

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE LORRENTE ECHAVARRIA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51042

JOSE LORRENTE ECHAVARRIA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52358

**FILED**

JUL 20 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are appeals from district court orders denying appellant Jose Lorrente Echavarria's second and third post-conviction petitions for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On June 25, 1990, Echavarria shot and killed FBI Special Agent John Bailey during an attempted bank robbery. He fled to Juarez, Mexico, where he was arrested the next day and subsequently signed a written statement admitting to killing Agent Bailey. Echavarria was turned over to the FBI and returned to the United States. A jury convicted Echavarria of first-degree murder and other attendant charges and sentenced him to death. This court affirmed the judgment of conviction and death sentence. Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992). He subsequently filed a timely post-conviction petition

for a writ of habeas corpus, which the district court denied. After lengthy post-conviction proceedings in federal court, he filed a second post-conviction petition in May 2007 and a third post-conviction petition in May 2008. The district court summarily denied both petitions.

In these appeals from the denial of his second and third post-conviction petitions, Echavarria argues that the district court erred by (1) denying his claims of ineffective assistance of trial, appellate, and post-conviction counsel as procedurally barred; (2) denying his claim that the trial judge was biased against him; (3) denying his challenge to the premeditation instruction as procedurally barred; (4) concluding that he is not entitled to a new penalty hearing under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004); and (5) denying his challenge to the constitutionality of the lethal injection protocol.

#### Ineffective-assistance-of-counsel claims

Echavarria contends that the district court erred by denying his claims of ineffective assistance of trial, appellate, and post-conviction counsel as procedurally barred. Because he filed his petition many years after this court issued remittitur from his direct appeal, the petitions were untimely under NRS 34.726.<sup>1</sup> The petitions were also successive and

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<sup>1</sup>We reject Echavarria's argument that "fault of the petitioner" as contemplated by NRS 34.726(1)(a) requires that the petitioner himself must act or fail to act to cause the delay. This court has defined that provision as requiring "a petitioner [to] show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). This language contemplates that the delay in filing a petition must be caused by a circumstance not within the control of the defense team as a whole, not solely the defendant.

therefore procedurally barred pursuant to NRS 34.810(1)(b)(2). To overcome the procedural default, Echavarria must demonstrate good cause for his delay and actual prejudice. Also, because the State specifically pleaded laches, the petitions were subject to dismissal under NRS 34.800(2).

As to his post-conviction counsel claims, Echavarria relies on Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997), arguing that post-conviction counsel's ineffectiveness constituted good cause and prejudice to excuse the procedural bars in NRS 34.726 and NRS 34.810. Although Echavarria suggests that trial and appellate counsel's ineffectiveness excuses the procedural default rules, the crux of his good-cause argument focuses primarily on post-conviction counsel's alleged ineffectiveness.<sup>2</sup> In this, he argues that first post-conviction counsel represented him during the time in which he could have complied with procedural default rules but "[s]he clearly had no incentive to raise her own ineffectiveness," which "gives rise to a conflict of interest to find sufficient cause to excuse the untimely filing." Therefore, Echavarria argues, he was unable to challenge post-conviction counsel's effectiveness until she ceased representing him.

Echavarria's good-cause argument is flawed. As this court explained in Riker, Echavarria reads Crump too broadly in arguing that post-conviction counsel's ineffectiveness alone establishes good cause for

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<sup>2</sup>We reject Echavarria's contention that the procedural default rules should be disregarded on the ground that this court arbitrarily and inconsistently applies them. See State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005).

his failure to timely file subsequent post-conviction petitions. 121 Nev. at 235, 112 P.3d at 1077. Although Echavarria was statutorily entitled to appointment of first post-conviction counsel, see NRS 34.820, and therefore the effective assistance of that counsel, a post-conviction petition challenging the effective assistance of post-conviction counsel nonetheless is subject to procedural default rules, including untimeliness under NRS 34.726 or NRS 34.800. Riker, 121 Nev. at 235, 112 P.3d at 1077. He thus had to raise his claims based on the ineffective assistance of post-conviction counsel within a reasonable time after discovering them. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506. Echavarria waited 11 years after this court resolved his appeal from the denial of his first post-conviction petition to challenge post-conviction counsel's effectiveness. Other than his misinterpretation of Crump, Echavarria offers no explanation for the delay. Therefore, we conclude that he failed to demonstrate good cause to overcome applicable procedural default rules.

