IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

SAMUEL HOWARD

Appellant,

vs.

RENEE BAKER, WARDEN, and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL FOR THE STATE OF NEVADA,

Respondents.

Case No. 57469

APPELLANT'S REPLY BRIEF

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

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Actual innocence of the death penalty exception can be invoked if it is shown by clear and convincing evidence that but for the constitutional violation, the petitioner would not have been eligible for the death penalty because some constitutional or state statutory prerequisite for the imposition of a death sentence could not have been satisified. Hirtz and Liebman, Federal Habeas Corpus Practice and Procedure, Section 26.4, p.1534 (6th ed. 2008). The state's argument that actual innocence requires a showing "so strong that a court cannot have confidence in the outcome of the trial" is completely misplaced as is its argument that a habeas petitioner must, in all cases, produce new evidence. Ans. Br. at 28, quoting from Schlup v. Delo, 513 U.S. 298, 316 (1995). Measured against the appropriate standard, Mr. Howard easily establishes his innocence of the death penalty argument and makes the requisite link between that status and constitutional error. His death sentence should be set aside.

I. STATE'S ARGUMENT

The state asserts here that a claim of actual innocence, whether of the underlying offense or of the death penalty requires "both an allegation that the defendant's constitutional rights were violated and the presentation of newly discovered evidence." Ans. Br. at 27. Neither element of this standard is accurate but the state proceeds from this premise to assert that "actual innocence focuses on actual not legal innocence," Ans. Br. at 28, foreclosing a challenge to the evidence presented at trial.[1] It is only then that a defendant can use the actual innocence claim to have his constitutional claims addressed on the merits.

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[1] As will become clear below, this assertion is quoted out of context. The actual quote is from Smith v. Murray, 477 U.S. 527, 537 (1986) where the Court acknowledged that actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." See Sawyer v. Whitley, 505 U.S. 333, 339-40 (1992). The Sawyer Court went on to note the "present case requires us to further amplify the meaning of 'actual innocence' in the setting of capital punishment." Id. at 340. The Court noted the difficulty of developing "an analogous framework when dealing with a defendant who has been sentenced to death." Id. at 341. To make such an analog "workable it must be subject to determination by relatively objective standards." Id. Those standards are discussed below.

In this context, not surprisingly, the state argues that Mr. Howard's claims must fail. The murder in the course of robbery aggravator challenge is untimely, Ans. Br. at 28-30, as is the challenge to the prior violent felony aggravator. Id. at 31. According to the state, Mr. Howard could only demonstrate innocence of this aggravator if he proved by clear and convincing evidence that the prior interpretation by this Court of the meaning of final conviction was "legally incorrect," Ans. Br. at 32, and that no reasonable juror would have found that aggravator beyond a reasonable doubt. The state argues that Mr. Howard did not meet that burden because there "is no evidence, let alone clear and convincing evidence, indicating the Legislature did not intend a jury verdict to act as a conviction under the statute and that a formal judgment of conviction is necessary to prove a prior crime of violence." Id. at 33. All of Mr. Howard's legal challenges to the prior violent felony aggravator are, thus, time barred. Id.

II. MR. HOWARD'S RESPONSE

A. Standards for establishing actual innocence.

Sawyer v. Whitley, 505 U.S. 333 (1992) made it clear that a habeas petitioner could establish actual innocence if he could prove that, but for the constitutional violation he claims, no reasonable juror could have found him guilty of the underlying offense, 505 U.S. at 343, or find him eligible for the death penalty. "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." 505 U.S. at 345. The Court also made it clear that "some other condition" could be a state statutory element ("Statutory provisions for restricting eligiblity . . . vary from State to State." 505 U.S. at 345, n.12), or some constitutional impediment.

Arave v. Creech, 507 U.S. 463, 476-77 (1993) provides an example of the latter standard; it discusses the standards for evaluating whether state law definitions of aggravating circumstances are sufficient to establish death eligibility which conform to the

Eighth Amendment. "[T]he question whether state courts properly have applied an aggravating circumstance is separate from the question whether the circumstance, as narrowed, is facially valid." A valid aggravating factor must channel a sentencer's discretion with clear and objective standards that provide specific and detailed guidance and make rationally reviewable the process of imposing death. 507 U.S. at 471. To do that, the federal courts must first determine if the statutory standard is vague and, if it is, examine state court construction of that statute to determine whether the courts have further defined the vague terms. Id. at 471. It is not enough that the statute is determinate; it must also genuinely narrow the class of persons eligible for the death penalty. Id. at 474. In pursuance of this constitutional requirement, federal courts may examine whether the aggravating factor is facially valid by considering state court formulations of the limiting construction to ensure consistency. Id. at 477.

