

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAOLA M. ARMENI, JONAH J.
HORWITZ, and DEBORAH A.
CZUBA,

Petitioners,

v.

THE EIGHTH JUDICIAL
DISTRICT COURT of the STATE of
NEVADA, IN AND FOR the
COUNTY of CLARK; and THE
HONORABLE MICHAEL P.
VILLANI,

Respondents,

and

TIMOTHY FILSON, Warden,
ADAM PAUL LAXALT, Attorney
General for the State of Nevada, and
THE STATE OF NEVADA,

Real Parties in Interest.

Supreme Court Case No.

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Elizabeth A. Brown
Clerk of Supreme Court

Underlying Case: Clark County Dist.
Ct. No. 81C053867

APPELLANT'S APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

VOLUME 3 OF 3

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CERTIFICATE OF SERVICE

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9 CLARK COUNTY, NEVADA

9 SAMUEL HOWARD,)
10)
11 Petitioner,) CASE NO: 81C053867
12 -vs-) DEPT NO: XVII
13 THE STATE OF NEVADA,)
14 Respondent.)

15 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING**
16 **MOTION TO AMEND AND OR SUPPLEMENT FIFTH PETITION FOR WRIT OF**
17 **HABEAS CORPUS (POST-CONVICTION) AND OPPOSITION TO MOTION TO**
18 **AMEND AND OR SUPPLEMENT FIFTH PETITION FOR WRIT OF HABEAS**
19 **CORPUS (POST-CONVICTION) AND IMPOSING SANCTIONS ON**
20 **PETITIONER'S COUNSEL**

21 DATE OF HEARING: March 17, 2017
22 TIME OF HEARING: 9:30 a.m.

23 THIS CAUSE having come on for hearing before the Honorable MICHAEL
24 VILLANI, District Judge, on the 27th day of March, 2017, and the 19th day of April 2017,
25 SAMUEL HOWARD (hereinafter "Petitioner" or "Howard") not present, represented by
26 Paola M. Armeni, Esq., Assistant Federal Public Defender Deborah A. Czuba, Esq. and
27 Assistant Federal Public Defender Jonah J. Horwitz, Esq., the Respondent being represented
28 by STEVEN B. WOLFSON, District Attorney, by and through JONATHAN E.

1 VANBOSKERCK, Chief Deputy District Attorney, and the Court having considered the
2 matter, including briefs, transcripts, testimony of witnesses, arguments of counsel, and/or
3 documents on file herein, now therefore, the Court makes the following findings of fact and
4 conclusions of law:

5 **FACTUAL BACKGROUND**

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

19 Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had
20 told her to wait for him and she was unaware of his intentions to obtain money through a
21 false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980
22 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall.
23 While escaping, Howard rear-ended a white Corvette driven by Stephen Houchin. Houchin
24 followed Howard when Howard left the scene of the accident. Howard pointed the .357
25 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own
26 business.

27 Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the
28 car for a few hours. Thomas and Howard walked about and Howard made some phone calls.

1 Later that evening Howard left for a couple of hours. When he returned, he told Thomas that
2 he had met up with a pimp, but the pimps' girls were with him so he could not rob him.
3 Howard indicated he had arranged to meet with the "pimp" the next morning and would rob
4 him then.

5 Howard and Thomas drove to the Western Six motel located on the Boulder Highway
6 near the intersection of Desert Inn Road. The couple had stayed at this motel before and
7 Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel
8 registration card under that name was admitted into evidence and a documents' examiner
9 compared handwriting on the card with Thomas' and indicated they matched.

10 Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to
11 breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George
12 Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel
13 room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio
14 with him that had loose wires and a gold watch she had never seen before. Howard told
15 Thompson that he was tired of Las Vegas and to pack up their things as they were leaving
16 for California.

17 Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking
18 distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and would
19 park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and
20 near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's
21 home and business phone numbers and the business address.

22 About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr.
23 Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the
24 van. The caller was a male who identified himself as "Keith" and stated he was a security
25 guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted
26 to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs.
27 Monahan indicated the caller would have to talk to her husband who was expected home
28 shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to

1 meet "Keith" at Caesar's later that night.

2 The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met
3 "Keith" that evening at the appointed time and place. Howard was identified as the man
4 who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard
5 talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the
6 van but did not touch the door handle while doing so. Howard arranged to meet Dr.
7 Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the
8 van at Dr. Monahan's office before returning home in another vehicle.

9 The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took
10 with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs.
11 Monahan arrived at the office at about 8:00 a.m., Dr. Monahan was not there and a patient
12 was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office.
13 Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on
14 his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and
15 stating that he had an appointment with the doctor.

16 Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description
17 she gave worked security. After obtaining this information, Mrs. Monahan called the police
18 to report her husband as a missing person. This occurred at about 9:00 a.m.

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

27 In response to television coverage, the police learned the Monahan van was behind
28 the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an

1 overturned table and some coverings. He had been shot once in the head. The bullet went
2 through Dr. Monahan's head and a projectile was recovered on the floor of the van. The
3 projectile was compared to Howard's .357 revolver. Because the bullet was so badly
4 damaged; forensic analysis could not establish an exact match. It was determined that the
5 bullet could have come from certain makes and models of revolvers, Howard's included.
6 The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet
7 were missing. A fingerprint recovered from one of the van's doors matched Howard's.

8 Homicide detectives were aware of the Sears robbery that had occurred on March
9 26th. The description of the Sears suspect matched that given by Mrs. Monahan of the man
10 calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the
11 walkie-talkie in possession of the suspect, the close proximity of the dental office to the
12 Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a
13 bulletin to state and out-of-state law enforcement agencies describing the suspect and the car
14 used in the Sears' robbery.

15 On March 27, 1980, while the police were searching for Dr. Monahan, Howard and
16 Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on
17 the way they stopped for gas. At that time Howard had a brown or black wallet that had
18 credit cards and photos in it. Howard went to the gas station rest room and when he returned
19 he no longer had the wallet.

20 On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino,
21 California. Once again, Howard left Thompson in the car while he entered the Sears, picked
22 up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears
23 security badge in the attempt. The Sears personal were suspicious and left Howard at the
24 register while they called Las Vegas. When they returned Howard had left. Howard had
25 returned to the car and Thompson and Howard ducked down when the people from Sears
26 stepped outside to view the parking lot.

27 On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping
28 Center in Downey, California. He entered a jewelry store and talked to a security agent,

1 Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police
2 officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater
3 talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store
4 went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed
5 Howard walking up and down the aisles of the drugstore, picking items up and replacing
6 them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No
7 gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had
8 been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge
9 stolen from Kinsey.

10 Howard was arrested for carrying a concealed weapon and then identified and booked
11 for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police
12 officers. Disputed evidence was presented regarding his response and whether he invoked
13 his right to silence. Based on information in the all-points bulletin, the California authorities
14 contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980,
15 LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda
16 rights, which Howard indicated he understood, interviewed Howard regarding the Sears
17 robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to
18 counsel at this time.

19 Howard told Detective Leavitt he recalled being at the Sears department store but no
20 details about what happened and that he did not remember anything about March 27, 1980.
21 He stated he could have killed Dr. Monahan but he did not know.

22 Ed Schwartz was working as a car salesman in New York on October 5, 1979. When
23 he arrived at work at approximately 9:00 a.m., Howard entered the agency and was looking
24 at an Oldsmobile car. Howard showed Schwartz a New York driver's license and
25 checkbook and told Schwartz that he worked for a security firm in New York. Howard
26 asked if they could take a demonstration ride and Schwartz drove the car for a few blocks
27 while Howard was the passenger. Howard asked if he could drive the car and the men
28 switched seats. After driving for a short time, Howard pulled over and pointed an automatic

1 pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his
2 shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet.
3 Schwartz got out of the car when ordered to do so and Howard drove off. The car was later
4 found abandoned.¹

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

14 Howard testified over the objection of counsel. He indicated he did not recall much
15 about March 26, 1980. He remembered being in Las Vegas in general on and off and that at
16 one point Dwana Thomas' brother, who was about Howard's height, age and weight, and
17 had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey
18 could have been telling the truth about the Sears store. Howard indicated he was not sure
19 because when the Sears people gathered around him, it reminded him of Vietnam and he
20 kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the
21 Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he
22 could not be that callous.

23 On cross-examination, Howard admitted he left New York in the middle of his
24 robbery trial and was asked about statements he made to Detective Leavitt. Howard also
25 acknowledged he has used a number of aliases including Harold Stanback. Howard
26 indicated he was taking the blame for Dawana and her brother Lonnie.

27
28 ¹ This evidence was admitted to show identity and motive for the Monahan murder.

1 Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been
2 in Las Vegas in March of 1980.

3 In the penalty phase, the State presented evidence on the details of Howard's 1979
4 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband,
5 testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a
6 closet and demanded she removed her clothes. She refused and he left. After the robbery,
7 Howard called Weisband trying to get more cash from her in return for her car and
8 threatened her.

9 Howard testified regarding his military, family and mental health histories. Howard
10 discussed his military service and stated he had suffered a concussion and received a purple
11 heart.² Howard also stated he was on veteran's disability in New York.³ He said he was in
12 various mental health facilities in California including being housed in the same facility as
13 Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the
14 doctors thought he was malingering. When asked about his childhood, Howard became
15 upset. He indicated he did not want to talk about the death of his mother and sister. Howard
16 indicated he was not mentally ill and knew what he was doing at all times.

17 PROCEDURAL HISTORY

18 On May 20, 1981 Howard was indicted on one count of robbery with use of a deadly
19 weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one
20 count of robbery with use of a deadly weapon involving Dr. George Monahan and one count
21 of murder with use of a deadly weapon involving Dr. Monahan, both committed on March
22 27, 1980. With respect to the murder count, the State alleged two theories: willful,
23 premeditated and deliberate murder or murder in the commission of a robbery.

24 Howard was arrested in California where he was serving time for a robbery
25

26 ² The military records attached to the current Fourth Petition do not reflect any such injury or award.

27 ³ Howard's military records do not support this and there is nothing in the record substantiating any admission to a
28 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 committed on or about April 1, 1980. He was extradited in November of 1982 and an initial
2 appearance was set for November 23, 1982. At that time the matter was continued for
3 appointment of counsel, the Clark County Public Defender's Office.

4 On November 30, 1982, Terry Jackson of the Public Defender's Office represented to
5 the district court that Howard qualified for the Public Defender's services; however, Mr.
6 Jackson indicated he had a personal conflict as he was a friend of the victim. The district
7 judge determined that the relationship did not create a conflict for the Public Defender's
8 Office, barred Mr. Jackson from involvement with the case and appointed another deputy
9 public defender to Howard's case.

10 Howard's counsel requested a one-week continuance to consult with Howard about
11 the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After
12 discussion, the district court accepted a plea of not guilty and set a trial date of January 10,
13 1983.

14 Howard filed a motion in late in December asking for his counsel to be removed and
15 substitute counsel appointed. Counsel filed a response addressing issues raised in the
16 motion. After a hearing, the district court determined there were no grounds for removing
17 the Clark County Public Defender's Office.

18 A motion for a psychiatric expert was filed. At a hearing, the district court inquired if
19 this was for competency and Howard's counsel indicated it was not, but it was to help
20 evaluate Howard's mental status at the time of the events. The district court granted the
21 motion and appointed Dr. O'Gorman to assist the defense.

22 At a status check on January 4, 1983, defense counsel indicated the defense could not
23 be ready for the January 10th trial date due to the need to conduct additional investigation and
24 discovery. In addition, counsel noted Howard was refusing to cooperate with counsel.
25 Howard objected to any continuance with knowledge that his attorneys' could not complete
26 the investigations by that date. Given Howard's objections, the district court stated the trial
27 would go forward as scheduled.

28 On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's

1 conflict created mistrust in Howard and he therefore refused to cooperate. This motion was
2 denied. Defense counsel then moved for a continuance as they did not feel comfortable
3 proceeding to trial in this case, given the issues involved, with only six weeks to prepare.
4 After extensive argument and a recess so that counsel could discuss the issue with Howard,
5 the district court granted the continuance over Howard's objections.