As to Echavarria's claims of ineffective assistance of trial and appellate counsel, he neglects to explain good cause except to state that he "received ineffective assistance of trial counsel as an independent claim." In this, he asserts that post-conviction counsel's ineffectiveness precluded him from raising his trial and appellate counsel claims until now. However, as this court explained in Hathaway, a claim of ineffective assistance of counsel may excuse a procedural default, but "to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted. In other words, a petitioner must demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion." 119 Nev. at 252, 71 P.3d at 506 (footnote omitted). Because the claims of ineffective assistance of post-conviction counsel are procedurally

barred, they cannot provide good cause to excuse the procedural default of the trial and appellate counsel claims.

Nevertheless, even if Echavarria established good cause to overcome the procedural bars applicable to his ineffective-assistance-of-counsel claims, he must demonstrate actual prejudice, see NRS 34.726(1), NRS 34.810(3), which requires a showing “not merely that the errors created a possibility of prejudice, but that they worked to [the petitioner’s] actual and substantial disadvantage, in affecting the [trial] with error of constitutional dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). Whether Echavarria can demonstrate actual prejudice thus depends on the merits of his claims that counsel at various stages provided constitutionally ineffective assistance of counsel. See Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995). Under the two-part test established by the United States Supreme Court in Strickland v. Washington, Echavarria must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) prejudice in that there is a reasonable probability of a different outcome. 466 U.S. 668, 687-88, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996). For the reasons below, we conclude that he failed to satisfy Strickland and therefore cannot demonstrate actual prejudice to excuse the procedural default.

#### Trial counsel

Echavarria argues that the district court erred by denying his claims that trial counsel were ineffective for failing to (1) investigate the crime scene and (2) investigate and present additional mitigation evidence.

### Crime scene investigation

Echavarria contends that trial counsel was ineffective for failing to investigate the crime scene and employ a crime scene expert. According to Echavarria, further investigation and an expert would have revealed that the eyewitnesses "simply got their facts wrong" when they testified that the killing was deliberate, thus supporting his claim that he acted in self-defense when he shot Agent Bailey.<sup>3</sup> He argues that an expert was critical to elucidate two matters: (1) the witnesses' accounts of him standing over Agent Bailey when he shot Agent Bailey did not explain the gunshot residue on Agent Bailey's hands and (2) the angle of the gunshots suggested that they occurred during a struggle. We disagree.

As to Echavarria's first contention regarding the gunshot residue, several witnesses testified that Agent Bailey fired a shot into a glass door after Echavarria ignored Agent Bailey's order to halt, thereby explaining the gunshot residue on Agent Bailey's hands. As to his second contention regarding a struggle, several witnesses testified that Echavarria shot Agent Bailey at least three times while Agent Bailey was lying on his back on the ground, which dispels any claim of self-defense. Based on the evidence elicited at trial, even if counsel had secured expert crime scene testimony, it would not have altered the trial outcome.

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<sup>3</sup>Echavarria also asserts that counsel's ineffectiveness was compounded by the State's withholding of some crime scene photographs, which he contends contradicted the testimony of several witnesses. However, he does not explain the substance of the withheld photographs or their significance relative to eyewitness testimony. Because Echavarria raised nothing more than a bare allegation of error, the district court did not err by denying this claim.

Accordingly, the district court did not err by denying this claim as procedurally barred.

#### Mitigation evidence

Echavarria argues that trial counsel was ineffective for failing to investigate and present mitigation evidence that would have provided a more robust picture of his dysfunctional childhood and mental health issues. In this, he chides counsel's representation in three respects: counsel's failure to (1) identify and present numerous damaging developmental factors present in his life; (2) articulate the role of moral culpability, which was critical to the jury's consideration of the nexus between mitigation and the capital offense; and (3) show that he posed no future danger. Prejudice resulted, according to Echavarria, because counsel's omissions left the jury to conclude that he was indeed "death-worthy." To support his contention, Echavarria included numerous affidavits from friends and family members and two psychological evaluations, describing his social and medical history.

