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SAMUEL HOWARD

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

SAMUEL HOWARD,

Appellant,

vs.

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

Respondents.

) Case No.: 57469  
) DEATH PENALTY CASE  
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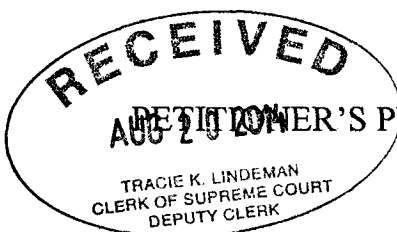
**FILED**

**AUG 21 2014**

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

**PETITION FOR REHEARING**

Comes now the Appellant, Samuel Howard, through his counsel, Teresa A. Hampton and Paola Armeni, and petitions this Court for rehearing in the above-styled case. This petition is based on the following argument and all papers and pleadings on file herein.

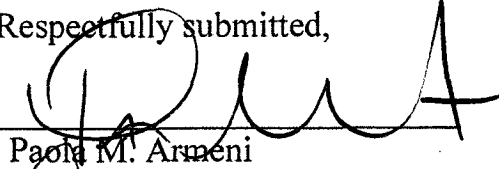


PETITIONER'S PETITION FOR REHEARING - Page 1

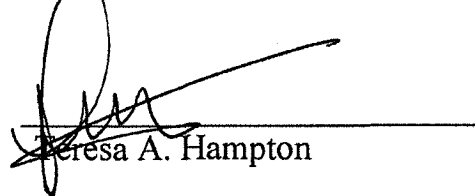
14-27559

DATED this 18th day of August, 2014.

Respectfully submitted,



Paola M. Armeni



Teresa A. Hampton

## STATEMENT OF FACTS

On April 22, 1983, a Clark County jury found Mr. Howard guilty of first degree murder with the use of a deadly weapon for the homicide of George Monahan. Appellant's Appendix, Vol. 6 at AA001303-09. A significant conflict existed between Mr. Howard and his trial attorneys from the onset of Mr. Howard's case. A close and personal relationship existed between the Clark County Public Defender's Office ("CCPD") and the victim. A senior attorney at the CCPD was close friends with the victim; the victim had been the attorney's dentist for fifteen years and his family also had personal connections to the victim. Appellant's Appendix, Vol. 1 at AA000005. In addition, Mr. Howard's trial counsel informed the court that another CCPD attorney had indicated that he believed Mr. Howard should be executed for the crime. *Id.* at AA000050.

The attorney-client relationship was severely compromised from both parties' perspective. There was little communication between trial counsel and Mr. Howard, and trial counsel failed to conduct any investigation on Mr. Howard's behalf. *Id.* at AA000051. Trial counsel made multiple requests, prior to and throughout the course of the trial, to withdraw. *Id.* at AA000050-51, AA000065, ROA, Vol. 3 at 514-15, ROA, Vol. 15 at 2444, ROA, Vol. 16 at 2674. These requests were based on the fact that Mr. Howard did not trust his counsel because of the CCPD's relationship with the victim. Appellant's Appendix, Vol. 1 at

AA000051. Mr. Howard expressed multiple times on the record his concerns about the CCPD representing him and his desire for conflict-free counsel. *Id.* at AA000014-17, AA000020-31.

During the guilt phase of Mr. Howard's case, defense counsel questioned Mr. Howard regarding whether he had any felony convictions. Appellant's Appendix, Vol. 5 at AA001141-1142. Mr. Howard responded that "in absencia [sic], in New York, they convicted me of possession of stolen property, gambling receipts, a robbery; I think that's about it." *Id.* at AA001142. On cross-examination, the prosecutor attempted to impeach Mr. Howard, asking him if he had been convicted of a number of crimes in different jurisdictions, including being "convicted of a felony in the State of New York."<sup>1</sup> *Id.* at AA001143. Mr. Howard responded "In absencia [sic], Yes." *Id.* In answering a series of leading questions, Mr. Howard agreed that he sat through the first two days of the trial before he absconded, and that the trial continued without him and the jury convicted him of robbery with the use of a weapon. *Id.* Mr. Howard believed that it was robbery and possession, but denied that he robbed the victim at gunpoint. *Id.* Defense counsel objected to this series of leading questions, stating that the prosecutor was "going a bit far with his questions," and the objection was

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<sup>1</sup> The State specifically noted that this line of questioning was "for the purpose of impeachment." Appellant's Appendix, Vol. 6 at AA001388.

sustained by the trial court. *Id.* at AA001144. No questions were asked, either by defense counsel or the prosecutor, regarding what sentence the New York court imposed; no records were introduced to verify any purported conviction. *Id.* at AA001141-43.