6 The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983.
7 The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin
8 on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a
9 scheduling problem. Because the district judge was on vacation, someone referred the juror
10 to the District Attorney's Office. That Office referred the juror to the jury commissioner.
11 Howard moved for a mistrial or elimination of the death penalty as a sentencing option based
12 upon this contact. After conducting an evidentiary hearing, the district court denied
13 Howard's motions.

14 Defense counsel made an oral motion to withdraw indicating they had irreconcilable
15 differences with Howard over the conduct of the penalty phase. Counsel indicated they had
16 documents and witnesses in mitigation, but that Howard had instructed them not to present
17 any mitigation evidence. Howard also instructed them not to argue mitigation and they
18 would not follow that directive, but would argue mitigation. Counsel also indicated that
19 Howard told them he wished to testify, but would not tell them the substance of his
20 testimony. Finally, counsel indicated they had attempted to get military and mental health
21 records but were unsuccessful because the agencies possessing the records would not send
22 copies without a release signed by Howard and Howard refused to sign the releases. The
23 district court canvassed Howard if this was correct and Howard confirmed it was true and
24 that he did not want any mitigation presented. The district court found Howard understood
25 the consequences of his decision and denied the motion to withdraw concluding defense
26 counsel's disagreement with Howard's decision was not a valid basis to withdraw.

27 The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State
28 originally alleged three aggravating circumstances: 1) the murder was committed by a

1 person who had previously been convicted of a felony involving the use of violence - namely
2 robbery with use of a deadly weapon in California, 2) prior violent felony - a 1978 New
3 York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder
4 occurred in the commission of a robbery. Howard moved to strike the California conviction
5 because the conviction occurred after the Monahan murder and the New York conviction
6 because it was not supported by a judgment of conviction. The district court struck the
7 California conviction but denied the motion as to the New York conviction, noting that the
8 records reflected a jury had convicted Howard and the lack of a formal judgment was the
9 result of Howard's absconding in the middle of trial.

10 The State presented evidence of the aggravating circumstances and Howard took the
11 stand and related information on his background. During a break in the testimony, Howard
12 suddenly stated he did not understand what mitigation meant and that he would leave it up to
13 his attorneys to decide what to do. The district court asked Howard if he was now
14 instructing his attorneys to present mitigation and he refused to answer the question.
15 Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel
16 asked for time to prepare which was granted. The jury found both aggravating
17 circumstances existed and that no mitigating circumstances outweighed the aggravating
18 circumstances. The jury returned a sentence of death.

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

1 The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v.
2 State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court
3 held that the relationship of two members of the Public Defender's Office with Monahan did
4 not objectively justify Howard's distrust and there was no evidence that those attorneys had
5 any involvement in his case. Therefore no actual conflict existed and the claim of ineffective
6 assistance of counsel on this basis had no merit. The Court further concluded the district
7 court did not abuse its discretion by refusing to sever the counts and by not granting an
8 evidentiary hearing on the suppression motion. The Court noted that the record reflected
9 proper Miranda warnings were given and the statements were admitted as rebuttal and
10 impeachment after Howard testified. The Court also found that the district court did not
11 error in rejecting the two accomplice instructions; the anti-sympathy language in one of the
12 instructions was not err in light of the totality of the instructions and the record supported the
13 district court's refusal to instruct on certain mitigating circumstances for lack of evidence.
14 The Court concluded by stating it had considered Howard's other claims of error and found
15 them to be without merit. Howard filed a petition for rehearing which was denied on March
16 24, 1987. Remittitur was stayed pending the filing of a petition for Writ of Certiorari to the
17 United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to
18 represent Howard on the writ petition. The petition was denied on October 5, 1987 and
19 remittitur issued on February 12, 1988.

20 On October 28, 1987, Howard filed his first State petition for post-conviction relief.
21 John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They
22 withdrew and David Schieck was appointed. The petition raised the following claims for
23 relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity
24 defense and Howard's history of mental illness and commitments; 2) ineffective assistance
25 of trial counsel – penalty phase – failure to present mental health history and documents;
26 failure to present expert psychiatric evidence that Howard was not a danger to jail
27 population; failure to rebut future dangerousness evidence with jail records and personnel;
28 failure to object to improper prosecutorial arguments involving statistics regarding

1 deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury
2 with "future victims," comparing victim's life with Howard's life, diluting jury's
3 responsibility by suggesting it was shared with other entities, voicing personal opinions in
4 support of the death penalty and its application to Howard, references to Charles Manson,
5 voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of
6 appellate counsel – failure to raise prosecutorial misconduct issues.

7 An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie
8 Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed
9 on October 3, 1988. The district court entered an oral decision denying the petition on
10 February 14, 1989. The district court concluded that trial counsel performed admirably
11 under difficult circumstances created by Howard himself. As to the failure to present an
12 insanity defense and present mental health records, the court found that Howard was
13 canvassed throughout the proceedings about his refusal to cooperate in obtaining those
14 records, particularly his refusal to sign releases. Howard knew what was going on, was
15 competent and was trying to manipulate the proceedings and that there was no evidence to
16 support an insanity defense, therefore counsel were not ineffective in this regard.

17 On the issue of failure to object to prosecutorial misconduct, the district court found
18 that defense counsel did object where appropriate and the arguments that were not objected
19 to did not amount to misconduct and were a fair comment on the evidence. Even if some of
20 the comments were improper, the district court concluded that they would not have
21 succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of
22 fact and conclusions of law were filed on July 5, 1989.⁴

23 The Nevada Supreme Court affirmed the district court's denial of Howard's first State
24 petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990)
25 (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal
26 Howard raised ineffective assistance of trial and appellate counsel regarding the

27
28 ⁴During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

1 prosecutorial misconduct issues. The Supreme Court found three comments to be improper
2 under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)⁵: 1) a personal opinion that
3 Howard merited the death penalty, 2) a golden rule argument – asking the jury to put
4 themselves in the shoes of a future victims and 3) an argument without support from
5 evidence that Howard might escape. The Court found that counsel were ineffective for
6 failing to object to these arguments but concluded there was no reasonable probability of a
7 contrary result absent these remarks and therefore no prejudice. The Court rejected
8 Howard's other contentions of improper argument.

9 With respect the mitigation evidence issues, the Nevada Supreme Court upheld the
10 district court's findings that this was a result of Howard's own conduct and not ineffective
11 assistance of counsel.⁶

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

14 Howard then filed a second State petition for post-conviction relief on December 16,
15 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition.
16 In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct,
17 namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt
18 and penalty phases; 2) expressions of personal belief and a personal endorsement of the
19 death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3)
20 comparing Howard's life with Dr. Monahan's and 4) a statement that the community would
21 benefit from Howard's death. The petition also asserted an ineffective assistance of trial
22 counsel claim for failing to explain to Howard the nature of mitigating circumstances and
23 their importance. Finally the petition raised a speedy trial violation and cumulative error.

24 The State moved to dismiss the second State petition as procedurally barred or
25

26 ⁵ Collier was decided two years after Howard's trial.

27 ⁶ The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks
28 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.

1 governed by the law of the case on February 10, 1992. In his reply, Howard dropped his
2 speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they
3 had been exhausted and Howard could proceed in Federal court.

4 The district court denied the petition on July 7, 1992. The district court found that the
5 claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as
6 well as the claims relating to mitigation evidence had been heard and found to be without
7 merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the
8 case. The district court further concluded that any claim of cumulative error and any issues
9 not raised in previous proceedings were procedurally barred. Finally, the district court found
10 the speedy trial violation was a naked allegation, frivolous and procedurally barred.

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

16 On December 8, 1993, Howard returned to federal court and filed a new pro se habeas
17 petition rather than lifting the stay in the previous petition. After almost three years, on
18 September 2, 1996, the federal district court dismissed the petition as inadequate and ordered
19 Howard to file a second amended federal petition that contained more than conclusory
20 allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second
21 Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years,
22 on September 23, 2002, the Second Amended Federal petition was stayed for Howard to
23 again exhaust his federal claims in state court.

24 Howard filed his third State petition for post-conviction relief on December 20, 2002.
25 Patricia Erickson represented him on this petition. The petition asserted the following
26 claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel
27 under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as
28 cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears

1 robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's
2 statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4)
3 trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a
4 matter of law and accomplice testimony should be viewed with distrust instructions – Dwana
5 Thomas; 6) improper jury instructions – diluting standard of proof – reasonable doubt,
6 second degree murder as lesser included of first degree murder, premeditation, intent and
7 malice instructions; 7) improper jury instructions – failure to clearly define first degree
8 murder as specific intent crime requiring malice and premeditation; 8) improper
9 premeditation instruction blurred distinction between first and second degree murder; 9)
10 improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give
11 influence of extreme mental or emotional disturbance mitigator instruction; 12) improper
12 limitation of mitigation by giving only “any other mitigating circumstance” instruction; 13)
13 failure to instruct that mitigating circumstances findings need not be unanimous; 14)
14 prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of
15 death penalty, improper argument regarding rehabilitation, escape and future killings;
16 comparing Howard and victim's lives, comparing Howard to notorious murder (Charles
17 Manson) and improper community benefit argument; 15) use of felony robbery as aggravator
18 and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective
19 assistance of trial counsel – inadequate contact, conflict of interest, failure to contact
20 California counsel to obtain records, failure to obtain Patton and Atescadero hospital records,
21 failure to obtain California trial transcripts, failure to review Clark County Detention Center
22 medical records, failure to challenge competency to stand trial, failure to obtain suppression
23 hearing, failure to present legal insanity, failure to object to reasonable doubt instruction,
24 failure to view visiting records and call witnesses based upon same, failure to call Pinkie
25 Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans
26 in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt,
27 failure to obtain military records, failure to adequately explain concept of mitigation
28 evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute

1 future dangerousness argument, failure to object to trial court's limitation of mitigating
2 circumstances and failure to object to instructions which allegedly required unanimous
3 finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed
4 to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of
5 post-conviction counsel – failure to adequately investigate and develop all trial and appeal
6 claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary,
7 irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual
8 punishment and 23) the death penalty violates evolving standards of decency.

9 The State filed a motion to dismiss Howard's third State petition on March 4, 2001.
10 The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one-
11 year limit) and NRS 34.800 (five-year laches) and that Howard had not shown good cause
12 for delay in raising the claims to overcome the procedural bars. The State also analyzed
13 each claim and noted what issues had already been raised and decided adversely to Howard
14 or should have been raised and were waived under NRS 34.810.

15 Howard filed an amended third State petition. The amended petition expanded the
16 factual matters under Claim 17 regarding Howard's family background that Howard asserted
17 should have been presented in mitigation.

18 On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his
19 third State petition. As good cause for delay, Howard alleged Nevada's successive petition
20 and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860,
21 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because
22 any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and
23 cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the
24 Due process and Equal Protection clauses of the Federal Constitution bar application of NRS
25 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800
26 did not apply because the State had not shown prejudice and the presumption of prejudice
27 was overcome by the allegations in the petition.

28 The State filed a reply to the opposition on September 24, 2003. The district court

1 issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally
2 barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing
3 good cause for delay. The district court also independently dismissed the claims under NRS
4 34.810. Written findings were entered on October 23, 2003.

5 Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the
6 district court's dismissal of the third State petition on December 4, 2004. The High Court
7 addressed Howard's assertions that he had either overcome the procedural bars or they could
8 not constitutionally be applied to him and rejected them. Among its conclusions, the Court
9 noted that the record reflected Howard was aware that all his claims challenging the
10 conviction or imposition of sentence must be joined in a single petition and that Howard had
11 no right to post-conviction counsel at the time of the filing of his first and second State
12 petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel
13 could not be good cause for delay.⁷

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

24 The United States District Court denied Howards' motion for stay and abeyance on
25 January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to
26 dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's
27

28 ⁷ See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

1 opposition to the original motion to dismiss and additionally moved to dismiss the Amended
2 Fourth Petition on October 7, 2009.⁸ Howard filed an Opposition to the Amended Motion to
3 Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

4 Argument on the State's motion to dismiss was heard on February 4, 2010. The
5 matter was taken under advisement so the district court could review the extensive record. A
6 Minute Order Decision was issued on May 13, 2010, dismissing the Fourth State Petition as
7 procedurally barred. A written Findings of Fact and Conclusions of Law was filed on
8 November 6, 2010.

