kill.

6 116 Nev. at 236, 994 P.2d at 714.

7 Howard lured the victim, Dr. Monahan, into a meeting under the auspices of buying the
8 Monahan van. He used the items he stole from Security Officer Kinsey to pose as a security official
9 from Caesar's Palace. He robbed Dr. Monahan and then killed him with one bullet to the head,
10 execution style. These facts clearly establish this was a deliberate, premeditated act committed
11 during a robbery. Thus, the district court properly concluded that, not only was this claim
12 procedurally barred, but any error was harmless beyond a reasonable doubt.

13 **III**
14 **DEFENDANT FAILS TO DEMONSTRATE ACTUAL INNOCENCE TO EXCUSE THE**
15 **DELAY IN BRINGING THESE CLAIMS**

16 Generally, a defendant who has procedurally defaulted on a claim may subsequently raise the
17 claim in a habeas petition only upon a showing of good cause, prejudice, or actual innocence.
18 Bousley v. State, 523 U.S. 614, 1611, 118 S.Ct. 1604, 1611 (1998). Courts have consistently found
19 "actual innocence" to be a miscarriage of justice sufficient to overcome any procedural post-
20 conviction time bar or default without analyzing good cause and prejudice. See Sawyer v. Whitley,
21 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). In other words, actual innocence acts as a
22 "gateway" for innocent defendants to present constitutional challenges to a court years after the
procedural defaults and bars have run. See Id. at 315, at 861.

23 A claim of actual innocence requires both an allegation that the defendant's constitutional
24 rights were violated and the presentation of newly discovered evidence. The Eighth Circuit Court
25 of Appeals has "rejected free-standing claims of actual innocence as a basis for habeas review
26 stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to
27 state a ground for federal habeas relief absent an independent constitutional violation occurring in
28 the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996)

1 (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). Furthermore, the newly
2 discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot
3 have confidence in the outcome of the trial." Id. at 316, at 861. Actual innocence focuses on actual
4 not legal innocence, and therefore, a defendant who only challenges the validity of evidence
5 presented at trial has not sufficiently claimed actual innocence to overcome the procedural bars and
6 defaults. See Sawyer, 112 U.S. at 339, 505 S. Ct. at 2519. The United States Supreme Court has
7 held that, "without any new evidence of innocence, even the existence of a concededly meritorious
8 constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a
9 habeas court to reach the merits of the barred claim." Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct.
10 851, 861 (1995). The applicable standard applied to the actual innocence analysis depends upon
11 whether the defendant is challenging his conviction or his death ineligibility:

12 To avoid application of the procedural bar to claims attacking the *validity of the*
13 *conviction*, a petitioner claiming actual innocence *must show that it is more likely than*
14 *not* that no reasonable juror would have convicted him absent a constitutional
15 violation. Where the petitioner has argued that the procedural default should be
16 ignored because he is *actually ineligible for the death penalty*, he must show by *clear*
and convincing evidence that, but for a constitutional error no reasonable juror would
17 have found him death eligible. (Emphasis added).

18 Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

19 Once a defendant has made such a showing, he may then use the claim of actual innocence as
20 a "gateway" to present his constitutional challenges to the court and require the court to decide them
21 on the merits. Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Howard alleges that he is actually innocent
22 of the death penalty because the robbery and the prior violent felony aggravators relied upon to
23 sentence him to death were invalid. Howard further alleges that the jury would not have imposed
24 the death penalty had trial counsel presented mitigating evidence. However, Howard fails to prove
25 "actual innocence" of the death penalty by clear and convincing evidence, and thus the district court
26 properly determined that Howard cannot overcome the procedural bars outlined in NRS 34.726,
27 NRS 34.800 and NRS 34.810.

28 **A. Howard's Claim Regarding the Validity of the Robbery Aggravator is Procedurally Barred**

Howard claims, based on the ruling in McConnell v. State, 120 Nev. 1043, 102 P.3d 606
(2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005), that the robbery aggravator is invalid

1 and thus he is actually innocent of the death penalty. However, this claim is procedurally barred.
2 The assertion that felony robbery may not be used both as a theory of first degree murder and as an
3 aggravator was raised in the Third State Petition and dismissed as procedurally barred. VIII AA
4 1848-51. Subsequent to the Third State Petition, the Nevada Supreme Court decided McConnell v.
5 State, which found that felony robbery could not be used as the grounds for first degree murder and
6 as an aggravating circumstance, overruling prior case law. However, so long as the reviewing court
7 can be certain that the jury based its finding of first degree murder upon a theory other than felony
8 murder, or on both felony murder and some other theory, it is harmless error. In McConnell, the
9 defendant admitted committing willful, premeditated and deliberate murder and the error was found
10 to be harmless. If a court cannot make this determination, then the appropriate remedy is to strike
11 the felony aggravator and either re-weigh the remaining aggravators and mitigators or conduct a
12 harmless error analysis.