Lewis v. Jeffers, 497 U.S. 764 (1990) sets another standard for evaluating the constitutional validity of an aggravating factor. If a habeas petitioner challenges the application of a particular aggravating factor in his case, he must demonstrate that under the proper standard no rational juror could have concluded that the aggravator applied. 497 U.S. at 783.

In Tison v. Arizona, 481 U.S. 137, 157-58 (1987), the Court entertained an Eighth Amendment challenge to the claim of a participant in a felony murder on the theory that the death penalty was disproportional to the offense of felony murder. The Court engrafted a requirement to the Arizona statute and required a showing that the defendant evince a reckless disregard for human life during the commission of the felony murder. Absent such proof, the death sentence must fail. See also Zant v. Stephens, 462 U.S. 862, 878 (1983) (discussing the Eighth Amendment requirement that a state death penalty procedure narrowly limit the class of eligible persons subject to the death penalty).

As noted above, constitutional issues are not the only means by which a court may examine a death penalty aggravator; violations of state procedural rules also give rise to

claims of innocence in the penalty phase context. In Haley v. Cockrell, 306 F.3d 257 (5th Cir. 2002), the petitioner was convicted in a Texas court of theft, a second-degree felony, and sentenced under the state's habitual offender statute to a term of sixteen years. The Texas Penal Code had a specific procedure for its enhancement scheme; two prior felonies had to be established and the second felony had to have occurred after the first conviction became final. The proof, however, showed that the first conviction, for delivery of a controlled substance, became a final conviction, only after Haley's appeal was denied, six days after the second conviction for aggravated robbery became final. He argued in post conviction proceedings that this failure to prove the requisite order of finality rendered him innocent of his punishment as a second-degree felon thus forgiving a procedural bar to his claim of evidentiary insufficiency. The Fifth Circuit agreed and granted Haley habeas relief. "If we were to condemn Haley to suffer the consequences of an affirmative finding which, . . . never existed, he would continue serving a sentence as an habitual offender of which he is in fact innocent. This is a classic example of a 'fundamental miscarriage of justice,' precisely what the actual innocence exception was created to prevent." 306 F.3d at 267-68.

The Supreme Court granted the petition for writ of certiorari and reversed, not disturbing the reasoning of the Fifth Circuit but remanding the case with an order that the other excuses to procedural default be considered before the fundamental miscarriage of justice claim. Dretke v. Haley, 541 U.S. 386 (2004). Justice Stevens, joined by JJ Kennedy and Souter, dissented arguing that because all parties agreed that "there is no factual basis for respondent's conviction as a habitual offender, it follows inexorably that respondent has been denied due process of law." 541 U.S. at 397. "The miscarriage of justice is manifest." Id. at 398. Justice Kennedy in a separate dissent noted that "some would say that Haley's innocence is a mere technicality, but that would miss the point. In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail." Id. at 399-400.

These cases are not an exhaustive recitation of the constitutional or statutory challenges to state punishment laws that give rise to an actual innocence of the penalty excuse of procedural default. They serve, however, as a significant rebuttal to the prosecution's central attack on Mr. Howard's argument; a claim for actual innocence of the death penalty requires no additional evidence, new or otherwise. If, but for a constitutional violation, the petitioner would not have been eligible for the penalty assessed because some constitutional or state statutory prerequisite for the imposition of a death sentence could not have been satisfied, he has established his innocence of that penalty. Nothing more is required. Mr. Howard meets that standard.

B. Mr. Howard's claim establish his innocence of the death penalty.

Mr. Howard's claim is simply put: all of the aggravating factors are void. Period. Even if the prior violent felony were valid, the reweighing process, utilizing all of the evidence, not just that adduced at trial, would establish a reasonable probability that a reasonable juror would have not sentenced Mr. Howard to death.