9 Petitioner challenged this Court's decision before the Nevada Supreme Court. Prior
10 to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an
11 opinion in Howard v. State, 128 Nev. 736, 291 P.3d 137 (2012), addressing the sealing of
12 documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to
13 substitute counsel that included information that was potentially embarrassing to one or more
14 current or former FPD attorneys as well as a prior private attorney who had represented
15 Howard. Id. at 747, 291 P.3d at 144. A cover sheet indicated that the motion was sealed but
16 the FPD failed to file a separate motion to seal the pleading. Id. at 739, 291 P.3d at 139.
17 The Court concluded that the FPD had not properly moved to seal and that sealing was
18 unjustified. Id. at 748, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of
19 habeas relief. (Order of Affirmance, filed July 30, 2014, attached to Clerk's Certificate, filed
20 October 24, 2014). The United States Supreme Court denied certiorari. Howard v. Nevada,
21 __ U.S. __, 135 S.Ct. 1898 (2015).

22 Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth
23 Petition) on October 5, 2016. Respondent filed an opposition and motion to dismiss on
24 November 2, 2016. On March 27, 2017, Petitioner filed an opposition to the State's request
25

26
27 ⁸ Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for
28 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 to dismiss the Fifth Petition. Respondent's reply to Petitioner's opposition was filed on
2 April 4, 2017.

3 On December 1, 2016, Petitioner filed an Amended Fifth Petition. The State moved
4 to strike the Amended Fifth Petition for failing to comply with NRS 34.750(5). Petitioner
5 opposed this request. This Court held a hearing on March 17, 2017, and after entertaining
6 argument, struck the Amended Fifth Petition pursuant to NRS 34.750(5) and Barnhart v.
7 State, 122 Nev. 301, 130 P.3d 650 (2006). An order memorializing this decision was filed
8 on April 7, 2017.

9 On April 6, 2017, Petitioner filed a Motion to Amend or Supplement that requested
10 reconsideration of this Court's decision to strike his Amended Fifth Petition without
11 requesting leave to do so in advance. Respondent filed an opposition on April 12, 2017, and
12 Petitioner replied on April 17, 2017.

13 Howard's Fifth Petition and Motion to Amend or Supplement came before this Court
14 on the April 19, 2017, Chamber Calendar. On May 2, 2017, this Court issued a minute order
15 denying the Fifth Petition and the Motion to Amend or Supplement and imposing a \$250.00
16 sanction upon Howard's counsel for causing the State to respond to a the Motion to Amend
17 when the Court had already decided the issue in the context of striking the Amended Fifth
18 Petition and/or for failing to seek leave of court prior to requesting reconsideration.

19 ANALYSIS

20 Petitioner's pursuit of reconsideration without obtaining leave of court requires that
21 this Court disregard the improper arguments offered by his March 27, 2017, Reply in
22 Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss and deny
23 his April 6, 2017, Motion to Amend or Supplement the Fifth Petition. Petitioner's incorrect
24 pursuit of reconsider forced the State to waste valuable prosecutorial resources in responding
25 to arguments not properly before this Court. As such, sanctions are warranted against
26 Petitioner's counsel. Finally, the Fifth Petition is denied as procedurally barred without a
27 sufficient showing of good cause and prejudice to ignore Petitioner's procedural defaults.
28

1 I. Reconsideration

2 On March 17, 2017, this Court struck Petitioner's Amended Fifth Petition pursuant to
3 NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). On March 27,
4 2017, Petitioner filed his Reply in Support of Petition for Writ of Habeas Corpus and
5 Response to Motion to Dismiss and on April 6, 2017, he filed a Motion to Amend or
6 Supplement the Fifth Petition. Both of these pleadings offered arguments premised upon the
7 application of the beyond a reasonable doubt standard to the jury's selection of death as the
8 appropriate punishment. The same or similar arguments were contained in Petitioner's
9 Amended Fifth Petition.

10 By offering the same or similar burden of proof arguments against the jury's selection
11 of death as were contained in the Amended Fifth Petition, both of these pleadings sought
12 reconsideration of this Court's March 17, 2017, decision to strike the Amended Fifth
13 Petition. Petitioner did not obtain leave of this Court to pursue reconsideration of the March
14 17, 2017, decision to strike the Amended Fifth Petition. The failure to do so violates Rule
15 13(7) of the District Court Rules of Nevada and Rule 7.12 of the Eighth Judicial District
16 Court Rules.

17 Counsel for Petitioner justifies raising these arguments not on any error or oversight
18 by this Court, but instead insists that "[c]ontrary to its own well-established practice, the
19 State filed a Motion to Strike Amended Petition ... [and] [t]he Court likewise departed from
20 its normal approach and struck the amended petition, on the basis that no leave was
21 requested prior to its filing ..." Whether or not the State in past unrelated cases has decided
22 not to file a motion to strike is irrelevant to this Court. When Petitioner refers to "this
23 Court," it is unclear whether counsel is specifically referring to Department XVII or to the
24 various judges of the Eighth Judicial District Court. In any event, each case stands on its
25 own factual and procedural history and, therefore, whether or not Department XVII has
26 allowed supplemental petitions in the past in unrelated cases is not a legal basis to violate the
27 procedural rules in this case. At the March 17, 2017, hearing this Court inquired from
28 Petitioner's counsel, Mr. Horowitz, as to the procedures followed by the federal judges he

1 usually appears in front of and Mr. Horowitz stated that rules are adhered to and enforced.
2 The Court advised all counsel that it was this Court's intention to follow the procedural rules
3 as well.

4 Therefore, the Court disregards Petitioner's improperly raised argument in the March
5 27, 2017, Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to
6 Dismiss and denies the April 6, 2017, Motion to Amend or Supplement the Fifth Petition.
7 Additionally, Counsel for Petitioner's improper pursuit of reconsider forced the State to
8 waste valuable prosecutorial resources in responding to arguments not properly before this
9 Court. As such, Petitioner's counsel are jointly and severally sanctioned \$250.00 in attorney
10 fees to be paid to the Clark County District Attorney.

11 II. The Fifth Petition is Procedurally Barred

12 Petitioner failed to raise the claim contained in the Fifth Petition in a timely fashion

13 A. Application of Procedural Bars is Mandatory

14 The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118
15 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days
16 late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the
17 district courts have a *duty* to consider whether post-conviction claims are procedurally
18 barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070,
19 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory
20 procedural default rules to post-conviction habeas petitions is mandatory," noting:

21 Habeas corpus petitions that are filed many years after conviction are an
22 unreasonable burden on the criminal justice system. The necessity for a
23 workable system dictates that there must exist a time when a criminal
24 conviction is final.

25 Id., at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars "cannot be
26 ignored when properly raised by the State." Id., at 233, 112 P.3d at 1075. The Nevada
27 Supreme Court has granted no discretion to the district courts regarding whether to apply the
28 statutory procedural bars.

1 B. NRS 34.726(1)

2 NRS 34.726(1) states that “unless there is good cause shown for delay, a petition that
3 challenges the validity of a judgment or sentence must be filed within 1 year after entry of
4 the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year
5 after the Supreme Court issues its remittitur.” The one-year time bar is strictly construed and
6 enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that
7 the “clear and unambiguous” provisions of NRS 34.726(1) demonstrate an “intolerance
8 toward perpetual filing of petitions for relief, which clogs the court system and undermines
9 the finality of convictions.” Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).
10 For cases that arose before NRS 34.726 took effect on January 1, 1993, the deadline for
11 filing a petition extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

12 Remittitur issued from Petitioner’s direct appeal on February 12, 1988. Therefore,
13 Petitioner had until January 1, 1994, to file a timely habeas petition. Petitioner filed the Fifth
14 Petition on October 5, 2016. As such, the Fifth Petition is time barred.

15 Even if the one-year rule did not begin to run until Petitioner’s challenge to the
16 Nevada Supreme Court’s reweighing decision was indisputably available, the Fifth Petition
17 is still time barred. Petitioner’s contention is that a new penalty hearing is required due to
18 the combination of the Nevada Supreme Court’s invalidation of an aggravating circumstance
19 on appeal of the Fourth Petition and Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016). It
20 is undisputable that Hurst was published in 2016; however, Hurst was merely an application
21 of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at ___, 136 S.Ct.
22 at 621-22 (“[t]he analysis the Ring Court applied to Arizona’s sentencing scheme applies
23 equally to Florida’s”). Ring was published on June 24, 2002. Remittitur issued from the
24 Nevada Supreme Court’s decision invalidating an aggravating circumstance and reweighing
25 on October 20, 2014. Under the most favorable analysis possible, Petitioner had until
26 October 20, 2015, to bring a Ring challenge against the Nevada Supreme Court’s reweighing
27 decision.
28

1 C. NRS 34.810

2 Petitioner's fifth attempt at state habeas relief must be dismissed on waiver grounds
3 and as an abuse of the writ.

4 Claims that could have been raised on direct appeal or in a prior petition are barred
5 under NRS 34.810(1)(b):

6 The court *shall dismiss* a petition if the court determines that:

7 ...

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

9 (1) Presented to the trial court;

10 (2) *Raised in a direct appeal or a prior petition for a writ of habeas
corpus or post-conviction relief, unless the court finds both cause for
11 the failure to present the grounds and actual prejudice to the petitioner.*

12 (Emphasis added). The failure to raise grounds for relief at the first opportunity is an abuse
13 of the writ. NRS 34.810(2).

14 Nevada law dictates that all claims appropriate for direct appeal must be pursued on
15 direct appeal or they will be "considered waived in subsequent proceedings." Franklin v.
16 State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds,
17 Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). The Nevada Supreme Court has
18 emphasized that: "[a] court *must* dismiss a habeas petition if it presents claims that either
19 were or could have been presented in an earlier proceeding, unless the court finds both cause
20 for failing to present the claims earlier or for raising them again and actual prejudice to the
21 petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis
22 added). Where a claim arises after direct appeal, a petitioner has one year in which to file a
23 petition alleging the claim or it too is barred. Rippo v. State, 132 Nev. __, __, 368 P.3d 729,
24 734 (2016), vacated on other ground sub nom., Rippo v. Baker, __ U.S. __, 137 S.Ct. 905
25 (2017) ("[A] petition ... has been filed within a reasonable time after the ... claim became
26 available so long as it is filed within one year after entry of the district court's order
27 disposing of the prior petition or, if a timely appeal was taken from the district court's order,
28

1 within one year after this court issues its remittitur.”).

2 Petitioner’s Hurst claim is barred by NRS 34.810(1)(b)(2) as waived and by NRS
3 34.810(2) as an abuse of the writ since it was not raised within a year of when it became
4 available to him. Petitioner’s contention is that a new penalty hearing is required due to the
5 combination of the Nevada Supreme Court’s invalidation of an aggravating circumstance on
6 appeal of the Fourth Petition and Hurst. It is undisputable that Hurst was published in 2016;
7 however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428
8 (2002). Hurst, 577 U.S. at ___, 136 S.Ct. at 621-22 (“[t]he analysis the Ring Court applied to
9 Arizona’s sentencing scheme applies equally to Florida’s”). Ring was published on June 24,
10 2002. Remittitur issued from the Nevada Supreme Court’s decision invalidating an
11 aggravating circumstance and reweighing on October 20, 2014. Under the most favorable
12 analysis possible, Petitioner had until October 20, 2015, to bring a Ring challenge against the
13 Nevada Supreme Court’s reweighing decision. Petitioner’s failure to raise this complaint at
14 the first opportunity amounts to a waiver of the claim and his decision to proffer it in the
15 Fifth Petition amounts to an abuse of the writ.

16 III. Petitioner Fails to Justify Ignoring the Procedural Bars

17 To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for
18 delay in filing his petition or for bringing new claims or repeating claims in a successive
19 petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.810(3). To establish
20 prejudice “a petitioner must show that errors in the proceedings underlying the judgment
21 worked to the petitioner’s actual and substantial disadvantage.” State v. Huebler, 128 Nev.
22 ___, ___, 275 P.3d 91, 94-95 (2012), cert. denied, ___ U.S. ___, 133 S.Ct. 988 (2013).