13 The McConnell decision was issued in 2004, yet Howard waited until 2007, almost three
14 years later, to raise his McConnell claim. If Howard wished to take advantage of the ruling in
15 McConnell, he should have raised it within a reasonable time after McConnell was decided, and in
16 no event more than a year after it was decided. See Hathaway v. State, 119 Nev. 248, 71 P.3d 503
17 (2003). Accordingly, the district court dismissed this claim in Howard's Fourth State Petition as
18 untimely per NRS 34.726 since it was not raised within one year of the decision. Howard claims the
19 one year time period should not have begun until the Nevada Supreme Court made McConnell
20 retroactive in Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006). However, Howard could have
21 raised the issue of retroactivity in a petition for post-conviction relief, and the district court properly
22 determined that the time period should run from when the claim was reasonably available in 2004.

23 Howard also claims he is actually innocent of this aggravator and therefore the procedural
24 bar does not apply. This is incorrect. Unlike Leslie v. State, 118 Nev. 773, 59 P.3d 440 (2002), the
25 felony aggravator is not, in itself, invalid. Rather, it is the general verdict form that creates the issue,
26 not the substantive law of the aggravator. Nor is Howard actually innocent of the death penalty as a
27 remaining aggravator exists – the prior felony aggravator based upon the New York robbery. Thus,
28 actual innocence has not been demonstrated and therefore the procedural bar has not been overcome.

1 Even if this claim were not procedurally barred, the appropriate remedy would be to strike
2 the McConnell aggravator and conduct a re-weighting analysis. Assuming the McConnell aggravator
3 were stricken, taking into account the remaining aggravating factor – the prior violent felony in New
4 York – this Court could still conclude that aggravator was not outweighed by the mitigating
5 evidence presented at trial. In dismissing Howard’s claim regarding the robbery aggravator in his
6 Fourth State Petition, the district court further determined that, even if the claim were timely made,
7 the inclusion of the aggravator was harmless beyond a reasonable doubt. This Court has indicated
8 that where an aggravating circumstance is stricken, the death sentence may be upheld if the court
9 can conclude, beyond a reasonable doubt, that the jury would still have found the remaining
10 aggravators were not outweighed by the mitigating circumstances or that the inclusion of the
11 improper aggravator amounts to harmless error. In reviewing the evidence, the court looks at the
12 evidence at the time of trial. Leslie v. Warden, 118 Nev. at 783, 59 P.3d at 440; Rippo v. State, 122
13 Nev. 1086, 1093, 146 P.3d 279, 284 (2006) (Court considered only the remaining aggravators and
14 trial mitigation evidence in re-weighting after striking McConnell aggravators). Although Howard
15 alleges that the district court erred in considering only the mitigation evidence adduced at the time of
16 trial, the district court properly refused to consider the new mitigation evidence, as will be more
17 fully discussed in Section IV, *infra*.

18 In the instant case the jury heard aggravator evidence that Howard committed armed robbery
19 in New York approximately one year prior to robbing and murdering Dr. Monahan. He attacked a
20 woman he knew, Dorothy Weisband, taking her money and car. VI AA 1401-16. The mitigating
21 evidence consisted of Howard’s testimony. VI AA 1449-66. Howard indicated he served honorably
22 in Vietnam, was wounded and received a Purple Heart and that he had a history of mental illness
23 possibly attributable to his experiences in Vietnam. He testified that he had been incarcerated in the
24 mental health facilities or wards of California’s prison system with people like Charles Manson.
25 Howard also said he told Detective Leavitt he doesn’t know what he hurts people and that he needed
26 help. The jury also heard evidence that, at a young age, Howard witnessed his father murder his
27 mother and sister. The record reflects Howard broke down or became emotional when asked
28 questions about the incident, necessitating a recess. Yet Howard never expressed remorse at Dr.