Prior to the trial, the State indicated its intention to proceed on three aggravating circumstances: (1) a prior felony conviction involving the use or threat of violence in San Bernardino County, California; (2) that the homicide occurred during the course of a robbery; and (3) that the homicide was committed for the purpose of avoiding arrest. Appellant's Appendix, Vol. 1 at AA000046-47. At the beginning of the penalty phase however, the State modified the aggravating circumstances, announcing that it would only proceed on the first two aggravating circumstances, and expanding the prior felony convictions aggravator to include the Queens County, New York crime.<sup>2</sup> Appellant's Appendix, Vol. 6 at A001389-90.

The State first called Dorothy Weisband, who testified that Sam Howard had robbed her at gunpoint, that she had testified at his trial, and that he was not present when she testified. *Id.* at AA001400-1417. Ms. Weisband did not provide any further testimony regarding what occurred after she took the stand in the

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<sup>2</sup> The State initially sought to use the California conviction, however that crime clearly did not qualify as an aggravating circumstance because the event occurred after the Nevada incident. *See infra* at 7.

Queens County case. *Id.* The State also called John McNicholas, the investigating detective in the Queens County case. McNicholas recounted that he testified on the second day of Mr. Howard's trial, and that Mr. Howard was not present when he testified. McNicholas further testified that Mr. Howard was "convicted of robbery one." *Id.* at AA001417-28.

On cross-examination, McNicholas testified that he was not there when the jury returned a verdict, and that his information was based on what the District Attorney had told him. *Id.* at AA001424. On this hearsay basis, the defense moved to strike the testimony of McNicholas. *Id.* at AA001424-25. The prosecutor introduced Exhibit 69, which he represented was a certified copy of the minutes from the Supreme Court of New York.<sup>3</sup> *Id.* Defense counsel objected to the admission of Exhibit 69 as improperly certified, but the trial court overruled this objection and also the prior objection to McNicholas' testimony. *Id.* at AA001425-26. Again, no questions were asked to either witness, by defense counsel or the prosecutor, regarding what sentence the New York court imposed. Defense counsel did not introduce any court records to rebut the prosecution's exhibit. *Id.*

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<sup>3</sup> In actuality, Exhibit 69 was a certified extract of selected dates from the minutes rather than a certified copy of the actual minutes from the case. This excerpt only documents that a jury verdict was returned and that Mr. Howard had absconded during the course of jury selection. Appellant's Appendix, Vol. 9 at AA002067.

The next day, the trial court ruled that the State could not rely on Mr. Howard's felony conviction in San Bernardino County California. *Id.* at AA001441. Reliance on this conviction was barred because it occurred after the Nevada homicide. *Id.* The State was left with the New York offense as the only available evidence of a prior conviction. At the conclusion of the penalty phase, the jury found that the murder was committed by a defendant who was previously convicted of a violent felony and that the murder was committed while the defendant was engaged in the commission of a robbery, and returned a sentence of death. Appellant's Appendix, Vol. 7 at AA001544-45.

This Court denied Mr. Howard's direct appeal on December 15, 1986 in an unpublished order. *Howard v. State*, Case No. 15113. On appeal, Mr. Howard raised an issue regarding Nevada's sentencing statute, contending that the aggravating circumstances allowed by the trial court were not permissible under the Nevada statute. *Id.*, Opening Brief at 17-22. In a *per curiam* opinion the Court found,

Our review of the record in this case leads us to conclude that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor. We further conclude that Howard's sentence of death is neither excessive nor disproportionate to the crime or defendant.

*Id.*, Opinion at 8. The opinion did not mention any independent review of the validity of the aggravating circumstances in Mr. Howard's case and it summarily

disposed of his argument regarding the aggravating circumstances as lacking in merit. *Id.* at 8-9.