At trial, counsel presented testimony from several of Echavarria's friends, who testified to his good character and described him as a helpful and good friend, nonviolent and free of drugs and alcohol. Echavarria also testified on his own behalf. Counsel also presented evidence painting Echavarria as a hard working Cuban immigrant who wanted to attend school and improve his circumstances and who missed his family and was working several jobs so that he could bring his mother to the United States. Although trial counsel presented no evidence suggesting that Echavarria was a low risk for future violence, the State did not focus its presentation or argument on future dangerousness.

While the additional evidence Echavarria now suggests should have been presented is credible, it is not so persuasive as to have altered the outcome of the proceeding. Because he failed to demonstrate actual prejudice, we conclude that the district court did not err by denying this claim as procedurally barred.

Appellate counsel

Echavarria argues that appellate counsel was ineffective for not challenging the district court's denial of his Batson challenge.<sup>4</sup>

A Batson challenge requires the district court to employ a "three-step analysis: (1) the opponent of the peremptory challenge must make out a prima facie case of discrimination, (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination." Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006); see Purkett v. Elem, 514 U.S. 765, 767 (1995); Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004).

Here, the trial court stated that Echavarria's Batson challenge was "totally without merit" and discussed several bases for the juror's removal, including that the juror disclosed that one of the defense counsel

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<sup>4</sup>Echavarria also contends that post-conviction counsel was ineffective for failing to challenge the district court's denial of his Batson challenge. His claim lacks merit, however, because trial error was subject to a procedural bar under NRS 34.810(1)(b) because it could have been raised on direct appeal. Post-conviction counsel cannot be faulted for not raising a procedurally barred claim.



had represented the juror's uncle in a criminal matter and the juror failed to disclose a recent arrest.

Unfortunately, the trial court's reasoning in rejecting the Batson challenge is not entirely clear because there was an off-the-record discussion related to the challenge. Although we stress the importance of resolving Batson challenges on the record, we nevertheless conclude that in this instance the record on its face does not reveal a meritorious issue that appellate counsel should have raised on appeal. In addition to the trial court's observations, the juror explained the circumstances of his recent arrest, indicating that a police officer had treated him poorly during the incident. The juror's negative experience with the police and his arrest are race-neutral reasons supporting a peremptory challenge. Because Echavarria failed to demonstrate actual prejudice, the district court did not err by denying this claim as procedurally barred.

#### Post-conviction counsel

Echavarria argues that the district court erred by denying his claims that post-conviction counsel was ineffective for not raising claims related to (1) the deficiency of interpreter services used at trial, (2) the voluntariness of his confession to Mexican authorities, and (3) jury misconduct.

#### Deficiency of interpreter

Echavarria argues that post-conviction counsel was ineffective for not challenging the constitutionally deficient interpreter services he received at trial. Other than to identify certain phrases and words he asserts were interpreted incorrectly, Echavarria fails to explain the significance of these errors or identify any critical testimony that was inaccurately translated such that the errors worked to his actual and

substantial disadvantage in affecting the trial with error of constitutional dimensions. Because he failed to demonstrate actual prejudice, the district court did not err by denying this claim as procedurally barred.

#### Voluntariness of Echavarria's confession

Echavarria complains that post-conviction counsel was ineffective for failing to argue that his due process rights were violated when witnesses falsely testified at trial concerning the voluntariness of his confession to Mexican authorities. After carefully reviewing the record and Echavarria's arguments on this matter, we conclude that he failed to establish that any witness testified falsely regarding the reputation of the Mexican police. And even if perjured testimony was introduced at trial sufficient to undermine the voluntariness of the challenged confession, no prejudice resulted considering the testimony of several witnesses who observed Echavarria shoot Agent Bailey three times while Agent Bailey lay on the floor and Echavarria's admissions to others that he shot Agent Bailey, albeit, according to him, in self-defense. Therefore, even assuming any deficiency in first post-conviction counsel's representation, Echavarria cannot demonstrate that it had a reasonable probability of leading to a different result in the prior post-conviction proceeding. Therefore, the district court did not err by denying this claim as procedurally barred.