23 “To establish good cause, petitioners must show that an impediment external to the
24 defense prevented their compliance with the applicable procedural rule. A qualifying
25 impediment might be shown where the factual or legal basis for a claim was not reasonably
26 available at the time of default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003),
27 rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004);
28 see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) (“In order to

1 demonstrate good cause, a petitioner must show that an impediment external to the defense
2 prevented him or her from complying with the state procedural default rules”); Pellegrini,
3 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician’s
4 declaration in support of a habeas petition were sufficient “good cause” to overcome a
5 procedural default, whereas finding by Supreme Court that defendant was suffering from
6 Multiple Personality Disorder was). An external impediment could be “that the factual or
7 legal basis for a claim was not reasonably available to counsel, or that ‘some interference by
8 officials’ made compliance impracticable.” Id. (quoting, Murray v. Carrier, 477 U.S. 478,
9 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904
10 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

11 The Nevada Supreme Court has held that, “appellants cannot attempt to manufacture
12 good cause[.]” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a
13 “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at
14 506; (quoting, Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded
15 by statute as recognized by, Huebler, 128 Nev. at ___, 275 P.3d at 95, footnote 2). Excuses
16 such as the lack of assistance of counsel when preparing a petition as well as the failure of
17 trial counsel to forward a copy of the file to a petitioner have been found not to constitute
18 good cause. Phelps v. Dir. Nev. Dep’t of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306
19 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d
20 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

21 A. No Good Cause

22 Petitioner’s failure to prosecute his Ring / Hurst complaint within a year of when it
23 became available precludes a finding of good cause.

24 Petitioner’s contention is that a new penalty hearing is required due to the
25 combination of the Nevada Supreme Court’s invalidation of an aggravating circumstance on
26 appeal of the Fourth Petition and Hurst. It is undisputable that Hurst was published in 2016;
27 however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428
28 (2002). Hurst, 577 U.S. at ___, 136 S.Ct. at 621-22 (“[t]he analysis the Ring Court applied to

1 Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24,
2 2002. Remittitur issued from the Nevada Supreme Court's decision invalidating an
3 aggravating circumstance and reweighing on October 20, 2014. This complaint has been
4 available to Petitioner at least since October 20, 2014. As such, Petitioner had until October
5 20, 2015, to file this claim. Rippo, 132 Nev. at __, 368 P.3d at 734 ("[A] petition... has
6 been filed within a reasonable time after the ... claim became available so long as it is filed
7 within one year after entry of the district court's order disposing of the prior petition or, if a
8 timely appeal was taken from the district court's order, within one year after this court issues
9 its remittitur.").

10 Petitioner cannot demonstrate an impediment external to the defense since both Ring
11 and the Nevada Supreme Court's decision on appeal of the Fourth Petition are matters of
12 public record. Petitioner cannot argue that his change in law impediment should be counted
13 from Hurst and not Ring. "Good cause for failing to file a timely petition or raise a claim in
14 a previous proceeding may be established where the factual or legal basis for the claim was
15 not reasonably available." Bejarano v. State, 122 Nev. 1066, 1073, 146 P.3d 265, 270
16 (2006). Here the factual impediment would be the date of remittitur from the Fourth
17 Petition. The issue is when the legal basis arose for Petitioner's newest claim. Petitioner
18 wants to count from Hurst because it resets the clock and makes his filing timely. However,
19 Hurst was merely an application of Ring. Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he
20 analysis the Ring Court applied to Arizona's sentencing scheme applies equally to
21 Florida's"). The entirety of the United States Court's discussion in Hurst focused on
22 applying Ring to the case before it. Id. The Court ended by concluding:

23 As with Timothy Ring, the maximum punishment Timothy Hurst could have
24 received without any judge-made findings was life in prison without parole. As
25 with Ring, a judge increased Hurst's authorized punishment based on her own
factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth
Amendment.

26 Id. at __, 136 S.Ct. at 622. Petitioner cannot use Hurst to bootstrap himself into a timely
27 Ring complaint. Crump v. State, 2016 Nev. Unpub. Lexis 374, p. 6-7, footnote 5 ("Riley
28 would not provide good cause as it relies on Hern, which has been available for decades").

1 B. Insufficient Prejudice

2 Petitioner cannot establish sufficient prejudice to ignore his procedural defaults
3 because his interpretation of Hurst is meritless.

4 The facts underlying the Fifth Petition stem from a July 30, 2014, decision by the
5 Nevada Supreme Court where the Court struck one of the two aggravating circumstances
6 found by Petitioner's jury. The Nevada Supreme Court reweighed the remaining
7 aggravating evidence against the mitigating evidence and found that "the jury would have
8 found Howard death eligible and imposed death." Petitioner demands that this Court
9 invalidate his death sentence under state and federal constitutional provisions guaranteeing
10 the right to a trial by jury on the basis that only a jury- not a judge can find the facts
11 permitting the imposition of a sentence of death. Petitioner asserts that because one of two
12 aggravating circumstances has been nullified, his death sentence is unlawful and he is
13 entitled to a new penalty hearing. This Court finds such argument unpersuasive.

14 Hurst does not stand for the proposition that appellate reweighing is unconstitutional;
15 rather, it only found that it was constitutionally infirm for a judge alone to determine the
16 existence of an aggravating circumstance. Hurst does not expand Ring and does not cure
17 Petitioner's procedural default since the entirety of the United States Supreme Court's
18 decision in Hurst focused on applying Ring to Florida's advisory jury system for imposition
19 of a sentence of death. Therefore, because Hurst is only an application of Ring and thus
20 offers nothing relevant to Petitioner's case, Petitioner has failed to demonstrate the requisite
21 prejudice necessary to ignore his procedural defaults.

22 **ORDER**

23 It is HEREBY ORDERED that Petitioner's Motion to Amend or Supplement is
24 DENIED.

25 It is FURTHER ORDERED that Paola M. Armeni, Esq., Assistant Federal Public
26 Defender Deborah A. Czuba, Esq. and Assistant Federal Public Defender Jonah J. Horwitz,
27 Esq. are jointly and severally sanctioned \$250.00, payable to the Clark County District
28 Attorney's Office.

1 It is FURTHER ORDERED that the Fifth Petition is denied as procedurally barred
2 without a sufficient showing of good cause and prejudice to ignore Petitioner's procedural
3 defaults.

4 DATED this ____ day of May 2017.

5
6
7 MICHAEL VILLANI
DISTRICT JUDGE

8 STEVEN B. WOLFSON
9 DISTRICT ATTORNEY
Nevada Bar #001565

10
11 BY


12 JONATHAN E. VANBOSKERCK
13 Chief Deputy District Attorney
Nevada Bar #006528
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1 **CERTIFICATE OF ELECTRONIC FILING**

2 I hereby certify that service of Findings of Fact, Conclusion of Law and Order was
3 made this 10th day of May, 2017, by Electronic Filing to:

4
5 JONAH J. HORWITZ,
(pro hac vice)
Assistant Federal Public Defender
6 Email: jonah_horwitz@fd.org

7 DEBORAH A. CZUBA,
(pro hac vice)
Assistant Federal Public Defender
8 Email: deborah_a_czuba@fd.org

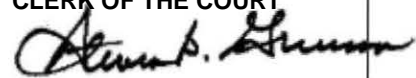
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10 PAOLA M. ARMENI, ESQ.
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12 Counsels for Petitioner

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16 Employee for the District Attorney's Office

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1 **FFCL**
2 STEVEN WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN E. VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar #006528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8
9 CLARK COUNTY, NEVADA

10 SAMUEL HOWARD,)	
11 Petitioner,)	CASE NO: 81C053867
12 -vs-)	DEPT NO: XVII
13 THE STATE OF NEVADA,)	
14 Respondent.)	

15 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING**
16 **MOTION TO AMEND AND OR SUPPLEMENT FIFTH PETITION FOR WRIT OF**
17 **HABEAS CORPUS (POST-CONVICTION) AND OPPOSITION TO MOTION TO**
18 **AMEND AND OR SUPPLEMENT FIFTH PETITION FOR WRIT OF HABEAS**
19 **CORPUS (POST-CONVICTION) AND IMPOSING SANCTIONS ON**
20 **PETITIONER'S COUNSEL**

21 DATE OF HEARING: March 17, 2017
22 TIME OF HEARING: 9:30 a.m.

23 THIS CAUSE having come on for hearing before the Honorable MICHAEL
24 VILLANI, District Judge, on the 27th day of March, 2017, and the 19th day of April 2017,
25 SAMUEL HOWARD (hereinafter "Petitioner" or "Howard") not present, represented by
26 Paola M. Armeni, Esq., Assistant Federal Public Defender Deborah A. Czuba, Esq. and
27 Assistant Federal Public Defender Jonah J. Horwitz, Esq., the Respondent being represented
28 by STEVEN B. WOLFSON, District Attorney, by and through JONATHAN E.

1 VANBOSKERCK, Chief Deputy District Attorney, and the Court having considered the
2 matter, including briefs, transcripts, testimony of witnesses, arguments of counsel, and/or
3 documents on file herein, now therefore, the Court makes the following findings of fact and
4 conclusions of law:

5 **FACTUAL BACKGROUND**

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

19 Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had
20 told her to wait for him and she was unaware of his intentions to obtain money through a
21 false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980
22 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall.
23 While escaping, Howard rear-ended a white Corvette driven by Stephen Houchin. Houchin
24 followed Howard when Howard left the scene of the accident. Howard pointed the .357
25 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own
26 business.

27 Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the
28 car for a few hours. Thomas and Howard walked about and Howard made some phone calls.

1 Later that evening Howard left for a couple of hours. When he returned, he told Thomas that
2 he had met up with a pimp, but the pimps' girls were with him so he could not rob him.
3 Howard indicated he had arranged to meet with the "pimp" the next morning and would rob
4 him then.

5 Howard and Thomas drove to the Western Six motel located on the Boulder Highway
6 near the intersection of Desert Inn Road. The couple had stayed at this motel before and
7 Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel
8 registration card under that name was admitted into evidence and a documents' examiner
9 compared handwriting on the card with Thomas' and indicated they matched.

10 Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to
11 breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George
12 Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel
13 room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio
14 with him that had loose wires and a gold watch she had never seen before. Howard told
15 Thompson that he was tired of Las Vegas and to pack up their things as they were leaving
16 for California.

17 Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking
18 distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and would
19 park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and
20 near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's
21 home and business phone numbers and the business address.

22 About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr.
23 Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the
24 van. The caller was a male who identified himself as "Keith" and stated he was a security
25 guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted
26 to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs.
27 Monahan indicated the caller would have to talk to her husband who was expected home
28 shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to

1 meet "Keith" at Caesar's later that night.

2 The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met
3 "Keith" that evening at the appointed time and place. Howard was identified as the man
4 who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard
5 talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the
6 van but did not touch the door handle while doing so. Howard arranged to meet Dr.
7 Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the
8 van at Dr. Monahan's office before returning home in another vehicle.

9 The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took
10 with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs.
11 Monahan arrived at the office at about 8:00 a.m., Dr. Monahan was not there and a patient
12 was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office.
13 Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on
14 his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and
15 stating that he had an appointment with the doctor.

16 Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description
17 she gave worked security. After obtaining this information, Mrs. Monahan called the police
18 to report her husband as a missing person. This occurred at about 9:00 a.m.

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

27 In response to television coverage, the police learned the Monahan van was behind
28 the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an

1 overturned table and some coverings. He had been shot once in the head. The bullet went
2 through Dr. Monahan's head and a projectile was recovered on the floor of the van. The
3 projectile was compared to Howard's .357 revolver. Because the bullet was so badly
4 damaged; forensic analysis could not establish an exact match. It was determined that the
5 bullet could have come from certain makes and models of revolvers, Howard's included.
6 The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet
7 were missing. A fingerprint recovered from one of the van's doors matched Howard's.

8 Homicide detectives were aware of the Sears robbery that had occurred on March
9 26th. The description of the Sears suspect matched that given by Mrs. Monahan of the man
10 calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the
11 walkie-talkie in possession of the suspect, the close proximity of the dental office to the
12 Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a
13 bulletin to state and out-of-state law enforcement agencies describing the suspect and the car
14 used in the Sears' robbery.

15 On March 27, 1980, while the police were searching for Dr. Monahan, Howard and
16 Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on
17 the way they stopped for gas. At that time Howard had a brown or black wallet that had
18 credit cards and photos in it. Howard went to the gas station rest room and when he returned
19 he no longer had the wallet.