A copy of the court record in Mr. Howard's Queens County, New York case was attached to the Petition for Writ of Habeas Corpus [Post Conviction] as exhibit 149 and is set forth in the record on appeal to this Court. Appellant's Appendix, Vol. 9 at AA002003-67. The cover sheet to the court record reflects that no sentence was ever entered by the trial court in the case. *Id.* at AA002005. The final docket entries in the supplementary sheet for the docket minutes indicates that jury selection and pretrial suppression hearings were held in the case over the course of two days, that Mr. Howard was not present, and that a bench warrant was issued. *Id.* at AA002007. The voucher submitted to the court by defense counsel indicates that no hours were billed for time spent in or out of court for sentencing. *Id.* at AA002061. No document evidencing any sentence or judgment appears in the Queens County, New York court record.

### **ARGUMENT**

This Court issued its Opinion affirming the dismissal of Mr. Howard's post-conviction petition on July 30, 2014. The Court rejected Mr. Howard's argument that the aggravating circumstance of a prior violent felony conviction was invalid. The Court's Opinion is premised upon both a misapprehension of a material fact in



the record and a failure to consider decisions directly controlling dispositive issues in this case.

A petition for rehearing may be granted under either two sets of circumstances:

(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or

(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

NRAP 40(c)(2). *See also McConnell v. State*, 121 Nev. 25, 26, 107 P.3d 1287, 1288 (2005) (quoting Nevada Rules of Appellate Procedure Rule 40(c)(2)). The record now before this Court establishes that the prior violent felony conviction aggravating circumstance was invalid at the time and remains so. The record evidence establishes that Mr. Howard did not have a felony conviction.

**A. The Queen County, New York Case is Legally Insufficient to Establish a Conviction Under Nevada Law**

Under Nevada law, a “conviction” has a specific legal meaning when this type of evidence is used in the context of a legal proceeding. This Court has consistently held that a conviction requires something more than merely an

arrest or a guilty verdict.<sup>4</sup> Mr. Howard's Queen County, New York case is legally insufficient to establish a conviction under Nevada Law.

In *Fairman v. State*, 83 Nev. 287, 429 P.2d 63 (1967), this Court held that under Nevada's evidentiary rules, more than a jury verdict of guilty is necessary in order to impeach a witness through the use of a prior conviction. In *Fairman*, the defendant was asked on the stand about a prior conviction. *Fairman*, 83 Nev. at 289. The state did not have a copy of the judgment and attempted to impeach through a court clerk's testimony. *Id.* This Court found problematic the lack of a sentence imposed at the time of the defendant's examination, holding that a "verdict of the jury is not a judgment of the court" and that an entry of the judgment and a sentence was necessary to establish a conviction. *Id.* (citing *People v. Marendi*, 107 N.E. 1058, 1063 (N.Y. 1915) ("Of course, there should have been no reference whatever on this trial to a verdict of a jury in some other trial not followed by judgment. The mere verdict of a jury, which may be set aside and never result in judgment is not even evidence, much less an adjudication.")). See also *Allgood v. State*, 78 Nev. 326, 328, 372 P.2d 466, 467 (1962) ("A verdict of the jury is not a judgment of the court, nor is it a final determination. Indeed, after a jury verdict is returned but before the time appointed for pronouncing

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<sup>4</sup> Nevada applies its own law to determine if an out-of-state action meets the definition of "conviction" under NRS 176.105. *Jones v State*, 105 Nev. 124, 126, 771 P.2d 154, 155 n. 1 (1989).

judgment, judgment may be arrested or a new trial granted.”). An important factor in *Fairman*, as this Court noted, was that when the trial court realized the incompetency of the court clerk’s testimony, the trial court properly struck the testimony and instructed the jury to disregard it.<sup>5</sup> *Id.*