1. All of the aggravators are void.

There is no controversy that Mr. Howard's murder in the course of a robbery aggravator is invalid and both McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006) so hold. The state's only response is that, unless Mr. Howard can establish his innocence of the death penalty, the claim is time barred. 1 AA 46-48. The second aggravating factor was that the murder occurred in the course of a robbery. Id. A third aggravating factor alleged murder for the purpose of avoiding or preventing a lawful arrest, but it was abandoned before trial. 6 AA 1388-89. No other aggravating factor was alleged and the prosecution does not contend otherwise.

The penalty phase commenced on the afternoon of May 2, 1983. The first witness called by the state was Dorothy Weisband, who testified that Mr. Howard robbed her. 6 AA 1400-16. John McNicholas, the investigating detective, also testified. 6 AA 1417-28. The state introduced exhibit 69, a certified copy of the minutes from the Supreme Court of New

York. Defense counsel objected to its admission but the trial court overruled the objection. 6 AA 1425-26. It was clear, as the prosecution admitted, that no judgment of conviction was ever entered.

The following day, the prosecutor informed the court that he intended to call the investigating officer from San Bernardino, California, and to move for the introduction of the abstract of judgment from California indicating that on May 27, 1982, Mr. Howard was convicted of one count of theft and one count of robbery. 6 AA 1431. The defense objected, arguing that Mr. Howard had been convicted of the California offense after the commission of the Nevada offense and therefore the California offense was not a prior conviction within the meaning of the statute. 6 AA 1431-43. The trial court sustained the objection. Id. at 1443.

> The Court: Counsel, let's not waste any time. The court is going to sustain the objection.
>
> I don't think you can read this sentence any way other than it is. Your misinterpretation of it doesn't change it. The sentence reads:
>
> The murder, which is the murder under consideration, was committed by a person who was previously convicted of another murder or a felony involving the use or threat or violence to the person of another.
>
> The reason the other information came in or the other felony came in from New York was because it was a previous felony involving violence. This felony that we have in California is a subsequent felony involving violence.
>
> Your objection is sustained.

6 AA 1442-43.

Once that ruling occurred there were no other aggravators to submit to the jury other than the murder in the course of robbery. To allow the Weisband robbery to "substitute' for the disallowed California robbery violates the constitution in two important ways: (1) there is no notice of it and (2) it is not a final conviction. To apply the current statutory definition of final judgment violates the Ex Post Facto Clause of the constitution. Were this Court to change the definition of final conviction now, it would violate the Due Process Clause of the

constitution.[2]

2. Lack of notice.

The state argues that SCR 250 should not apply and they are correct. At the time of Mr. Howard's trial, however, NRS 175.552 mandated notice of aggravating factors at any time "before the commencement of the penalty hearing." See Rogers v. State, 101 Nev. 457, 466-67, 705 P.2d 664, 671 n.2 (1985), cert denied, 476 U.S. 1130 (1986). Thus, once the penalty phase started in Mr. Howard's trial, the state was barred from altering its notice of intent to seek death.

Because notice to the defense was required, cases construing the effect of lack of notice are useful whether they construe NRS 175.552 or SCR 250. In Bennett v. Eighth Judicial Dist. Court, 121 Nev. 802, 121 P.3d 605 (2005), the prosecution filed a notice of aggravating factors in 1988 and obtained a death sentence which was later reversed and a new penalty hearing ordered. At that point, only one valid aggravating factor remained from the original notice.[3] The state sought to add three new aggravating factors to its notice of intent to seek death under SCR 250(4). The trial court permitted this new addition and Mr. Bennett sought a writ of mandamus to compel their dismissal. 121 Nev. at 805, 806, 121 P.3d at 607-08. This Court agreed.

> Our view on this matter is only strengthened by the fact that the evidence upon which the State bases the newly alleged aggravators has existed since Bennett's original prosecution in 1988. The State originally passed on these aggravators, which it has recognized in its answer to Bennett's petition were weaker than the ones it actually chose to pursue. That we issued the

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[2] The state argues that these two arguments - lack of notice and Ex Post Facto/retroactive application - are themselves time barred but this argument ignores the central focus of Mr. Howard's claim. These arguments arise if and only if this Court upholds the death sentence by using the Weisband New York case in lieu of the disallowed California conviction. There is no constitutional violation unless that occurs and thus, no one year time bar. The claims would be brought within one year of the constitutional violation.