1 Monahan's death or Howard's treatment of Nurse Weisband.

2 Other evidence presented at trial and in the penalty hearing rebutted Howard's portrayal as a
3 troubled Vietnam veteran with mental health issues. Howard himself indicated he knew what he
4 was doing. His actions in robbing the Sears store, contacting Dr. Monahan and arranging the false
5 test drive also belie this picture. So too does his robbery of Mr. Schwartz in New York. None of his
6 actions in those instances support he was acting out of mental illness as opposed to greed.

7 Based on the foregoing, even assuming this claim was not procedurally barred, this Court
8 could still conclude that the remaining aggravating circumstance was not outweighed by the
9 mitigating evidence. Accordingly, the district court properly determined that, even if the felony
10 robbery aggravator were stricken, the jury would have still sentenced Howard to death and therefore
11 any error related to this aggravator was harmless beyond a reasonable doubt.

12 Finally, the inclusion of this aggravator is also harmless beyond a reasonable doubt because
13 there is overwhelming evidence that Monahan's murder was deliberate and premeditated, and thus it
14 was not necessary that felony murder be used to support First Degree Murder in this instance.
15 Howard, posing as a Caesar's Palace security guard, met with Dr. Monahan and his wife to discuss
16 purchasing the Monahan van one day prior to murdering Dr. Monahan. Howard then arranged to
17 meet with Dr. Monahan the next morning under the guise of wanting to test drive the vehicle.
18 During the meeting the next morning, Howard robbed Dr. Monahan and then killed him with one
19 bullet to the head, execution style. These facts support the conclusion that the Monahan murder was
20 premeditated and deliberate. The district court properly denied this claim as procedurally barred.
21 However, even if this Court were to find that it is not procedurally barred, Howard's claim is
22 meritless as the inclusion of this aggravator was harmless beyond a reasonable doubt. As such, the
23 district court denial of this claim in Howard's Fourth State Petition should be affirmed.

24 **B. Howard's Claim Regarding the Validity of the Prior Violent Felony Aggravator is**
25 **Procedurally Barred and Does Not Prove Actual Innocence of the Death Penalty**

26 This Court recognizes one other form of "actual innocence" involving aggravating
27 circumstances. Where the legal interpretation of an aggravating circumstance is found to be in error,
28 and the facts of the case are such that a court can say, as a matter of law, that the aggravating
circumstance did not apply, then a defendant is "actually innocent" of that aggravating circumstance.

1 Leslie v. Warden, Ely State Prison, 118 Nev. 773, 783, 59 P.3d 440, 447 (2002). In Leslie, this
2 Court concluded that a previous interpretation of the “random and no apparent motive” aggravator
3 was incorrect based upon new evidence in the form of legislative history surrounding the enactment
4 of that aggravator. This Court then concluded, as a matter of law, based upon the facts of the case,
5 that the aggravator was not applicable and that Leslie was “actually innocent” of that aggravator.

6 This Court did not refer to Sawyer but it did cite to the Nevada case that recognized the
7 Sawyer standard, Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). When read with
8 Pellegrini, Leslie indicates that to be “actually innocent” of an aggravating circumstance under
9 Leslie a defendant must demonstrate, by clear and convincing new evidence, that: 1) the Supreme
10 Court previous interpretation of an aggravating circumstance was legally incorrect; 2) under the
11 correct interpretation, based upon the evidence presented at trial, no reasonable juror would have
12 found the existence of that aggravating factor beyond a reasonable doubt. However, the analysis
13 does not stop there. To be “actually innocent” of an aggravator for purposes of overcoming the
14 procedural bar applicable to that aggravator, a court must also find that there is a reasonable
15 probability that, absent the aggravator, the jury would not have imposed a sentence of death. If the
16 defendant can meet this standard, the procedural bar has been overcome as to that aggravator and the
17 aggravating circumstance is stricken. Leslie, 118 Nev. at 780, 59 P.3d at 445. The court then: 1)
18 reweighs the remaining valid aggravators with the mitigating factors derived from the evidence at
19 trial or 2) conducts a harmless beyond a reasonable doubt review. Leslie, 118 Nev. at 783, 59 P.3d
20 at 447 (emphasis added). Under either standard, if it is clear the jury would still have imposed
21 death, the sentence is upheld. If the court cannot make such a determination, then a new penalty
22 hearing is ordered. Leslie, 118 Nev. at 783, 59 P.3d at 447. In addition, Leslie only controls the
23 ability to demonstrate “actual innocence” for purposes of overcoming the procedural bar as to that
24 aggravator. It does not act as “gateway actual innocence” for overcoming procedural bars or
25 doctrines on other claims. For example, in Leslie, the Supreme Court applied the Law of the Case
26 Doctrine to bar reconsideration of issues that were decided on direct appeal. 118 Nev. at 784, 59
27 P.3d at 448. The State submits that if a defendant wishes to argue that the Leslie claim provides
28 grounds for demonstrating “actual innocence” as it relates to death eligibility, then the petitioner