The holding in *Fairman* was affirmed by this Court in *Revuelta v. State*, 86 Nev. 224, 467 P.2d 105 (1970). *Revuelta* also addressed the necessary elements of a “conviction” for the purposes of impeachment. There, the state offered a certified copy of the judgment of conviction for impeachment purposes. The trial court found that the copy of the judgment of conviction was missing a penal sentence and rejected the exhibit. *Id.* at 226. This Court affirmed, finding that the legal essential of a sentence was missing and the record revealed that it was purposely excluded from the written judgment of conviction. *Id.* at 227. “The failure to include the penal sentence in the written judgment rendered it incomplete at the time it was offered in evidence and the trial court acted correctly in denying the respondent’s request to impeach the appellant on the basis of that judgment.” *Id.*

This Court has also addressed the essential legal elements of a judgment of conviction in other contexts, such as under NRS 176.105

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<sup>5</sup> Similarly, trial counsel for Mr. Howard also sought to have some of the lay witness testimony regarding the Queens County, New York case stricken from the record. *See supra* at 4-6.

(Judgment and Execution). In *Miller v. Hayes*, 95 Nev. 927, 604 P.2d 117 (1979), a writ of mandamus was sought by the state after the trial court withdrew a sentence and judgment that had been pronounced by the court and entered in the court minutes, but not signed by the judge or entered by the clerk. *Hayes*, 95 Nev. at 928. The state contended that the trial court was without jurisdiction to modify the sentence. *Id.* This Court held that a judgment of conviction becomes final only when it is signed by the trial court and entered by the clerk. *Id.* at 929 (citing NRS 176.105). *See also Bradley v. State*, 109 Nev. 1090, 864 P.2d 1272 (1993).<sup>6</sup> *See also Jones v. State*, 105 Nev. 124, 771 P.2d 154 (1989) (NRS 176.105 interpreted in the context of a prior conviction for an enhanced DUI violation. Valid judgment of conviction sets forth verdict and the adjudication and sentence).

The record now before this Court in Mr. Howard's case conclusively establishes that while Mr. Howard and another lay witness may have testified that Mr. Howard had been convicted of First Degree Robbery in Queens County, New York, Mr. Howard was never sentenced in

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<sup>6</sup> Indeed, under Nevada law, NRS 178.388, a defendant must be present at the imposition of sentence unless he waives the right to be present and the waiver is (1) knowing, intelligent and voluntary after consulting with an attorney, (2) signed and dated by the defendant and notarized, and (3) signed and dated by the defendant's attorney after it has been signed by the defendant and notarized. *See* NRS 178.388 (2)(b). There is no record that Mr. Howard was ever returned to New York for sentencing or that he waived his appearance at any sentencing.

connection with the Queens County case, and no judgment of conviction was signed by the trial court or entered by the court clerk in that case. This is not legally sufficient to establish a conviction under Nevada law.

**B. The Miscarriage of Justice Exception Excuses Any Procedural Default of Mr. Howard's Claim.**

The district court ruled that Mr. Howard's claim was procedurally barred. Order of Affirmance at 2. This Court recognized in its decision on Mr. Howard's Petition for Writ of Habeas Corpus that a procedural bar may be excused if a petitioner demonstrates that failing to consider the petition would result in a fundamental miscarriage of justice. *Id.* In *Pellegrini v. State*, this Court held that a fundamental miscarriage of justice requires,

a colorable showing [that the petitioner] is actually innocent of the crime *or is ineligible for the death penalty*. To avoid application of the procedural bar to claims attacking the validity of the conviction, a petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation. Where the petitioner has argued that the procedural default should be ignored because he is actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible.

*Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (emphasis added). Unlike in *Pellegrini*, where this Court found that the petitioner did not show by clear and convincing evidence that no reasonable juror would

have found him death eligible, in Mr. Howard's case, the record is clear and convincing.

The testimony of Mr. Howard that he had been convicted of a felony was demonstrably false. Mr. Howard was present only for the first two days of a four day trial. Appellant's Appendix, Vol. 5 at AA001143. The evidence indicates that he was absent from the second day of the trial on, and that the trial court issued a bench warrant for his arrest. Appellant's Appendix, Vol. 9 at AA002007. And, as no sentence was ever imposed by the trial court or entered by the court clerk, he likewise did not witness a judgment of conviction. *Id.* at AA002005.