[3] In Bennett's case, three aggravating factors were alleged in the original notice: the murder created a risk of death to more than one person, NRS 200.033(3), the murder was committed in the course of a burglary, NRS 200.033(4), and that the murder was committed during the course of an attempted robbery, NRS 200.033(4). The last two aggravators were invalidated under McConnell v. State, supra, before the second penalty hearing.

> McConnell opinion does not now give the State cause to resurrect weaker aggravating circumstances it rejected nearly 17 years earlier.

121 Nev. at 811, 121 P.3d at 611.

In the case at bar, the prosecution, prior to trial, chose not to allege the New York prosecution as an aggravating factor. Once the prior violent felony conviction from California was disallowed by the trial court, the prosecution was left only with the murder in the course of a robbery; there was no other aggravating factor alleged. The New York trial cannot and should not save the case now. Because the only remaining aggravating factor before the Court to justify Mr. Howard's death sentence is the murder during the course of a robbery, an aggravating factor no longer valid after McConnell and Bejarano, the death sentence must be set aside.

This resolution is supported, not just by state law, but by the requirements of due process, especially notice. This Court has insisted that the notice provisions, whether statutory under NRS 175.552, or rule based under SCR 250, be interpreted strictly. These two sets of procedures, NRS 175.552 and SCR 250 (enacted in 1990 and applicable only to capital trials after its effective date) "are intended to ensure that defendants in capital cases receive notice sufficient to meet due process requirements." State v. Second Judicial Dist. Court, 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000); see also Deutscher v. State, 95 Nev. 669, 678, 601 P.2d 407, 413 (1979) ("We believe that the purpose of [NRS 175.552] is to provide the accused notice and to insure due process so he can meet any new evidence which may be presented during the penalty hearing.")

This Court has consistently and strictly applied the requirements of each procedure. Even technical compliance may violate due process. See Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 724 (1991) ("Consistent with the constitutional requirement of due process, defendants should be notified of any and all evidence to be presented during the penalty hearing. Although the state in this case did give the accused notice before the commencement of the penalty hearing [and thus complied with the statute], it was only one day's notice. We hold that the notice given in this case was inadequate to meet the

requirements of due process."); see also Mason v. State, 118 Nev. 554, 562, 51 P.3d 521, 526 (2002).

The Fifth and Fourteenth Amendments are equally demanding:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. (Citation omitted). . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Cole v. Arkansas, 333 U.S. 196, 201 (1948); Lankford v. Idaho, 500 U.S. 110, 121, 126 n.22 (1991) ("fair notice as the bedrock of any constitutionally fair procedure."); see also id. at 126 (collecting cases).

Once the McConnell aggravator is invalidated, there are no other extant aggravating circumstances alleged. Mr. Howard's death sentence fails. To allow the prosecution to substitute the New York case now violates the Fifth Amendment.

3. To now describe the New York case as a conviction violates alternatively, the Ex Post Facto provision of the Fifth Amendment or the Due Process Clause.

Even if the state had provided proper notice, the New York proceedings were not sufficient to satisfy then existing Nevada law to prove a conviction.[4] The evidence of the Queens Supreme Court case is uncontradicted. The state introduced no conviction or sentence. Mr. Howard appeared for trial for two days and then disappeared. The trial judge submitted the case to the jury and obtained a guilty verdict from that jury, but took no other

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[4] The State argues that this "claim" was not presented in the court below but that argument misapprehends the procedural posture of the case. In the current posture, there is no ex post facto violation. The State did not argue and the court below did not find that the NY guilty verdict could be salvaged by applying NRS 200.033(2)(b) or by suggesting that the court interpret the word "conviction" to include only a guilty verdict. In that current posture, the issues about ex post facto and retroactivity are simply Mr. Howard's arguments about why this Court cannot so salvage the New York proceedings. It is only in the event that should this Court, as it did in Rogers v. Warden, noted in footnote 6, apply the 1997 amendments to NRS 200.033(2)(b) or decide on its own to retroactively redefine the concept of conviction, that these issues would become claims. See Rogers v. McDaniel, ___ F.Supp. 2d ____, 2011 WL 2680763 (D. Nev. July 8, 2011). "[A]ny application of the 1997 amendments to NRS 200.033(2) in this case . . . would violate the Ex Post Facto Clause of the United States Constitution."

action.