1 must demonstrate, by Sawyer's clear and convincing standard, that, absent the stricken aggravator
2 and but for constitutional error, no reasonable juror would have concluded the aggravating
3 circumstances were not outweighed by the mitigating circumstances (or the aggravating
4 circumstances outweighed the mitigating circumstances) and therefore "actual innocence" relating to
5 death eligibility was shown.¹²

6 Contrary to Howard's assertions, Howard is not "actually innocent" of the death penalty.
7 Even assuming the felony robbery aggravator must be eliminated pursuant to McConnell, Howard
8 failed to present any new evidence, legislative or otherwise, suggesting his actual innocence of the
9 remaining aggravator. Howard's Fourth State Petition raised procedurally-barred legal arguments
10 challenging the sufficiency of the New York felony aggravator. Howard argues that, without an
11 actual judgment of conviction, the New York felony is invalid and that improper notice was given of
12 the aggravator under SCR 250. There is no evidence, let alone clear and convincing evidence,
13 indicating the Legislature did not intend a jury verdict to act as a conviction under the statute and
14 that a formal judgment of conviction is necessary to prove a prior crime of violence. There is no
15 evidence indicating Howard is "actually innocent" of the New York robbery. Further, even
16 assuming that SCR 250 provisions quoted were in existence at the time of Howard's trial, failure to
17 comply does not demonstrate Howard did not commit the New York robbery. Thus, this case is
18 easily distinguished from Leslie. Howard also raises an Ex Post Facto issue in relation to this claim.
19 First, this issue is procedurally barred under the provisions of NRS 34.726 and NRS 34.810.
20 Further, because this issue is being raised for the first time on appeal and has not been addressed on
21 its merits below, this Court need not consider it. However, in the event this Court determines that
22 Howard's challenges to the New York robbery aggravator are not procedurally barred, the
23 appropriate remedy is to remand this issue for the district court to determine it on its merits. As
24 Howard cannot meet the Leslie standard for actual innocence of an aggravator, the prior violent
25 felony aggravator remains valid. Given the aggravator, and the evidence rebutting the mitigating
26

27 ¹² Pursuant to NRS 200.030(4)(a), a person convicted of first-degree murder may be sentenced to
28 death if one or more aggravating circumstances are found and any mitigating circumstances found
do not outweigh the aggravating circumstance(s); see also Summers v. State, 112 Nev. 1326, 148
P.3d 778, 783 (2006).

1 testimony provided by Howard, Howard also has not demonstrated by clear and convincing evidence
2 that, even absent the McConnell felony robbery aggravator, no reasonable juror would have found
3 the aggravating circumstance was not outweighed by the mitigating evidence which existed at trial.
4 As previously noted, where the petitioner argues actual innocence of the death penalty, he must
5 show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would
6 have found him death eligible. Pellegrini v. State, 117 Nev. at 887, 34 P.3d at 537 (2001). Because
7 Howard has failed to prove “actual innocence” for death eligibility, the district court properly
8 determined that the procedural bars relating to penalty phase claims have not been overcome.

9 **IV**
10 **THE DISTRICT COURT PROPERLY DECLINED TO CONSIDER THE NEW**
11 **MITIGATION EVIDENCE PRESENTED IN SUPPORT OF HOWARD’S**
12 **ACTUAL INNOCENCE CLAIM**

13 Howard alleges that, even if one or both of the aggravating factors were valid, the district
14 court erred in failing to reweigh the aggravating factor(s) against the new mitigation evidence. In
15 support of this argument, Howard presents over 30 pages of “new” information in mitigation.¹³