Similarly, the testimony of McNicholas was also false. This lay witness testified and was present for one day of Mr. Howard's trial. Appellant's Appendix, Vol. 6 at AA001423. He had no personal knowledge and was not present when the jury returned its verdict. *Id.* at AA001424. At Mr. Howard's penalty phase, McNicholas based his knowledge of the New York outcome on what he was told by the handling District Attorney in the Queens County case. *Id.* He was not questioned about any "sentence" Mr. Howard received and could not have been informed of a sentence since one was never imposed. *Id.* at AA001417-28.

The one page extract of court minutes introduced by the State falls far short of independently establishing Mr. Howard's conviction of a prior violent felony. It only evidences in two sentences that on one day a bench warrant was issued for Mr. Howard during jury selection, and that three days later, Mr. Howard was found guilty in absentia. Appellant's Appendix, Vol. 9 at AA002067. Had trial counsel done any adequate investigation into Mr. Howard's case, counsel could have easily impeached Mr. Howard with the Queens County court record, and introduced this record to support the invalidity of this aggravating circumstance in this case. *See N.R.S 50.075 et seq.*

This Court's decision in *Kirksey v. State*, 107 Nev. 499, 814 P.2d 1008 (1991) is not incongruous. In *Kirksey*, this Court determined that the defendant's admission that he committed a prior robbery, a copy of the probation officer's report of the crime and recommended sentence, and a copy of the defendant's criminal history were sufficient to prove an aggravating circumstance alleged pursuant to NRS 200.033 (2)(b). *Kirksey*, 107 Nev. at 504. Important about *Kirksey* however, is while the defendant admitted he committed the crime, the additional documents established that there was "no doubt that Kirksey was *actually convicted* of the robbery." *Id.* (emphasis added). Unlike in *Kirksey*, where there was no doubt that a

conviction existed, in Mr. Howard's case it is precisely the opposite. It is absolutely clear that no sentence was ever handed down and no judgment of conviction was ever entered in Mr. Howard's Queens County, New York case.

The prior violent felony aggravator is the sole remaining aggravating factor in Mr. Howard's case. The State originally noticed three aggravating circumstances: (1) a prior felony conviction involving the use or threat of violence in San Bernardino County, California; (2) that the homicide occurred during the course of a robbery; and (3) that the homicide was committed for the purpose of avoiding arrest. The State withdrew the aggravating circumstance that the homicide was committed for the purpose of avoiding arrest; this Court rejected the aggravating circumstance that the homicide occurred during the course of a robbery; and the evidence proves that the aggravating circumstance of a prior felony conviction involving the use or threat of violence is legally impossible. There is no evidence by which a juror could have determined that Mr. Howard was eligible for the death penalty beyond a reasonable doubt.

### **CONCLUSION**

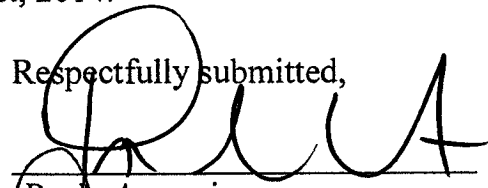
The aggravating circumstance of a prior violent felony is invalid in Mr. Howard's case. Any procedural bar to this claim is excused under the fundamental



miscarriage of justice exception. Mr. Howard respectfully requests that this Court's opinion be withdrawn, and that the Court grant Mr. Howard's Petition for Writ of Habeas Corpus, vacate his sentence, and order that Mr. Howard be resentenced to a sentence less than death.

DATED this 18th day of August, 2014.

Respectfully submitted,



Paola Armeni



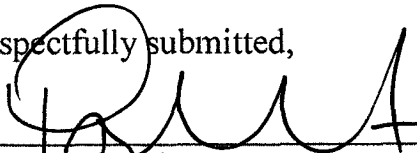
Teresa A. Hampton

### CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. I further certify that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionally spaced, has a typeface of 14 points or more and contains 3853 words.

DATED this 18th day of August, 2014.

Respectfully submitted,



Paola Armeni

### CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of August, 2014, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

Jonathan E. VanBoskerck  
Clark County District Attorney  
Regional Justice Center  
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☐ Federal Express

DATED this 18<sup>th</sup> day of August, 2014.

Respectfully submitted,

  
Paola Armeni