20 On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino,
21 California. Once again, Howard left Thompson in the car while he entered the Sears, picked
22 up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears
23 security badge in the attempt. The Sears personal were suspicious and left Howard at the
24 register while they called Las Vegas. When they returned Howard had left. Howard had
25 returned to the car and Thompson and Howard ducked down when the people from Sears
26 stepped outside to view the parking lot.

27 On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping
28 Center in Downey, California. He entered a jewelry store and talked to a security agent,

1 Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police
2 officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater
3 talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store
4 went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed
5 Howard walking up and down the aisles of the drugstore, picking items up and replacing
6 them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No
7 gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had
8 been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge
9 stolen from Kinsey.

10 Howard was arrested for carrying a concealed weapon and then identified and booked
11 for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police
12 officers. Disputed evidence was presented regarding his response and whether he invoked
13 his right to silence. Based on information in the all-points bulletin, the California authorities
14 contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980,
15 LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda
16 rights, which Howard indicated he understood, interviewed Howard regarding the Sears
17 robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to
18 counsel at this time.

19 Howard told Detective Leavitt he recalled being at the Sears department store but no
20 details about what happened and that he did not remember anything about March 27, 1980.
21 He stated he could have killed Dr. Monahan but he did not know.

22 Ed Schwartz was working as a car salesman in New York on October 5, 1979. When
23 he arrived at work at approximately 9:00 a.m., Howard entered the agency and was looking
24 at an Oldsmobile car. Howard showed Schwartz a New York driver's license and
25 checkbook and told Schwartz that he worked for a security firm in New York. Howard
26 asked if they could take a demonstration ride and Schwartz drove the car for a few blocks
27 while Howard was the passenger. Howard asked if he could drive the car and the men
28 switched seats. After driving for a short time, Howard pulled over and pointed an automatic

1 pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his
2 shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet.
3 Schwartz got out of the car when ordered to do so and Howard drove off. The car was later
4 found abandoned.¹

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

14 Howard testified over the objection of counsel. He indicated he did not recall much
15 about March 26, 1980. He remembered being in Las Vegas in general on and off and that at
16 one point Dwana Thomas' brother, who was about Howard's height, age and weight, and
17 had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey
18 could have been telling the truth about the Sears store. Howard indicated he was not sure
19 because when the Sears people gathered around him, it reminded him of Vietnam and he
20 kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the
21 Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he
22 could not be that callous.

23 On cross-examination, Howard admitted he left New York in the middle of his
24 robbery trial and was asked about statements he made to Detective Leavitt. Howard also
25 acknowledged he has used a number of aliases including Harold Stanback. Howard
26 indicated he was taking the blame for Dawana and her brother Lonnie.

27
28 ¹ This evidence was admitted to show identity and motive for the Monahan murder.

1 Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been
2 in Las Vegas in March of 1980.

3 In the penalty phase, the State presented evidence on the details of Howard's 1979
4 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband,
5 testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a
6 closet and demanded she removed her clothes. She refused and he left. After the robbery,
7 Howard called Weisband trying to get more cash from her in return for her car and
8 threatened her.

9 Howard testified regarding his military, family and mental health histories. Howard
10 discussed his military service and stated he had suffered a concussion and received a purple
11 heart.² Howard also stated he was on veteran's disability in New York.³ He said he was in
12 various mental health facilities in California including being housed in the same facility as
13 Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the
14 doctors thought he was malingering. When asked about his childhood, Howard became
15 upset. He indicated he did not want to talk about the death of his mother and sister. Howard
16 indicated he was not mentally ill and knew what he was doing at all times.

17 PROCEDURAL HISTORY

18 On May 20, 1981 Howard was indicted on one count of robbery with use of a deadly
19 weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one
20 count of robbery with use of a deadly weapon involving Dr. George Monahan and one count
21 of murder with use of a deadly weapon involving Dr. Monahan, both committed on March
22 27, 1980. With respect to the murder count, the State alleged two theories: willful,
23 premeditated and deliberate murder or murder in the commission of a robbery.

24 Howard was arrested in California where he was serving time for a robbery
25

26 ² The military records attached to the current Fourth Petition do not reflect any such injury or award.

27 ³ Howard's military records do not support this and there is nothing in the record substantiating any admission to a
28 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 committed on or about April 1, 1980. He was extradited in November of 1982 and an initial
2 appearance was set for November 23, 1982. At that time the matter was continued for
3 appointment of counsel, the Clark County Public Defender's Office.

4 On November 30, 1982, Terry Jackson of the Public Defender's Office represented to
5 the district court that Howard qualified for the Public Defender's services; however, Mr.
6 Jackson indicated he had a personal conflict as he was a friend of the victim. The district
7 judge determined that the relationship did not create a conflict for the Public Defender's
8 Office, barred Mr. Jackson from involvement with the case and appointed another deputy
9 public defender to Howard's case.

10 Howard's counsel requested a one-week continuance to consult with Howard about
11 the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After
12 discussion, the district court accepted a plea of not guilty and set a trial date of January 10,
13 1983.

14 Howard filed a motion in late in December asking for his counsel to be removed and
15 substitute counsel appointed. Counsel filed a response addressing issues raised in the
16 motion. After a hearing, the district court determined there were no grounds for removing
17 the Clark County Public Defender's Office.

18 A motion for a psychiatric expert was filed. At a hearing, the district court inquired if
19 this was for competency and Howard's counsel indicated it was not, but it was to help
20 evaluate Howard's mental status at the time of the events. The district court granted the
21 motion and appointed Dr. O'Gorman to assist the defense.

22 At a status check on January 4, 1983, defense counsel indicated the defense could not
23 be ready for the January 10th trial date due to the need to conduct additional investigation and
24 discovery. In addition, counsel noted Howard was refusing to cooperate with counsel.
25 Howard objected to any continuance with knowledge that his attorneys' could not complete
26 the investigations by that date. Given Howard's objections, the district court stated the trial
27 would go forward as scheduled.

28 On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's

1 conflict created mistrust in Howard and he therefore refused to cooperate. This motion was
2 denied. Defense counsel then moved for a continuance as they did not feel comfortable
3 proceeding to trial in this case, given the issues involved, with only six weeks to prepare.
4 After extensive argument and a recess so that counsel could discuss the issue with Howard,
5 the district court granted the continuance over Howard's objections.

6 The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983.
7 The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin
8 on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a
9 scheduling problem. Because the district judge was on vacation, someone referred the juror
10 to the District Attorney's Office. That Office referred the juror to the jury commissioner.
11 Howard moved for a mistrial or elimination of the death penalty as a sentencing option based
12 upon this contact. After conducting an evidentiary hearing, the district court denied
13 Howard's motions.

14 Defense counsel made an oral motion to withdraw indicating they had irreconcilable
15 differences with Howard over the conduct of the penalty phase. Counsel indicated they had
16 documents and witnesses in mitigation, but that Howard had instructed them not to present
17 any mitigation evidence. Howard also instructed them not to argue mitigation and they
18 would not follow that directive, but would argue mitigation. Counsel also indicated that
19 Howard told them he wished to testify, but would not tell them the substance of his
20 testimony. Finally, counsel indicated they had attempted to get military and mental health
21 records but were unsuccessful because the agencies possessing the records would not send
22 copies without a release signed by Howard and Howard refused to sign the releases. The
23 district court canvassed Howard if this was correct and Howard confirmed it was true and
24 that he did not want any mitigation presented. The district court found Howard understood
25 the consequences of his decision and denied the motion to withdraw concluding defense
26 counsel's disagreement with Howard's decision was not a valid basis to withdraw.

27 The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State
28 originally alleged three aggravating circumstances: 1) the murder was committed by a

1 person who had previously been convicted of a felony involving the use of violence - namely
2 robbery with use of a deadly weapon in California, 2) prior violent felony - a 1978 New
3 York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder
4 occurred in the commission of a robbery. Howard moved to strike the California conviction
5 because the conviction occurred after the Monahan murder and the New York conviction
6 because it was not supported by a judgment of conviction. The district court struck the
7 California conviction but denied the motion as to the New York conviction, noting that the
8 records reflected a jury had convicted Howard and the lack of a formal judgment was the
9 result of Howard's absconding in the middle of trial.

10 The State presented evidence of the aggravating circumstances and Howard took the
11 stand and related information on his background. During a break in the testimony, Howard
12 suddenly stated he did not understand what mitigation meant and that he would leave it up to
13 his attorneys to decide what to do. The district court asked Howard if he was now
14 instructing his attorneys to present mitigation and he refused to answer the question.
15 Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel
16 asked for time to prepare which was granted. The jury found both aggravating
17 circumstances existed and that no mitigating circumstances outweighed the aggravating
18 circumstances. The jury returned a sentence of death.

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

1 The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v.
2 State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court
3 held that the relationship of two members of the Public Defender's Office with Monahan did
4 not objectively justify Howard's distrust and there was no evidence that those attorneys had
5 any involvement in his case. Therefore no actual conflict existed and the claim of ineffective
6 assistance of counsel on this basis had no merit. The Court further concluded the district
7 court did not abuse its discretion by refusing to sever the counts and by not granting an
8 evidentiary hearing on the suppression motion. The Court noted that the record reflected
9 proper Miranda warnings were given and the statements were admitted as rebuttal and
10 impeachment after Howard testified. The Court also found that the district court did not
11 error in rejecting the two accomplice instructions; the anti-sympathy language in one of the
12 instructions was not err in light of the totality of the instructions and the record supported the
13 district court's refusal to instruct on certain mitigating circumstances for lack of evidence.
14 The Court concluded by stating it had considered Howard's other claims of error and found
15 them to be without merit. Howard filed a petition for rehearing which was denied on March
16 24, 1987. Remittitur was stayed pending the filing of a petition for Writ of Certiorari to the
17 United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to
18 represent Howard on the writ petition. The petition was denied on October 5, 1987 and
19 remittitur issued on February 12, 1988.

20 On October 28, 1987, Howard filed his first State petition for post-conviction relief.
21 John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They
22 withdrew and David Schieck was appointed. The petition raised the following claims for
23 relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity
24 defense and Howard's history of mental illness and commitments; 2) ineffective assistance
25 of trial counsel – penalty phase – failure to present mental health history and documents;
26 failure to present expert psychiatric evidence that Howard was not a danger to jail
27 population; failure to rebut future dangerousness evidence with jail records and personnel;
28 failure to object to improper prosecutorial arguments involving statistics regarding

1 deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury
2 with "future victims," comparing victim's life with Howard's life, diluting jury's
3 responsibility by suggesting it was shared with other entities, voicing personal opinions in
4 support of the death penalty and its application to Howard, references to Charles Manson,
5 voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of
6 appellate counsel – failure to raise prosecutorial misconduct issues.

7 An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie
8 Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed
9 on October 3, 1988. The district court entered an oral decision denying the petition on
10 February 14, 1989. The district court concluded that trial counsel performed admirably
11 under difficult circumstances created by Howard himself. As to the failure to present an
12 insanity defense and present mental health records, the court found that Howard was
13 canvassed throughout the proceedings about his refusal to cooperate in obtaining those
14 records, particularly his refusal to sign releases. Howard knew what was going on, was
15 competent and was trying to manipulate the proceedings and that there was no evidence to
16 support an insanity defense, therefore counsel were not ineffective in this regard.

17 On the issue of failure to object to prosecutorial misconduct, the district court found
18 that defense counsel did object where appropriate and the arguments that were not objected
19 to did not amount to misconduct and were a fair comment on the evidence. Even if some of
20 the comments were improper, the district court concluded that they would not have
21 succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of
22 fact and conclusions of law were filed on July 5, 1989.⁴

23 The Nevada Supreme Court affirmed the district court's denial of Howard's first State
24 petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990)
25 (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal
26 Howard raised ineffective assistance of trial and appellate counsel regarding the

27
28 ⁴During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

1 prosecutorial misconduct issues. The Supreme Court found three comments to be improper
2 under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)⁵: 1) a personal opinion that
3 Howard merited the death penalty, 2) a golden rule argument – asking the jury to put
4 themselves in the shoes of a future victims and 3) an argument without support from
5 evidence that Howard might escape. The Court found that counsel were ineffective for
6 failing to object to these arguments but concluded there was no reasonable probability of a
7 contrary result absent these remarks and therefore no prejudice. The Court rejected
8 Howard's other contentions of improper argument.