#### Jury misconduct

Echavarria argues that post-conviction counsel was ineffective for not asserting a claim of juror misconduct based on allegations that, during deliberations, the jury foreman commented that the appeals Echavarria would receive would correct any errors the jurors made and therefore the jurors need not worry about the consequences of imposing

death. Echavarria contends that he is entitled to a new penalty hearing based on the misconduct.

In the context of motions for a new trial based on juror misconduct, this court has held that the defendant must establish that (1) misconduct occurred and (2) prejudice. Meyer v. State, 119 Nev. 554, 563, 80 P.3d 447, 455 (2003).

To prove that this misconduct occurred, Echavarria included a deposition from a juror who explained that the jury foreman stated during deliberations that there are always appeals in capital cases. Consideration of the appellate process as being available to correct errors by the jury and take ultimate responsibility from the jury is improper. See Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985) (condemning prosecutor's comments assuring jury that errors could be corrected on appeal and questioning reliability of sentence because "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's sentence rests elsewhere"). Accordingly, it appears that Echavarria could establish misconduct. The question then becomes prejudice.

Considering the factors in Meyer used to assess prejudice, we conclude that there is no reasonable probability that the foreman's improper comments affected the sentencing decision. 119 Nev. at 566, 80 P.3d at 456. Because Echavarria failed to meet his burden of establishing prejudice, the district court did not err by denying this claim.

#### Judicial bias

Echavarria argues that the district court erred by denying his claim that the trial judge was biased against him because Agent Bailey

had investigated the trial judge regarding an allegedly fraudulent land transaction that he had been involved in when he was Chairman of the Colorado River Commission. No prosecution against the trial judge resulted from the FBI's investigation.

Echavarria suggests that Agent Bailey's investigation created judicial bias as evidenced by the trial judge's disparaging and embarrassing treatment toward counsel. As evidence of the trial judge's animus, Echavarria points to numerous instances where the trial judge disparaged, "yelled at," and threatened counsel with sanctions throughout the trial. Echavarria argues that had he been aware of the FBI investigation, he would have moved to disqualify the trial judge.

We conclude that the district court did not err by denying this claim. Echavarria raised a claim of judicial bias on direct appeal, arguing that the trial judge made numerous disparaging and embarrassing comments about counsel. Although it appears that Echavarria did not learn of Agent Bailey's investigation until well after trial, the incidents he identifies as evidence of judicial bias were largely raised on direct appeal and rejected summarily by this court. See Echavarria, 108 Nev. at 749, 839 P.2d at 599 ("We have carefully examined appellants' numerous other assignments of error and determine that they lack merit."). In his post-conviction petition, Echavarria merely refined this claim, contending that the genesis of the trial judge's bias was related to Agent Bailey's investigation of him. New information as to the source of the alleged bias is not so significant as to persuade us to abandon the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975) (stating that "a more detailed and precisely focused argument" affords no

basis for avoiding the doctrine of the law of the case). Accordingly, the district court did not err by denying this claim.

Premeditation instruction

Relying on Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), and the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), Echavarria contends that the district court erred by denying his claim that the premeditation instruction given, commonly known as the Kazalyn instruction, unconstitutionally conflated the concepts of deliberation and premeditation. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). Six years after Echavarria's direct appeal was resolved, this court decided Byford, which disapproved of the Kazalyn instruction on the mens rea required for a first-degree murder conviction based on willful, deliberate, and premeditated murder, and provided the district courts with new instructions to use in the future. Byford, 116 Nev. at 233-37, 994 P.2d at 712-15. This court recently held that Byford effected a change in Nevada law and does not apply to cases that were final when it was decided. Nika v. State, 124 Nev. 1272, 1287, 198 P.3d 839, 850 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 130 S. Ct. 414 (2009). Because Echavarria's conviction was final when Byford was decided, see Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002), neither Byford nor Polk provides Echavarria relief.

Echavarria acknowledges Nika but argues that its reasoning is flawed because it ignores the constitutional vagueness concerns attendant to the Kazalyn instruction and failed to determine whether Byford should apply retroactively as a substantive rule of criminal law. We conclude that neither argument warrants relief. Until Byford, this court consistently upheld the Kazalyn instruction and rejected

constitutional challenges similar to Echavarria's. Byford did not alter the law in effect when Echavarria's conviction became final; rather, it changed the law prospectively. And because that change concerned a matter of state law, the Byford decision did not implicate federal constitutional concerns, triggering retroactivity scrutiny.