At the time of Mr. Howard's trial, the term "conviction" had a specific legal meaning. NRS 50.095 permitted the use of convictions to impeach a witness's credibility. This Court interpreted the term "conviction" to require something more than merely an arrest or, as in the case at bar, a guilty verdict. In 1967, the Court, in Fairman v. State, 83 Nev. 287, 289, 429 P.2d 63, 64 (1967), ruled that a jury verdict of guilty against a defendant, where the entry of a judgment on that verdict and sentencing had been delayed a week, did not permit the prosecution to use that verdict to impeach the defendant in a trial occurring after the verdict but before entry of judgment and sentencing: "A verdict of the jury was not a judgment of the court, nor is it the final determination." The Court upheld the rule of Fairman, in Colle v. State, 85 Nev 289, 292, 454 P.2d 21, 23 (1969), Boley v. State, 85 Nev. 466, 470, 456 P.2d 447, 449 (1969), and Revuelta v. State, 86 Nev. 224, 227, 467 P.2d 105 (1970).

In Revuelta v. State, this Court ruled that no judgment of conviction can be complete without a sentence. In another context, this Court ruled that the mere pronouncement of a conviction and sentence of imprisonment was not sufficient to constitute a conviction; the judgment could not be final until signed by the judge and entered by the clerk. Miller v. Hayes, 95 Nev. 927, 604 P.2d 117 (1979); see also Bradley v. State, 109 Nev. 1090, 864 P.2d 1272 (1993).

In 1997, the Legislature amended NRS 200.033(2)(b) to permit the use of a prior violent felony conviction aggravating factor when the jury simply returned a guilty verdict. This Court has held that when the Legislature changes an existing statute, it intends to either create a new right or withdraw an old one. The change is presumed to indicate a change in legal rights. Courts assume the Legislature was aware of the previous interpretation and evinced its disagreement with it by enacting the change. Utter v. Casey, 81 Nev. 268, 274, 401 P.2d 684, 688 (1965).[5]

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[5] The Legislative history of the change indicates that the Legislature intended to make a very precise change. Senator Mark James, Chair of the Committee on Judiciary asked, when the bill came up, what was wrong with the "previously convicted of

Nevada law, in 1981, required the prosecution to prove a "conviction" by establishing both the existence of and the entry of a final judgment; under that standard, the New York proceeding fails. Consequently, the prior conviction involving violence aggravator cannot sustain Mr. Howard's death sentence.

4. The Court cannot retroactively apply NRS 200.033(2)(b) to Mr. Howard's case nor retroactively change the definition of conviction.

This Court is not free either to apply the 1997 amendment to NRS 200.033(2)(b), or to alter the definition of conviction commonly understood in 1981.

The use of NRS 200.033(1)(b) retroactively violates the ex post facto clause of the Fifth Amendment because the amendment reduced the state's burden of proof. See Carmell v. Texas, 529 U.S. 513 (2000).[6]

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another murder" language. The representative of the Nevada District Attorneys Association noted that the existing language was confusing. Committee counsel noted that under the then-existing statute, a person would have to be convicted of murder at the time of the commission of a subsequent murder to invoke the aggravating circumstances; "with passage of the proposed amendment, a person would only need to have been convicted at the sentencing stage prior to commission of a subsequent murder in order to invoke aggravating circumstances." Clearly, the Legislature intended this amendment to reduce the state's burden of proof but only as to the timing of the prior conviction, not the quantum of proof required to establish it.

[6] The same issue was raised in Rogers v. Warden, where the state used a jury verdict without a judgment to satisfy a prior violent felony aggravator. This Court applied NRS 200.033(2)(b) to the case even though Mr. Rogers was tried in 1981:

> Imposition of a sentence is not required for a conviction under NRS 200.033(2). Neither the district court nor the parties addressed this statute, which provides that "a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury." We conclude that the trial court makes a pronouncement of guilt once it accepts a defendant's guilty plea as valid. This is the point in the proceedings which is equivalent to a jury's rendering of a guilty verdict. Thus, under NRS 200.033(2), a valid conviction existed for Roger's 1977 offense.

In federal court proceedings attacking Mr. Rogers' death sentence, the federal court, in a published order, invalidated in part, Mr. Rogers' death sentence because of the ex post facto violation. Rogers v. McDaniel, ___ F. Supp. 2d ____, 2011 WL 2680763 (D. Nev. July 8, 2011). "[A]ny application of the 1997 amendments to NRS 200.033(2) in this case . . . would violate the Ex Post Facto Clause of the United States Constitution."

In Rogers v. Tennessee, 532 U.S. 451 (2001), the Supreme Court made it clear that, while the Ex Post Facto clause of Art. I, Sec. 10 of the Constitution did not apply to judicial constructions of a statute, Bouie v. City of Columbia, 378 U.S. 347 (1964) incorporated the due process concepts of foreseeability, fair warning, and notice to ban certain retroactive judicial constructions. Judicial interpretations that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" violate due process. 532 U.S. at 462, quoting from Bouie, 378 U.S. at 354. This Court can neither retroactively apply the 1997 amendment to Mr. Howard's 1983 trial or judicially alter Nevada law as it existed in 1983.

Under then-existing Nevada law, Mr. Howard was never convicted in New York. The New York court never entered a sentence or judgment of conviction, even if proper notice was given. The death sentence must be set aside.

Given these constitutional constraints, there can be no doubt that all of the aggravating factors alleged against Mr. Howard are void and his death sentence set aside.

5. Reweighing.

The state, on the one hand faults Mr. Howard for not presenting new "evidence" in his attacks on the aggravating circumstances, Ans. Br. at 33 ("Howard failed to present any new evidence, legislative or otherwise, suggesting his actual innocence of the remaining aggravator.") and yet insists that any new evidence cannot be considered in reweighing and reconciles that contradictory position by arguing that such evidence is irrelevant and cannot be considered. Id. at 34, citing Sawyer v. Whitley, 505 U.S. 333, 347-48 (1992). They reconcile the contradiction by arguing that Sawyer so holds.

Sawyer, however, construed a Louisiana statute where mitigating evidence played no role in the determination of death eligibility. Under Louisiana law, a defendant is eligible if he is both convicted a first degree murder, defined as an intentional killing while in the course of committing another crime, and the jury finds at least two aggravating factors. 505 U.S. at 348. Once eligibility has been established, the "deliberations assume a different

tenor." 505 U.S. at 342. The consideration of mitigating evidence becomes part of the selection process: does the defendant himself merit a sentence of death.

In Nevada, it is well settled that a defendant's eligibility for death depends not just on an affirmative finding of an aggravating circumstance but balancing that aggravating factor against proffered mitigating evidence. Rippo v. State, 122 Nev. 1086, 1093, 146 P.3d 279, 284 (2006) ("The primary focus of our analysis, therefore, is on the effect of the invalid aggravators on the jury's eligibility decision, i.e., whether we can conclude beyond a reasonable doubt that the jurors would have found that the mitigating circumstances did not outweigh the aggravating circumstances even if they had considered only the three valid aggravating circumstances rather than six.") Further, after reweighing the remaining aggravating factors and the mitigating evidence, if the Court finds a reasonable probability that, absent the invalid aggravating factor, the jury would not have imposed a death sentence, the defendant has established the fundamental miscarriage of justice that overcomes any procedural bars. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002); Bennett v. State, 119 Nev. 589, 598, 81 P.3d 1, 7 (2003); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (procedural bars can be overcome by demonstrating that the court's failure to review an issue would result in a fundamental miscarriage of justice.)

It is true that in the past this Court has insisted that reweighing be limited to the facts proffered at trial but under the federal standard, an actual innocence claim requires the reviewing court to consider all of the proffered evidence, both from trial and that adduced in post conviction. In House v. Bell, 547 U.S. 518 (2006), the Court made it clear that, where a habeas petitioner argues that his actual innocence forgives a procedural default, the habeas court must consider not only the trial evidence but the new evidence as well. Id. at 536, citing Schlup v. Delo, 513 U.S. 298, 324-32 (1995).

It would serve no useful purpose to set forth again all of the newly developed mitigating evidence. It is clear, from even the most cursory review of that evidence, however, that there is now a substantially different picture of Mr. Howard than was presented

at trial. There is more than a reasonable probability that a reasonable juror would vote to assess a life sentence. The death sentence should be set aside.

III. CONCLUSION

Based on the authorities presented to this Court in this document and in the opening brief, Mr. Howard asks this Court to grant him a new trial.

Dated this 9th day of November 2011.

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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 a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 9th day of November 2011.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 9th day of November 2011. Electronic Service of the foregoing Appellant's Opening Brief shall be made in accordance with the Master Service List as follows:

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