9 With respect the mitigation evidence issues, the Nevada Supreme Court upheld the
10 district court's findings that this was a result of Howard's own conduct and not ineffective
11 assistance of counsel.⁶

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

14 Howard then filed a second State petition for post-conviction relief on December 16,
15 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition.
16 In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct,
17 namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt
18 and penalty phases; 2) expressions of personal belief and a personal endorsement of the
19 death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3)
20 comparing Howard's life with Dr. Monahan's and 4) a statement that the community would
21 benefit from Howard's death. The petition also asserted an ineffective assistance of trial
22 counsel claim for failing to explain to Howard the nature of mitigating circumstances and
23 their importance. Finally the petition raised a speedy trial violation and cumulative error.

24 The State moved to dismiss the second State petition as procedurally barred or
25

26 ⁵ Collier was decided two years after Howard's trial.

27 ⁶ The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks
28 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.

1 governed by the law of the case on February 10, 1992. In his reply, Howard dropped his
2 speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they
3 had been exhausted and Howard could proceed in Federal court.

4 The district court denied the petition on July 7, 1992. The district court found that the
5 claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as
6 well as the claims relating to mitigation evidence had been heard and found to be without
7 merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the
8 case. The district court further concluded that any claim of cumulative error and any issues
9 not raised in previous proceedings were procedurally barred. Finally, the district court found
10 the speedy trial violation was a naked allegation, frivolous and procedurally barred.

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

16 On December 8, 1993, Howard returned to federal court and filed a new pro se habeas
17 petition rather than lifting the stay in the previous petition. After almost three years, on
18 September 2, 1996, the federal district court dismissed the petition as inadequate and ordered
19 Howard to file a second amended federal petition that contained more than conclusory
20 allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second
21 Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years,
22 on September 23, 2002, the Second Amended Federal petition was stayed for Howard to
23 again exhaust his federal claims in state court.

24 Howard filed his third State petition for post-conviction relief on December 20, 2002.
25 Patricia Erickson represented him on this petition. The petition asserted the following
26 claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel
27 under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as
28 cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears

1 robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's
2 statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4)
3 trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a
4 matter of law and accomplice testimony should be viewed with distrust instructions – Dwana
5 Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt,
6 second degree murder as lesser included of first degree murder, premeditation, intent and
7 malice instructions; 7) improper jury instructions – failure to clearly define first degree
8 murder as specific intent crime requiring malice and premeditation; 8) improper
9 premeditation instruction blurred distinction between first and second degree murder; 9)
10 improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give
11 influence of extreme mental or emotional disturbance mitigator instruction; 12) improper
12 limitation of mitigation by giving only “any other mitigating circumstance” instruction; 13)
13 failure to instruct that mitigating circumstances findings need not be unanimous; 14)
14 prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of
15 death penalty, improper argument regarding rehabilitation, escape and future killings;
16 comparing Howard and victim's lives, comparing Howard to notorious murder (Charles
17 Manson) and improper community benefit argument; 15) use of felony robbery as aggravator
18 and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective
19 assistance of trial counsel – inadequate contact, conflict of interest, failure to contact
20 California counsel to obtain records, failure to obtain Patton and Atescadero hospital records,
21 failure to obtain California trial transcripts, failure to review Clark County Detention Center
22 medical records, failure to challenge competency to stand trial, failure to obtain suppression
23 hearing, failure to present legal insanity, failure to object to reasonable doubt instruction,
24 failure to view visiting records and call witnesses based upon same, failure to call Pinkie
25 Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans
26 in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt,
27 failure to obtain military records, failure to adequately explain concept of mitigation
28 evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute

1 future dangerousness argument, failure to object to trial court's limitation of mitigating
2 circumstances and failure to object to instructions which allegedly required unanimous
3 finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed
4 to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of
5 post-conviction counsel – failure to adequately investigate and develop all trial and appeal
6 claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary,
7 irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual
8 punishment and 23) the death penalty violates evolving standards of decency.

9 The State filed a motion to dismiss Howard's third State petition on March 4, 2001.
10 The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one-
11 year limit) and NRS 34.800 (five-year laches) and that Howard had not shown good cause
12 for delay in raising the claims to overcome the procedural bars. The State also analyzed
13 each claim and noted what issues had already been raised and decided adversely to Howard
14 or should have been raised and were waived under NRS 34.810.

15 Howard filed an amended third State petition. The amended petition expanded the
16 factual matters under Claim 17 regarding Howard's family background that Howard asserted
17 should have been presented in mitigation.

18 On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his
19 third State petition. As good cause for delay, Howard alleged Nevada's successive petition
20 and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860,
21 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because
22 any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and
23 cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the
24 Due process and Equal Protection clauses of the Federal Constitution bar application of NRS
25 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800
26 did not apply because the State had not shown prejudice and the presumption of prejudice
27 was overcome by the allegations in the petition.

28 The State filed a reply to the opposition on September 24, 2003. The district court

1 issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally
2 barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing
3 good cause for delay. The district court also independently dismissed the claims under NRS
4 34.810. Written findings were entered on October 23, 2003.

5 Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the
6 district court's dismissal of the third State petition on December 4, 2004. The High Court
7 addressed Howard's assertions that he had either overcome the procedural bars or they could
8 not constitutionally be applied to him and rejected them. Among its conclusions, the Court
9 noted that the record reflected Howard was aware that all his claims challenging the
10 conviction or imposition of sentence must be joined in a single petition and that Howard had
11 no right to post-conviction counsel at the time of the filing of his first and second State
12 petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel
13 could not be good cause for delay.⁷

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

24 The United States District Court denied Howards' motion for stay and abeyance on
25 January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to
26 dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's
27

28 ⁷ See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

1 opposition to the original motion to dismiss and additionally moved to dismiss the Amended
2 Fourth Petition on October 7, 2009.⁸ Howard filed an Opposition to the Amended Motion to
3 Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

4 Argument on the State's motion to dismiss was heard on February 4, 2010. The
5 matter was taken under advisement so the district court could review the extensive record. A
6 Minute Order Decision was issued on May 13, 2010, dismissing the Fourth State Petition as
7 procedurally barred. A written Findings of Fact and Conclusions of Law was filed on
8 November 6, 2010.

9 Petitioner challenged this Court's decision before the Nevada Supreme Court. Prior
10 to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an
11 opinion in Howard v. State, 128 Nev. 736, 291 P.3d 137 (2012), addressing the sealing of
12 documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to
13 substitute counsel that included information that was potentially embarrassing to one or more
14 current or former FPD attorneys as well as a prior private attorney who had represented
15 Howard. Id. at 747, 291 P.3d at 144. A cover sheet indicated that the motion was sealed but
16 the FPD failed to file a separate motion to seal the pleading. Id. at 739, 291 P.3d at 139.
17 The Court concluded that the FPD had not properly moved to seal and that sealing was
18 unjustified. Id. at 748, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of
19 habeas relief. (Order of Affirmance, filed July 30, 2014, attached to Clerk's Certificate, filed
20 October 24, 2014). The United States Supreme Court denied certiorari. Howard v. Nevada,
21 __ U.S. __, 135 S.Ct. 1898 (2015).

22 Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth
23 Petition) on October 5, 2016. Respondent filed an opposition and motion to dismiss on
24 November 2, 2016. On March 27, 2017, Petitioner filed an opposition to the State's request
25

26 ⁸ Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for
27 some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a
28 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 to dismiss the Fifth Petition. Respondent's reply to Petitioner's opposition was filed on
2 April 4, 2017.

3 On December 1, 2016, Petitioner filed an Amended Fifth Petition. The State moved
4 to strike the Amended Fifth Petition for failing to comply with NRS 34.750(5). Petitioner
5 opposed this request. This Court held a hearing on March 17, 2017, and after entertaining
6 argument, struck the Amended Fifth Petition pursuant to NRS 34.750(5) and Barnhart v.
7 State, 122 Nev. 301, 130 P.3d 650 (2006). An order memorializing this decision was filed
8 on April 7, 2017.

9 On April 6, 2017, Petitioner filed a Motion to Amend or Supplement that requested
10 reconsideration of this Court's decision to strike his Amended Fifth Petition without
11 requesting leave to do so in advance. Respondent filed an opposition on April 12, 2017, and
12 Petitioner replied on April 17, 2017.

13 Howard's Fifth Petition and Motion to Amend or Supplement came before this Court
14 on the April 19, 2017, Chamber Calendar. On May 2, 2017, this Court issued a minute order
15 denying the Fifth Petition and the Motion to Amend or Supplement and imposing a \$250.00
16 sanction upon Howard's counsel for causing the State to respond to a the Motion to Amend
17 when the Court had already decided the issue in the context of striking the Amended Fifth
18 Petition and/or for failing to seek leave of court prior to requesting reconsideration.

19 ANALYSIS

20 Petitioner's pursuit of reconsideration without obtaining leave of court requires that
21 this Court disregard the improper arguments offered by his March 27, 2017, Reply in
22 Support of Petition for Writ of Habeas Corpus and Response to Motion to Dismiss and deny
23 his April 6, 2017, Motion to Amend or Supplement the Fifth Petition. Petitioner's incorrect
24 pursuit of reconsider forced the State to waste valuable prosecutorial resources in responding
25 to arguments not properly before this Court. As such, sanctions are warranted against
26 Petitioner's counsel. Finally, the Fifth Petition is denied as procedurally barred without a
27 sufficient showing of good cause and prejudice to ignore Petitioner's procedural defaults.
28

1 I. Reconsideration

2 On March 17, 2017, this Court struck Petitioner's Amended Fifth Petition pursuant to
3 NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). On March 27,
4 2017, Petitioner filed his Reply in Support of Petition for Writ of Habeas Corpus and
5 Response to Motion to Dismiss and on April 6, 2017, he filed a Motion to Amend or
6 Supplement the Fifth Petition. Both of these pleadings offered arguments premised upon the
7 application of the beyond a reasonable doubt standard to the jury's selection of death as the
8 appropriate punishment. The same or similar arguments were contained in Petitioner's
9 Amended Fifth Petition.

10 By offering the same or similar burden of proof arguments against the jury's selection
11 of death as were contained in the Amended Fifth Petition, both of these pleadings sought
12 reconsideration of this Court's March 17, 2017, decision to strike the Amended Fifth
13 Petition. Petitioner did not obtain leave of this Court to pursue reconsideration of the March
14 17, 2017, decision to strike the Amended Fifth Petition. The failure to do so violates Rule
15 13(7) of the District Court Rules of Nevada and Rule 7.12 of the Eighth Judicial District
16 Court Rules.

17 Counsel for Petitioner justifies raising these arguments not on any error or oversight
18 by this Court, but instead insists that "[c]ontrary to its own well-established practice, the
19 State filed a Motion to Strike Amended Petition ... [and] [t]he Court likewise departed from
20 its normal approach and struck the amended petition, on the basis that no leave was
21 requested prior to its filing ..." Whether or not the State in past unrelated cases has decided
22 not to file a motion to strike is irrelevant to this Court. When Petitioner refers to "this
23 Court," it is unclear whether counsel is specifically referring to Department XVII or to the
24 various judges of the Eighth Judicial District Court. In any event, each case stands on its
25 own factual and procedural history and, therefore, whether or not Department XVII has
26 allowed supplemental petitions in the past in unrelated cases is not a legal basis to violate the
27 procedural rules in this case. At the March 17, 2017, hearing this Court inquired from
28 Petitioner's counsel, Mr. Horowitz, as to the procedures followed by the federal judges he

1 usually appears in front of and Mr. Horowitz stated that rules are adhered to and enforced.
2 The Court advised all counsel that it was this Court's intention to follow the procedural rules
3 as well.

4 Therefore, the Court disregards Petitioner's improperly raised argument in the March
5 27, 2017, Reply in Support of Petition for Writ of Habeas Corpus and Response to Motion to
6 Dismiss and denies the April 6, 2017, Motion to Amend or Supplement the Fifth Petition.
7 Additionally, Counsel for Petitioner's improper pursuit of reconsider forced the State to
8 waste valuable prosecutorial resources in responding to arguments not properly before this
9 Court. As such, Petitioner's counsel are jointly and severally sanctioned \$250.00 in attorney
10 fees to be paid to the Clark County District Attorney.

11 II. The Fifth Petition is Procedurally Barred

12 Petitioner failed to raise the claim contained in the Fifth Petition in a timely fashion

13 A. Application of Procedural Bars is Mandatory

14 The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118
15 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days
16 late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the
17 district courts have a *duty* to consider whether post-conviction claims are procedurally
18 barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070,
19 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory
20 procedural default rules to post-conviction habeas petitions is mandatory," noting:

21 Habeas corpus petitions that are filed many years after conviction are an
22 unreasonable burden on the criminal justice system. The necessity for a
23 workable system dictates that there must exist a time when a criminal
24 conviction is final.

25 Id., at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars "cannot be
26 ignored when properly raised by the State." Id., at 233, 112 P.3d at 1075. The Nevada
27 Supreme Court has granted no discretion to the district courts regarding whether to apply the
28 statutory procedural bars.

1 B. NRS 34.726(1)

2 NRS 34.726(1) states that “unless there is good cause shown for delay, a petition that
3 challenges the validity of a judgment or sentence must be filed within 1 year after entry of
4 the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year
5 after the Supreme Court issues its remittitur.” The one-year time bar is strictly construed and
6 enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that
7 the “clear and unambiguous” provisions of NRS 34.726(1) demonstrate an “intolerance
8 toward perpetual filing of petitions for relief, which clogs the court system and undermines
9 the finality of convictions.” Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).
10 For cases that arose before NRS 34.726 took effect on January 1, 1993, the deadline for
11 filing a petition extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

12 Remittitur issued from Petitioner’s direct appeal on February 12, 1988. Therefore,
13 Petitioner had until January 1, 1994, to file a timely habeas petition. Petitioner filed the Fifth
14 Petition on October 5, 2016. As such, the Fifth Petition is time barred.

15 Even if the one-year rule did not begin to run until Petitioner’s challenge to the
16 Nevada Supreme Court’s reweighing decision was indisputably available, the Fifth Petition
17 is still time barred. Petitioner’s contention is that a new penalty hearing is required due to
18 the combination of the Nevada Supreme Court’s invalidation of an aggravating circumstance
19 on appeal of the Fourth Petition and Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016). It
20 is undisputable that Hurst was published in 2016; however, Hurst was merely an application
21 of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at ___, 136 S.Ct.
22 at 621-22 (“[t]he analysis the Ring Court applied to Arizona’s sentencing scheme applies
23 equally to Florida’s”). Ring was published on June 24, 2002. Remittitur issued from the
24 Nevada Supreme Court’s decision invalidating an aggravating circumstance and reweighing
25 on October 20, 2014. Under the most favorable analysis possible, Petitioner had until
26 October 20, 2015, to bring a Ring challenge against the Nevada Supreme Court’s reweighing
27 decision.

1 C. NRS 34.810

2 Petitioner's fifth attempt at state habeas relief must be dismissed on waiver grounds
3 and as an abuse of the writ.

4 Claims that could have been raised on direct appeal or in a prior petition are barred
5 under NRS 34.810(1)(b):

6 The court *shall dismiss* a petition if the court determines that:

7 ...

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

9 (1) Presented to the trial court;

10 (2) *Raised in a direct appeal or a prior petition* for a writ of habeas
corpus or post-conviction relief, *unless the court finds both cause for*
11 *the failure to present the grounds and actual prejudice to the petitioner.*

12 (Emphasis added). The failure to raise grounds for relief at the first opportunity is an abuse
13 of the writ. NRS 34.810(2).

14 Nevada law dictates that all claims appropriate for direct appeal must be pursued on
15 direct appeal or they will be "considered waived in subsequent proceedings." Franklin v.
16 State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds,
17 Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). The Nevada Supreme Court has
18 emphasized that: "[a] court *must* dismiss a habeas petition if it presents claims that either
19 were or could have been presented in an earlier proceeding, unless the court finds both cause
20 for failing to present the claims earlier or for raising them again and actual prejudice to the
21 petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis
22 added). Where a claim arises after direct appeal, a petitioner has one year in which to file a
23 petition alleging the claim or it too is barred. Rippo v. State, 132 Nev. __, __, 368 P.3d 729,
24 734 (2016), vacated on other ground sub nom., Rippo v. Baker, __ U.S. __, 137 S.Ct. 905
25 (2017) ("[A] petition ... has been filed within a reasonable time after the ... claim became
26 available so long as it is filed within one year after entry of the district court's order
27 disposing of the prior petition or, if a timely appeal was taken from the district court's order,
28

1 within one year after this court issues its remittitur.”).

2 Petitioner’s Hurst claim is barred by NRS 34.810(1)(b)(2) as waived and by NRS
3 34.810(2) as an abuse of the writ since it was not raised within a year of when it became
4 available to him. Petitioner’s contention is that a new penalty hearing is required due to the
5 combination of the Nevada Supreme Court’s invalidation of an aggravating circumstance on
6 appeal of the Fourth Petition and Hurst. It is undisputable that Hurst was published in 2016;
7 however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428
8 (2002). Hurst, 577 U.S. at ___, 136 S.Ct. at 621-22 (“[t]he analysis the Ring Court applied to
9 Arizona’s sentencing scheme applies equally to Florida’s”). Ring was published on June 24,
10 2002. Remittitur issued from the Nevada Supreme Court’s decision invalidating an
11 aggravating circumstance and reweighing on October 20, 2014. Under the most favorable
12 analysis possible, Petitioner had until October 20, 2015, to bring a Ring challenge against the
13 Nevada Supreme Court’s reweighing decision. Petitioner’s failure to raise this complaint at
14 the first opportunity amounts to a waiver of the claim and his decision to proffer it in the
15 Fifth Petition amounts to an abuse of the writ.

16 III. Petitioner Fails to Justify Ignoring the Procedural Bars

17 To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for
18 delay in filing his petition or for bringing new claims or repeating claims in a successive
19 petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.810(3). To establish
20 prejudice “a petitioner must show that errors in the proceedings underlying the judgment
21 worked to the petitioner’s actual and substantial disadvantage.” State v. Huebler, 128 Nev.
22 ___, ___, 275 P.3d 91, 94-95 (2012), cert. denied, ___ U.S. ___, 133 S.Ct. 988 (2013).

23 “To establish good cause, petitioners must show that an impediment external to the
24 defense prevented their compliance with the applicable procedural rule. A qualifying
25 impediment might be shown where the factual or legal basis for a claim was not reasonably
26 available at the time of default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003),
27 rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004);
28 see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) (“In order to

1 demonstrate good cause, a petitioner must show that an impediment external to the defense
2 prevented him or her from complying with the state procedural default rules”); Pellegrini,
3 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician’s
4 declaration in support of a habeas petition were sufficient “good cause” to overcome a
5 procedural default, whereas finding by Supreme Court that defendant was suffering from
6 Multiple Personality Disorder was). An external impediment could be “that the factual or
7 legal basis for a claim was not reasonably available to counsel, or that ‘some interference by
8 officials’ made compliance impracticable.” Id. (quoting, Murray v. Carrier, 477 U.S. 478,
9 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904
10 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

11 The Nevada Supreme Court has held that, “appellants cannot attempt to manufacture
12 good cause[.]” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a
13 “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at
14 506; (quoting, Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded
15 by statute as recognized by, Huebler, 128 Nev. at ___, 275 P.3d at 95, footnote 2). Excuses
16 such as the lack of assistance of counsel when preparing a petition as well as the failure of
17 trial counsel to forward a copy of the file to a petitioner have been found not to constitute
18 good cause. Phelps v. Dir. Nev. Dep’t of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306
19 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d
20 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

21 A. No Good Cause

22 Petitioner’s failure to prosecute his Ring / Hurst complaint within a year of when it
23 became available precludes a finding of good cause.

24 Petitioner’s contention is that a new penalty hearing is required due to the
25 combination of the Nevada Supreme Court’s invalidation of an aggravating circumstance on
26 appeal of the Fourth Petition and Hurst. It is undisputable that Hurst was published in 2016;
27 however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428
28 (2002). Hurst, 577 U.S. at ___, 136 S.Ct. at 621-22 (“[t]he analysis the Ring Court applied to

1 Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24,
2 2002. Remittitur issued from the Nevada Supreme Court's decision invalidating an
3 aggravating circumstance and reweighing on October 20, 2014. This complaint has been
4 available to Petitioner at least since October 20, 2014. As such, Petitioner had until October
5 20, 2015, to file this claim. Rippo, 132 Nev. at ___, 368 P.3d at 734 ("[A] petition ... has
6 been filed within a reasonable time after the ... claim became available so long as it is filed
7 within one year after entry of the district court's order disposing of the prior petition or, if a
8 timely appeal was taken from the district court's order, within one year after this court issues
9 its remittitur.").

10 Petitioner cannot demonstrate an impediment external to the defense since both Ring
11 and the Nevada Supreme Court's decision on appeal of the Fourth Petition are matters of
12 public record. Petitioner cannot argue that his change in law impediment should be counted
13 from Hurst and not Ring. "Good cause for failing to file a timely petition or raise a claim in
14 a previous proceeding may be established where the factual or legal basis for the claim was
15 not reasonably available." Bejarano v. State, 122 Nev. 1066, 1073, 146 P.3d 265, 270
16 (2006). Here the factual impediment would be the date of remittitur from the Fourth
17 Petition. The issue is when the legal basis arose for Petitioner's newest claim. Petitioner
18 wants to count from Hurst because it resets the clock and makes his filing timely. However,
19 Hurst was merely an application of Ring. Hurst, 577 U.S. at ___, 136 S.Ct. at 621-22 ("[t]he
20 analysis the Ring Court applied to Arizona's sentencing scheme applies equally to
21 Florida's"). The entirety of the United States Court's discussion in Hurst focused on
22 applying Ring to the case before it. Id. The Court ended by concluding:

23 As with Timothy Ring, the maximum punishment Timothy Hurst could have
24 received without any judge-made findings was life in prison without parole. As
25 with Ring, a judge increased Hurst's authorized punishment based on her own
factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth
Amendment.

26 Id. at ___, 136 S.Ct. at 622. Petitioner cannot use Hurst to bootstrap himself into a timely
27 Ring complaint. Crump v. State, 2016 Nev. Unpub. Lexis 374, p. 6-7, footnote 5 ("Riley
28 would not provide good cause as it relies on Hern, which has been available for decades").

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1 It is FURTHER ORDERED that the Fifth Petition is denied as procedurally barred
2 without a sufficient showing of good cause and prejudice to ignore Petitioner's procedural
3 defaults.

4 DATED this 15 day of May 2017.

5
6 
7 MICHAEL VILLANI
DISTRICT JUDGE JB

8 STEVEN B. WOLFSON
9 DISTRICT ATTORNEY
Nevada Bar #001565

10
11 BY


12 JONATHAN E. VANBOSKERCK
13 Chief Deputy District Attorney
Nevada Bar #006528
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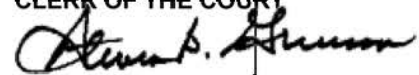
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Eileen Davis

From: Eileen Davis
Sent: Wednesday, May 10, 2017 8:07 AM
To: jonah_horwitz@fd.org; deborah_a_czuba@fd.org; parmeni@gcmaslaw.com
Cc: Jonathan VanBoskerck; Eileen Davis
Subject: Samuel Howard, 81C053867.
Attachments: Howard, Samuel, 81C053867, FFCL&O.pdf

Findings of Fact, Conclusions of Law and Order.

Please be advised that we will be presenting these Findings to the Court on May 12, 2017 in compliance with the Judge's Minute Order.



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Tel: (208) 331-5530
Fax: (208) 331-5559

Attorneys for Petitioner Samuel Howard

**DISTRICT COURT
CLARK COUNTY, NEVADA**

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and
ADAM PAUL LAXALT, Attorney
General for the State of Nevada,

Respondents.

Case No. 81C053867
Dept. No. XVII

CASE APPEAL STATEMENT

(Death Penalty Case)

1. Name of appellant filing this case appeal statement:

Samuel Howard.

