

1 court's assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at
2 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the
3 issues are debatable among jurists of reason, that a court could resolve the issues differently, or that
4 the questions are adequate to deserve encouragement to proceed further. *Id.*

5 Where the court has dismissed a petitioner’s habeas corpus petition on procedural grounds,
6 the determination whether a certificate of appealability (“COA”) should issue becomes a two-part
7 test. The Supreme Court has held that under such circumstances:

8 When the district court denies a habeas petition on procedural grounds
9 without reaching the prisoner’s underlying constitutional claim, a COA
10 should issue when the prisoner shows, at least, that jurists of reason
11 would find it debatable whether the petition states a valid claim of the
denial of a constitutional right and that jurists of reason would find it
debatable whether the district court was correct in its procedural
ruling.

12 *Slack*, 529 U.S. at 484. Therefore, in order to obtain a COA in cases dismissed on procedural
13 grounds, petitioner has the burden of demonstrating both that he was denied a valid constitutional
14 right, and that jurists of reason would find it debatable whether the court’s procedural ruling was
15 correct. In cases where there is a plain procedural bar to a petitioner’s claims and the district court is
16 correct to invoke that procedural bar to dispose of the case, “a reasonable jurist could not conclude
17 either that the district court erred in dismissing the petition or that the petitioner should be allowed to
18 proceed further.” *Id.* Under those circumstances “no appeal would be warranted.” *Id.*

19 In the instant case, the Nevada Supreme Court applied NRS 34.726(1) and ruled that
20 petitioner’s claims in the state post-conviction habeas petition were untimely filed. The Nevada
21 Supreme Court therefore refused to substantively consider any of petitioner’s claims. (Exhibit 36).¹
22 The claims in petitioner’s state post-conviction habeas petition are the same claims raised in the
23 federal petition in this Court. (ECF No. 1 & Exhibit 24). In the order filed February 19, 2013, this
24 Court determined that the Nevada Supreme Court’s application of the procedural bar of NRS
25 34.726(1) was an independent of any federal question and adequate to support the judgment. (ECF

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¹ The exhibits referenced in this order are found in the Court’s record at ECF Nos. 5-6.

1 No. 20, at pp. 3-4). *See Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991); *Murray v. Carrier*,
2 477 U.S. 478, 485 (1986); *Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir. 1996).

3 This Court further determined that petitioner did not demonstrate cause and prejudice to
4 excuse the procedural default of his claims because petitioner failed to show that some objective
5 factor external to the defense impeded his efforts to comply with the state procedural rule. (ECF No.
6 20, at pp. 4-6). *See Murray*, 477 U.S. at 488. Specifically, petitioner argued that his state petition
7 should have been deemed timely by the Nevada courts pursuant to the “mailbox rule.” Pursuant to
8 the “mailbox rule,” federal courts deem the filing date of a document as the date it was given to
9 prison officials for mailing. *Houston v. Lack*, 487 U.S. 266, 270 (1988). While the Ninth Circuit has
10 held that the mailbox rule applies to state as well as federal filings in computing the timeliness of the
11 federal petition under the AEDPA, the Ninth Circuit has also acknowledged that Nevada does not
12 recognize the prison mailbox rule for state post-conviction petitions in determining the timeliness of
13 a state petition under state law. *See Koerner v. Grigas*, 328 F.3d 1039, 1044 n.1 (9th Cir. 2003)
14 (“because Nevada does not recognize a prison mailbox rule for post-conviction petitions, [a] petition
15 [is] not filed under Nevada law until actually received by the clerk of court”) (citing *Gonzales v.*
16 *State*, 118 Nev. 590, 592 (2002) (Nevada does not recognize the “prison mailbox rule” and has
17 expressly rejected the rule for purposes of determining the filing date of state post-conviction habeas
18 petitions). Petitioner was required to comply with the Nevada’s state procedural rules in filing his
19 state habeas petition. Therefore, this Court determined that petitioner failed to demonstrate cause for
20 the procedural default in state court on the basis of untimeliness. (ECF No. 20, at p. 5). Because all
21 grounds of the federal petition were procedurally defaulted in state court on independent and
22 adequate state law grounds, and because petitioner filed the show cause and prejudice to excuse the
23 procedural default, the federal petition was procedurally barred from review by this Court.
24 Accordingly, the petition was dismissed with prejudice. (ECF No. 20, at pp. 5-6). In considering the
25 application for a certificate of appealability, this Court now finds that jurists of reason would not find
26 it debatable whether the petition states a valid claim of the denial of a constitutional right.

1 Moreover, this Court finds that jurists of reason would not find it debatable whether this Court was
2 correct in its ruling that all grounds of the federal petition were procedurally barred and subject to
3 dismissal.

4 Regarding petitioner’s Rule 60(b) motion for reconsideration, petitioner argued, for the first
5 time, that he was unable to file a timely state post-conviction habeas petition because his state
6 appointed counsel failed to provide him with court files until December 2, 2009, four months before
7 he filed his untimely state habeas petition. (ECF No. 22). In his opposition to the motion to dismiss,
8 petitioner did not argue that he had any difficulties obtaining court files from his state appointed
9 attorney. (ECF No. 16). Because petitioner may not raise new arguments in a motion for
10 reconsideration, the Court denied the motion. (ECF No. 24).

11 Additionally, in the Rule 60(b) motion, petitioner repeated arguments made in his opposition,
12 that respondents incorrectly calculated the date on which the Nevada Supreme Court issued
13 remittitur, and that he was entitled to application of the “mailbox rule” regarding his state habeas
14 petition. Those arguments were addressed and rejected in the Court’s order of February 13, 2013.
15 (ECF No. 20).

16 Finally, in his Rule 60(b) motion, petitioner argued that he was actually innocent. “[A]ctual
17 innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523
18 U.S. 614, 623 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). “Actual innocence does
19 not merely require a showing that a reasonable doubt exists in light of the new evidence, but rather
20 that no reasonable juror would have found the defendant guilty.” *Schlup v. Delo*, 513 U.S. 298, 327
21 (1995). A petitioner must support his allegation of constitutional error with new reliable evidence
22 such as “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical
23 evidence” that was not presented at trial. *Id.* at 324. Bare allegations unsupplemented by evidence
24 do not tend to establish actual innocence sufficient to overcome procedural default. *Thomas v.*
25 *Goldsmith*, 979 F.2d 746, 750 (9th Cir. 1992). Petitioner failed to present any new evidence that
26 would demonstrate that no reasonable juror would have found him guilty of his crimes to support a

1 claim of actual innocence. As such, this Court denied petitioner's Rule 60(b) motion for
2 reconsideration. (ECF No. 24). In considering the application for a certificate of appealability, this
3 Court now finds that jurists of reason would not find it debatable whether the petition states a valid
4 claim of the denial of a constitutional right. Additionally, this Court finds that jurists of reason
5 would not find it debatable whether this Court was correct in denying petitioner's Rule 60(b) motion
6 for reconsideration. No reasonable jurist could conclude that this Court's orders were erroneous.

7 **IT IS THEREFORE ORDERED** that petitioner's application for a certificate of
8 appealability is **DENIED**.

9 **IT IS FURTHER ORDERED** that the Clerk of Court shall transmit a copy of this order to
10 the United States Court of Appeals for the Ninth Circuit.

11 **DATED** this 12th day of December, 2013.

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16 Gloria M. Navarro
17 United States District Judge
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