16 As noted above, the “actual innocence” requirement focuses exclusively on those elements
17 that render a defendant eligible for the death penalty; any additional mitigating evidence that was not
18 presented at trial – even if it was the result of alleged constitutional errors – is irrelevant and will not
19 be considered in an actual innocence determination. Sawyer, 505 U.S. at 347-48, 112 S.Ct. at 2523-
20 24. Accordingly, to the extent that Howard now argues that the district court failed to consider his
21 actual innocence claim, he is incorrect. The district court considered, in depth, Howard’s actual
22 innocence claims raised in his Fourth State Petition and his Opposition. However, the court’s refusal
23 to consider the “new” mitigation evidence in determining whether Howard met his burden of
24 demonstrating actual innocence of the death penalty was entirely proper, as the court must consider
25 only that evidence presented at trial. Id. Howard claims that State v. Haberstroh, 119 Nev. 173, 69
26 P.3d 675 (2003) stands for the proposition that new mitigation evidence must be considered in a
27 Leslie re-weighing analysis. However, the Nevada Supreme Court specifically rejected this concept

28 ¹³ All of this mitigation evidence stems from Howard’s childhood and young adulthood and was thus
available to Howard to raise on appeal or in one of his three previous State Petitions, and is therefore
not “new” evidence.

1 in Footnote 23, stating that re-weighing does not involve factual finding because only the trial
2 evidence is considered. 119 Nev. at 184, 69 P.3d at 683. The Court further noted that the jury heard
3 *no* evidence in mitigation at Haberstroh’s penalty phase. This situation is easily distinguishable from
4 the instant case, in which the jury heard significant evidence in mitigation, including that Howard
5 witnessed the murders of his mother and sister at his father’s hand. Additionally, Howard cites to
6 House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 (2006) to support his argument that new evidence must
7 be considered when reviewing a claim of actual innocence to excuse a procedural default. However,
8 House does not stand for this proposition. In House, evidence was presented at trial that House’s
9 semen was found on the murder victim’s clothing. This evidence was used as an aggravating factor
10 under the theory that the murder was committed while House was committing, attempting to
11 commit, or fleeing from the commission of a rape or kidnapping. On post-conviction, new evidence
12 was presented that it was not House’s semen found on the victim’s clothing, but rather that of her
13 husband. The Court concluded that this evidence, which called into question House’s guilt as House
14 presented “substantial evidence pointing to a different suspect,” satisfied the actual innocence
15 “gateway” necessary for House to proceed on remand with procedurally defaulted claims. Id. at
16 554, 126 S.Ct. at 2086. Likewise, Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995), which was
17 cited in House and also by Howard, also involved new evidence (sworn statements of eyewitnesses)
18 that called into question Schlup’s involvement in the crime he was convicted of. Id. at 331, 115
19 S.Ct. at 869. The new, exculpatory evidence presented in House and Schlup that met the actual
20 innocence standard is in no way comparable to the mitigation evidence Howard now wishes to use to
21 circumvent the procedural bars, especially considering this evidence has been available to Howard
22 since before his trial began and does not in any way undermine his conviction. Again, Howard
23 failed to show, by clear and convincing evidence, that no reasonable juror would have found him
24 death eligible had he or she been presented with the “new” mitigation evidence.

25 Howard has set forth no case law that demonstrates that new *mitigation* evidence (as opposed
26 to exculpatory evidence) must be considered in a re-weighing analysis to determine whether actual
27 innocence of the death penalty has been proven. The law on this subject is clear – only the
28 mitigation evidence adduced at the time of trial will be considered in an actual innocence

1 determination, because actual innocence of the death penalty focuses on death penalty *eligibility*. As
2 argued *supra*, Howard failed to meet the standard of actual innocence of the death penalty by clear
3 and convincing evidence and the district court properly declined to consider his procedurally-barred
4 claims as a result. Accordingly, the district court's denial of Howard's Fourth State Petition should
5 be affirmed. Finally, in the event that this Court finds that (1) Howard's claims as to both the
6 robbery aggravator and the prior felony aggravator are not procedurally barred, and (2) that his
7 claims are meritorious, the proper remedy would then be to remand this case for a new penalty
8 hearing to allow the State to proceed on the prior violent felony aggravator stemming from the
9 California robbery which was improperly stricken by the district court prior to Howard's penalty
10 phase.

11 CONCLUSION

12 Based upon the foregoing, the State respectfully requests this Honorable Court AFFIRM the
13 district court's denial of Appellant's fourth Petition for Writ of Habeas Corpus (post-conviction).

14 Dated this 12th day of September, 2011.

15 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of September, 2011.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 12th day of September, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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