1 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

2 The Honorable Michael P. Villani

3 **3. Identify each appellant and the name and address of counsel for each appellant:**

4 Samuel Howard, represented by:

5 Paola M. Armeni, Esq.
6 410 South Rampart Boulevard, Suite 420
7 Las Vegas, Nevada 89145

Jonah Horwitz & Deborah Czuba
720 West Idaho Street, Suite 900
Boise, Idaho 83702

8 **4. Identify each respondent and the name and address of appellate counsel, if known, for**
9 **each respondent (if the name of a respondent's appellate counsel is unknown, indicate**
10 **as much and provide the name and address of that respondent's trial counsel:**

11 The respondents are Timothy Filson, Warden of the Ely State Prison, and Adam Paul
12 Laxalt, Attorney General for the State of Nevada. Undersigned counsel believe that
13 respondents' appellate counsel are:

14 Steven Wolfson
15 Clark County District Attorney
16 Jonathan E. VanBoskerck
17 Chief Deputy District Attorney
200 East Lewis Avenue
Las Vegas, Nevada 89101

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701
Nevada Attorney General

18 **5. Indicate whether any attorney identified above in response to question 3 or 4 is not**
19 **licensed to practice law in Nevada, and if so, whether the district court granted that**
20 **attorney permission to appear under SCR 42 (attach a copy of any district court order**
21 **granting such permission):**

22 Deborah Anne Czuba and Jonah J. Horwitz are not licensed to practice law in Nevada.
23 However, the district court granted those attorneys permission to appear under SCR 42. *See*
24 *Order Admitting to Practice Attorneys Deborah Anne Czuba, Esq., and Jonah J. Horwitz,*
25 *Esq., attached hereto as Exhibit 1.*

26 **6. Indicate whether appellant was represented by appointed or retained counsel in the**
27 **district court:**
28

Appellant was represented in the district court by Deborah Anne Czuba, Jonah J. Horwitz, and Paola Armeni. Ms. Czuba and Mr. Horwitz are attorneys with the Federal Defender Services of Idaho, which has been appointed to represent Appellant by the Nevada Supreme Court in case number 57469 on November 15, 2012, the United States Court of Appeals for the Ninth Circuit in case number 10-99003 on August 10, 2012, and the United States District Court for the District of Nevada in case number 2:93-cv-1209 on September 12, 2015. Ms. Armeni associated as local counsel with Ms. Czuba and Mr. Horwitz for purposes of representing appellant in this post-conviction action. The motion to associate was granted by the district court on October 24, 2016.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Appellant is represented on appeal by Deborah Anne Czuba, Jonah J. Horwitz, and Paola Armeni. Ms. Czuba and Mr. Horwitz are attorneys with the Federal Defender Services of Idaho, which has been appointed to represent Appellant by the Nevada Supreme Court in case number 57469 on November 15, 2012, the United States Court of Appeals for the Ninth Circuit in case number 10-99003 on August 10, 2012, and the United States District Court for the District of Nevada in case number 2:93-cv-1209 on September 12, 2015. Ms. Armeni associated as local counsel with Ms. Czuba and Mr. Horwitz for purposes of representing appellant in this post-conviction action. The motion to associate was granted by the district court on October 24, 2016.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Appellant did not apply in the district court for leave to proceed in forma pauperis on his fifth post-conviction petition, which is the subject of the instant appeal. However, appellant was allowed by the district court to proceed in forma pauperis on his fourth post-conviction petition in an order rendered on November 6, 2007, and reflected in the minutes for that day. Furthermore, appellant's counsel was granted by the district court a waiver of the pro hac vice application fees pursuant to SCR 42(3)(e), in an order entered on November 4, 2016. Appellant was also granted leave to proceed in forma pauperis in his ongoing federal

habeas action by the United States District Court for the District of Nevada in case number 2:93-cv-1209, on January 12, 1994.

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):

The petition for writ of habeas corpus was filed on October 5, 2016.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is a post-conviction action lodging a constitutional challenge to a death sentence. In the order being appealed, the district court denied appellant's motion to add a second claim to the petition by amendment, and denied the remaining claim as procedurally barred.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

The case has previously been the subject of the following appeals:

Howard v. State, No. 15113;

Howard v. State, No. 20368;

Howard v. State, No. 23386;

Howard v. State, No. 42593;

Howard v. State, No. 57469.

12. Indicate whether this appeal involves child custody or visitation:

This appeal does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

The Nevada Supreme Court has stated that "habeas corpus is a proceeding which should be characterized as neither civil nor criminal for all purposes. It is a special remedy which is essentially unique." *Hill v. Warden*, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980). To the extent this question applies to habeas corpus matters, undersigned counsel do not believe there is currently a possibility of settlement.

1 DATED this 1st day of June 2017.

2
3 GENTILE CRISTALLI
4 MILLER ARMENI SAVARESE

5 */s/ Paola M. Armeni*

6 PAOLA M. ARMENI, ESQ.
7 Nevada Bar No. 8357
8 410 South Rampart Boulevard, Suite 420
9 Las Vegas, Nevada 89145

10 FEDERAL DEFENDER
11 SERVICES OF IDAHO

12 */s/ Deborah A. Czuba*

13 DEBORAH A. CZUBA, ESQ. (*pro hac vice*)
14 Idaho Bar No. 9648
15 720 West Idaho Street, Suite 900
16 Boise, Idaho 83702

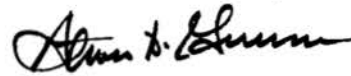
17 */s/ Jonah J. Horwitz*

18 JONAH J. HORWITZ, ESQ. (*pro hac vice*)
19 Wisconsin Bar No. 1090065
20 720 West Idaho Street, Suite 900
21 Boise, Idaho 83702
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Exhibit 1

**(Order Admitting to Practice Attorneys
Deborah Anne Czuba and Jonah J. Horwitz)**

1 **ORAP**
2 GENTILE CRISTALLI
3 MILLER ARMENI SAVARESE
4 PAOLA M. ARMENI
5 Nevada Bar No. 8357
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9 Tel: (702) 880-0000
10 Fax: (702) 778-9709
11 *Attorney for Defendant Samuel Howard*



CLERK OF THE COURT

7 **EIGHTH JUDICIAL DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 SAMUEL HOWARD,

10 Petitioner,

11 vs.

12 TIMOTHY FILSON, Warden, and
13 ADAM PAUL LAXALT, Attorney General for
14 the State of Nevada,

15 Respondents.

CASE NO. 81C053867
DEPT. XVII

16 **ORDER ADMITTING TO PRACTICE ATTORNEYS DEBORAH ANNE CZUBA, ESQ.,**
17 **AND JONAH J. HORWITZ, ESQ.**

18 Deborah Anne Czuba, Esq., and Jonah J. Horwitz, Esq., having filed their Motions to
19 Associate Counsel under Nevada Supreme Court Rule 42, together with Verified Applications
20 for Association of Counsel, the State Bar of Nevada Statement, Ms. Czuba submitting
21 Certificates of Good Standing for the Supreme Court State of Arkansas Little Rock, State of New
22 York Supreme Court, Appellate Division Third Judicial Department, State Bar of Georgia, and
23 Supreme Court of the State of Idaho, and Mr. Horwitz having filed a Certificate of Good
24 Standing for the State of Wisconsin, and said applications having been noticed, no objections
25 having been made, and the Court being fully apprised in the premises, and good cause appearing,
26 it is hereby,
27

28 ...

1 **ORDERED**, that said applications are hereby granted, and Deborah Anne Czuba, Esq.,
2 and Jonah J. Horwitz, Esq., are hereby admitted to practice in the above-entitled Court for the
3 purposes of the above-entitled matter only.

4 Dated this 20 day of Oct, 2016.

5 

6 _____
7 **MICHAEL P. VILLANI**
8 **DISTRICT COURT JUDGE**
9 **CASE NO.: 81C053867**

10 J3

11 Submitted by:

12 GENTILE CRISTALLI
13 MILLER ARMENI SAVARESE

14 
15 By: _____


16 **PAOLA M. ARMENI**
17 Nevada Bar No. 8357
18 410 South Rampart Boulevard, Suite 420
19 Las Vegas, Nevada 89145
20 Tel: (702) 880-0000
21 Fax: (702) 778-9709
22 Attorney for Defendant Samuel Howard

CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese hereby certifies that on the 18 day of October, 2016, I served a copy of the **Order Admitting to Practice Deborah Anne Czuba, Esq., and Jonah J. Horwitz, Esq.**, by electronic means and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

CLARK COUNTY DISTRICT ATTORNEY
CRIMINAL DIVISION
JONATHAN VANBOSKERCK
200 East Lewis Avenue
Las Vegas, Nevada 89101
Email: jonathan.vanboskerck@clarkcountynv.com

ADAM PAUL LAXALT
Nevada Attorney General
100 North Carson Street
Carson, City, Nevada 89701



An employee of Gentile Cristalli
Miller Armeni Savarese

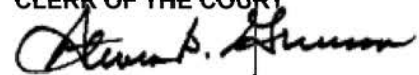
1 **CERTIFICATE OF SERVICE**

2 I hereby certify that service of this Case Appeal Statement was made this 1st day of June
3 2017, by Electronic Filing and by email to:

4 Jonathan E. VanBoskerck
5 Chief Deputy District Attorney
6 Office of the Clark County District Attorney
7 Jonathan.VanBoskerck@clarkcountyda.com

8 /s/ Joy Fish

9 Joy Fish
10 Paralegal
11 Federal Defender Services of Idaho
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1 NOASC
2 GENTILE CRISTALLI
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4 PAOLA M. ARMENI
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11 FEDERAL DEFENDER
12 SERVICES OF IDAHO
13 JONAH J. HORWITZ (admitted *pro hac vice*)
14 Wisconsin Bar No. 1090065
15 E-mail: Jonah_Horwitz@fd.org
16 DEBORAH A. CZUBA (admitted *pro hac vice*)
17 Idaho Bar No. 9648
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20 Boise, ID 83702
21 Tel: (208) 331-5530
22 Fax: (208) 331-5559

23 Attorneys for Petitioner Samuel Howard

24 **DISTRICT COURT**
25 **CLARK COUNTY, NEVADA**

26 SAMUEL HOWARD,

27 Petitioner,

28 vs.

TIMOTHY FILSON, Warden, and
ADAM PAUL LAXALT, Attorney
General for the State of Nevada,

Respondents.

Case No. 81C053867
Dept. No. XVII

NOTICE OF APPEAL

(Death Penalty Case)

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The May 15, 2017 order also instructed Mr. Howard's attorneys to pay \$250 to the Clark County District Attorney's Office ("CCDA"). Undersigned counsel have sent a check to Jonathan E. VanBoskerck, who represents the State here, in that amount. The sending of the check does not indicate that undersigned counsel agree that the sanctions must be paid immediately, nor does it indicate that undersigned counsel concede the appropriateness, validity, or lawfulness of the sanction. Furthermore, the payment should likewise not be understood to suggest that undersigned counsel believe the sanctions issue is resolved or settled in any way. Quite to the contrary, undersigned counsel will be challenging the sanctions in a petition for writ of mandamus filed with the Nevada Supreme Court. In that petition, undersigned counsel will be requesting an order from the Nevada Supreme Court vacating the sanctions and directing the CCDA to return the \$250. If the Nevada Supreme Court does so, undersigned counsel will be expecting the CCDA to repay the money in full.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

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DEBORAH A. CZUBA, ESQ. (*pro hac vice*)
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Boise, Idaho 83702

/s/ *Jonah J. Horwitz*

JONAH J. HORWITZ, ESQ. (*pro hac vice*)

Wisconsin Bar No. 1090065

720 West Idaho Street, Suite 900

Boise, Idaho 83702

CERTIFICATE OF SERVICE

I hereby certify that service of this Notice of Appeal was made this 1st day of June 2017,

by Electronic Filing and by email to:

Jonathan E. VanBoskerck

Chief Deputy District Attorney

Office of the Clark County District Attorney

Jonathan.VanBoskerck@clarkcountyda.com

I also certify that service of this Notice of Appeal was made this 1st day of June 2017, by

mail to:

Samuel Howard, #18329

High Desert State Prison

P.O. Box 650

Indian Springs, NV 89070

/s/ Joy Fish

Joy Fish

Paralegal

Federal Defender Services of Idaho