Because Byford does not apply to Echavarria, we conclude that the district court did not err by denying this claim.

#### Application of McConnell v. State

The State advanced three theories of first-degree murder—premeditated murder, murder to prevent a lawful arrest or effectuate an escape, and felony murder. The State relied on the same felonies (burglary and robbery) underlying the felony-murder theory to support two aggravators. In McConnell, this court “deem[ed] it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.” 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004). And in Bejarano v. State, this court held that McConnell has retroactive application. 122 Nev. 1066, 1070, 1076, 146 P.3d 265, 268, 272 (2006). Because the verdict is silent as to which theory or theories the jury relied on to find Echavarria guilty of Agent Bailey's murder, the burglary and robbery aggravators are invalid under McConnell. Although the district court struck the two felony aggravators under McConnell, it concluded that the jury's consideration of the aggravators was harmless. Echavarria disagrees, arguing that he is entitled to a new penalty hearing.

Because Echavarria's challenge to the felony aggravators pursuant to McConnell was appropriate for direct appeal, he must demonstrate good cause for his failure to raise it previously and actual

prejudice. NRS 34.810(1)(b)(2); NRS 34.810(3). We conclude that he failed to make either showing to overcome the procedural bar.

Echavarria filed his petition raising the McConnell claim in 2007, several years after McConnell was decided, but he provided no explanation for his delay in seeking relief under that decision. Accordingly, we disagree with the district court's conclusion that Echavarria demonstrated good cause to overcome applicable procedural bars because he did not raise this claim within a reasonable time after McConnell was decided. Nevertheless, even if he satisfied the good-cause requirement, he must demonstrate actual prejudice.

This court may uphold a death sentence based in part on an invalid aggravator either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. See Clemons v. Mississippi, 494 U.S. 738, 741 (1990).

After invalidating the felony aggravators, one remains—the murder was committed to prevent a lawful arrest.<sup>5</sup> Evidence supporting this aggravator shows that Echavarria shot Agent Bailey during the course of Echavarria's apprehension after a bank robbery attempt.

In mitigation, Echavarria presented evidence, including his own testimony, of his good character and nonviolence, his life-threatening

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<sup>5</sup>One theory that the State pursued for first-degree murder was that Echavarria murdered Agent Bailey to prevent a lawful arrest or effectuate an escape. He argues that, as a result, the preventing-a-lawful-arrest aggravator based on the same conduct is invalid under McConnell because it fails to genuinely narrow the class of defendants eligible for the death penalty. However, this court rejected a similar challenge in Blake v. State, 121 Nev. 779, 794, 121 P.3d 567, 577 (2005). Therefore, the district court did not err by denying this claim.

escape from Cuba and life as an immigrant in the United States, the circumstances of the offense and torture at the hands of Mexican authorities, and his remorse. Echavarria also supported his mother in Cuba and wanted to bring her to the United States; however, doing so required a great deal of money. Several friends testified that Echavarria did not drink, missed his family terribly, and was a good friend and not violent.

The preventing-a-lawful-arrest aggravator is particularly compelling in this case—the archetypal example of the aggravator in fact—and it appears that the jury found no circumstances mitigated the murder. Agent Bailey’s murder was callous and senseless, perpetrated merely to effectuate Echavarria’s escape from an abandoned robbery attempt. The aggravator juxtaposed to the relatively unimpressive mitigation evidence persuades us to conclude that the jury would have found Echavarria death eligible absent the invalid aggravators.<sup>6</sup>

The next question is whether the jury would have imposed a death sentence. In addition to the aggravators, the sentencing panel

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<sup>6</sup>Echavarria argues that this court must consider in the reweighing analysis the additional mitigation evidence that was not introduced at trial due to ineffective assistance of counsel. However, reweighing focuses only on mitigation evidence presented to the jury. See Rippo v. State, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006) (striking three McConnell aggravators and reweighing, looking only to the record for mitigating evidence); Archanian v. State, 122 Nev. 1019, 1040-41, 145 P.3d 1008, 1023 (2006) (same); State v. Haberstroh, 119 Nev. 173, 184 n.23, 69 P.3d 676, 683 n.23 (2003) (reweighing does not involve factual findings “other than those of the jury at the original penalty hearing”); Bridges v. State, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (this court reweighed based on a “review of the trial record”).



heard “other matter” evidence regarding Echavarria’s character. See NRS 175.552(3). In this respect, the jury heard evidence of three instances where Echavarria had threatened to kill people: (1) Echavarria’s neighbor testified that when a friend touched Echavarria’s car, Echavarria threatened to kill the neighbor’s friend; (2) Echavarria’s ex-girlfriend’s ex-husband testified that Echavarria threatened him at gunpoint shortly after Agent Bailey’s murder, when Echavarria fled to Mexico; and (3) Echavarria’s statement to a Mexican police officer that if he had been armed when he fled to Mexico, he “would have wiped out two or three” Mexican policemen.

Considering the callous and senseless nature of the murder and Echavarria’s volatile character, we conclude that the jury would have imposed death and therefore the McConnell error was harmless. Consequently, even if Echavarria demonstrated good cause for failing to timely raise this claim, he failed to establish prejudice. Therefore, the district court did not err by denying this claim as procedurally barred.<sup>7</sup>

#### Unconstitutionality of lethal injection

Echavarria argues that the district court erred by denying his claim that Nevada’s lethal injection protocol constitutes cruel and unusual

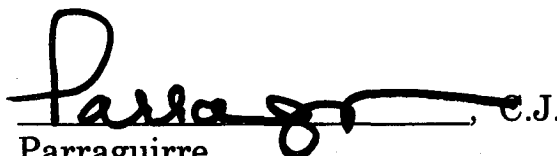
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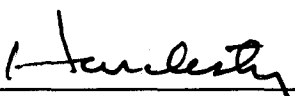
<sup>7</sup>Echavarria claims that procedural default rules are excused because he is actually innocent of the death penalty in that no valid aggravators remain. However, as the preventing-a-lawful-arrest aggravator remains viable, he is not actually innocent of the death penalty and therefore the fundamental miscarriage of justice exception to the procedural default rules does not apply. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

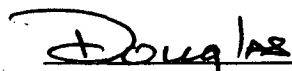
punishment.<sup>8</sup> Recently, however, this court concluded that this claim is not cognizable in a post-conviction habeas petition. McConnell v. State, 125 Nev. \_\_\_, \_\_\_, 212 P.3d 307, 311 (2009). Accordingly, the district court did not err by denying this claim.

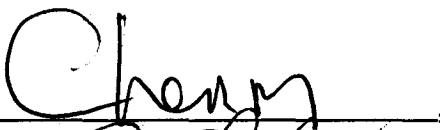
Having considered Echavarria's claims and concluded that no relief is warranted, we

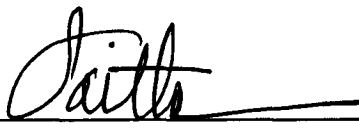
ORDER the judgment of the district court AFFIRMED.


  
Parraguirre, c.J.

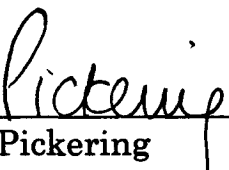
  
Hardesty, J.

  
Douglas, J.

  
Cherry, J.

  
Saitta, J.

  
Gibbons, J.

  
Pickering, J.

<sup>8</sup>To the extent Echavarria challenged the constitutionality of lethal injection as a method of execution in general, this claim was appropriate for direct appeal and procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.810(1)(b)(2); NRS 34.810(3). Because this court has upheld the constitutionality of lethal injection, see McConnell, 120 Nev. at 1055-56, 102 P.3d at 616; Rhyne v. State, 118 Nev. 1, 14, 38 P.3d 163, 171-72 (2002); Servin v. State, 117 Nev. 775, 785-86, 32 P.3d 1277, 1285 (2001), the district court did not err by denying this claim.

cc: Eighth Judicial District Court Dept. 8, District Judge  
Federal Public Defender/Las Vegas  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk