IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL HOWARD, Appellant, v. WILLIAM GITTERE, Warden, AARON D. FORD, Attorney General for the State of Nevada, Respondents.	Supreme Court Case Nos. 81278, 81279 Underlying Case Nos. 81C053867; A-18-780434-W

APPELLANT'S OPENING BRIEF

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

Eighth Judicial District Court, Clark County

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. The Clark County Public Defender's Office represented Appellant Samuel Howard at trial.

2. Lizzie Hatcher represented Mr. Howard on direct appeal.

3. In subsequent collateral proceedings in state and federal court, Mr. Howard was represented by the following attorneys and entities: John J. Graves, Jr. of Graves & Leavitt; David Schieck; Cal Potter, III of Potter Law Offices; Patricia M. Erickson; the Federal Public Defender's Office of Nevada; and Federal Defender Services of Idaho.

DATED this 24th day of June 2020.

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I. JURISDICTION

The instant appeal arises from a district court's denial of post-conviction relief in a death-penalty case. Below, the district court entered notice of its dispositive order on May 21, 2020. Vol. 3 at 528.[1] Appellant Samuel Howard filed a timely notice of appeal on May 29, 2020. Vol. 3 at 560. This Court has jurisdiction under NRS 34.575(1). The appeal is from a final order denying the post-conviction petition.

II. ROUTING STATEMENT

The matter at bar is presumptively retained by this Court under NRAP 17(a)(1) because it is a death-penalty case.

III. ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether Mr. Howard's death sentence must be vacated because the sole supporting aggravating circumstance has been invalidated.

IV. STATEMENT OF THE CASE

The pleading that triggered the proceedings below was Mr. Howard's sixth petition for post-conviction relief, which he filed on September 4, 2018. Vol. 1 at 1. In the petition, Mr. Howard alleged that his death sentence was unconstitutional

[1] Citations to the Appendix are in the format used above.

because the final surviving aggravating circumstance—a prior conviction[2] in New York—had been struck down by a state court in Queens. Vol. 1 at 11. Mr. Howard attacked the penalty as cruel and unusual under the holding of *Johnson v. Mississippi*, 486 U.S. 578 (1988), which struck down a death sentence by the authority of the Eighth Amendment when a prior-conviction aggravator had been invalidated by the courts of the originating jurisdiction. Vol. 1 at 11.

On October 30, 2019, the State filed an opposition and motion to dismiss the petition. Vol. 1 at 22. Mr. Howard responded to the motion on December 2, 2019, Vol. 2 at 317, and, on December 19, 2019, the State filed a reply in support, Vol. 2 at 446. After canceling oral argument due to the coronavirus pandemic, the district court issued a minute order on May 4, 2020. Vol. 2 at 465. The minute order announced that the district court had decided to deny the post-conviction petition in this capital case as procedurally barred, a decision that it justified with exactly four sentences of reasoning and no citations to any caselaw, Vol. 2 at 465, even though there were about seventy pages of briefing before the judge associated with the motion to dismiss, Vol. 1 at 22–48, Vol. 2 at 317–42, 446–64. On the question of whether the New York order rendered Mr. Howard actually innocent of the death penalty, which the parties had briefed extensively, Vol. 1 at 39–41, 43–47,

[2] Mr. Howard uses the term "conviction" in reference to the Queens proceedings for ease of reference. He does not thereby concede that there was ever a valid conviction in New York—a matter he is contesting in other cases.

Vol. 2 at 331–35, 459–60, the minute order offered no analysis whatsoever, Vol. 2 at 465.

On May 18, 2020, the State submitted a proposed order to the district court. Vol. 3 at 467–96, 527. The order was thirty pages long and nearly all of the text in it had appeared in the State's motion to dismiss and reply in support, with slight variation. Vol. 1 at 22–48, Vol. 2 at 446–64, Vol. 3 at 467–96. More than thirty-five different cases were cited in the proposed order. Vol. 3 at 467–96. There was a detailed exploration in the proposed order of whether Mr. Howard was actually innocent of the death penalty. Vol. 3 at 490–95. The very same day it was submitted—May 18, 2020—the district court signed the proposed order without making a single change. Vol. 3 at 467–527. This appeal followed.

V. STATEMENT OF FACTS

On May 24, 1978, Dorothy Weisband was robbed in Queens, New York. Vol. 2 at 402–04. Shortly thereafter, Mr. Howard was charged with the crime. Vol. 2 at 445. During jury selection, Mr. Howard failed to appear at the courthouse. Vol. 2 at 353. Despite his absence, the trial continued and the jury returned a guilty verdict on July 13, 1979. Vol. 2 at 353. No sentence or judgment was ever imposed for the offense. Vol. 2 at 353.

On March 27, 1980, George Monahan was murdered in Las Vegas. Vol. 3 at 499. Mr. Howard was convicted of the offense in 1983. *See Howard v. State*

(Howard I), 102 Nev. 572, 729 P.2d 1341 (1986) (per curiam). At the penalty phase of his trial, Mr. Howard was sentenced to death on the basis of two aggravating circumstances: (1) a previous conviction for a violent felony in New York, i.e., the Weisband robbery; and (2) committing the charged murder while engaged in the commission of robbery. *See Howard v. State (Howard II)*, 106 Nev. 713, 720, 800 P.2d 175, 179 (1990), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000) (en banc) (per curiam). Since then, Mr. Howard has been challenging his murder conviction and death sentence in various proceedings in state and federal court. The proceedings most directly relevant to the instant appeal began with Mr. Howard's fourth application for state post-conviction relief.

In that application, Mr. Howard challenged both aggravating circumstances and raised a series of other claims whose substance is not germane here. *See Howard v. State (Howard III)*, No. 57469, 2014 WL 3784121, at *1–6 (July 30, 2014) (per curiam) (table).[3] The trial court denied relief. *See id.* at *1. On appeal, this Court sustained Mr. Howard's challenge to the robbery-murder aggravating circumstance and invalidated it. *See id.* at *6. However, the Court upheld the

[3] To the extent necessary, Mr. Howard asks the Court to take judicial notice of all of the documents previously lodged here in his previous appeals and referred to in this brief. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (en banc) (taking judicial notice of court proceedings).

prior-felony aggravating circumstance and with it the death sentence as a whole. *See id.* at *5–6.

On May 22, 2018, on Mr. Howard's motion, the Queens County Supreme Court vacated his indictment and conviction for the Weisband robbery because the case had never concluded in violation of his right under New York law to be sentenced without unreasonable delay. Vol. 2 at 355. In his order, the New York judge found that the authorities there knew Mr. Howard's whereabouts since at least 1980 and made no effort to have him sentenced on the robbery, which they could have done had they chosen to. Vol. 2 at 353–55. Based on the judge's order, the Queens County Clerk issued a certificate indicating that Mr. Howard's "arrest and prosecution" for the robbery "shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status occupied before the arrest and prosecution." Vol. 2 at 358.[4] In the Queens case, the New York prosecutor did not appeal, and the order became final. Vol. 1 at 21.

VI. SUMMARY OF ARGUMENT

This is an exceptionally straightforward case, because Mr. Howard's death sentence now lacks the most basic element needed to make it lawful: an

[4] In this brief, unless otherwise noted, all internal quotation marks and citations are omitted and all emphasis is added.

aggravating circumstance. Each of the aggravators found by the jury have been invalidated. His death sentence must therefore be vacated.

The district court found Mr. Howard's claim procedurally defaulted, but he has cause and prejudice because he could not have raised the issue until his prior conviction was set aside, and he did so in a timely fashion after it was. Moreover, even if a bar applies, it is excused by actual innocence since the invalidation of the prior conviction renders him ineligible for the death penalty.

VII. ARGUMENT

Mr. Howard will first address why his petition is not procedurally barred and then why it is meritorious.[5]

A. The Petition is Not Procedurally Barred

Overlooking the fact that Mr. Howard's claim only became available a few months before he filed his petition, and misunderstanding the nature of actual innocence, the district court relied upon procedural bar. Vol. 3 at 510–25. It did so in error and should be reversed.

When reviewing a district judge's application of procedural bar, this Court defers to the lower tribunal's findings of facts but considers its legal determinations de novo. *See State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95

[5] Many of the issues in this brief are interrelated. Therefore, Mr. Howard incorporates every section of the pleading into every other section.

(2012) (en banc). In the present case, there are no disputes regarding the facts. To the contrary, the essential facts are agreed upon by all and are quite simple: two aggravators were found by the jury; one was invalidated by this Court; and the second was based on a prior conviction subsequently struck down by a competent New York judge. *See supra* at Part V. The debate is over the legal significance of those facts. Vol. 1 at 22–48, Vol. 2 at 317–42, 446–64. Accordingly, no deference is called for.

Even if some level of deference was appropriate in this general legal context, it should not be afforded under the circumstances of the case at hand. As detailed above, the district court signed the State's thirty-page proposed order (which was itself just a slightly revised version of the motion to dismiss and reply in support) without changes on the same day it was submitted, after giving the prosecutor no meaningful guidance on how to address any issue in the case and no guidance whatsoever on how to deal with actual innocence, one of the most important questions in the case. *See supra* at Part IV. Confirming the judicial abdication of responsibility, the proposed order suffered from a number of typos, none of which were corrected by the district court before it reflexively signed the document.[6]

[6] *See, e.g.*, Vol. 3 at 497 (referring mistakenly to May 4, 2019 instead of 2020); Vol. 3 at 510 (describing a pleading wrongly as the fifth post-conviction petition instead of the sixth); Vol. 3 at 512 (using the word "has" incorrectly instead of "have"); Vol. 3 at 521 (employing the phrase "to the time" ungrammatically

The district court's order is not an outgrowth of any reasoned judicial deliberation. It is an interested party's litigation work-product, which was rubber-stamped by the district court without any apparent direction, oversight, or reflection. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) (warning against the "potential for overreaching and exaggeration on the part of [the] attorneys preparing findings of fact"); *Bright v. Westmoreland Cty.*, 380 F.3d 729, 732 (3d Cir. 2004) (strongly critiquing a trial judge for signing an opinion prepared by a litigant because "when a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions"). By virtue of their life-and-death stakes, capital cases demand a "*greater* degree of scrutiny," *California v. Ramos*, 463 U.S. 992, 998–99 (1983), which certainly is not provided when a district judge essentially endorses a lengthy, complex brief as his own decision on the same day it was proposed to him. Even if it might otherwise be proper, no deference is due for such an order, particularly in a case raising a substantial challenge to a death sentence.

1. The Petition is Not Time barred

Turning to the specific bars at issue, the district court first deemed the petition untimely under NRS 34.726(1). Vol. 3 at 511. Under the usual rules, Mr.

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instead of "at the time"); Vol. 3 at 525 (mentioning the "Petition" by accident instead of the "Petitioner").

Howard's petition would have been due on January 1, 1994, *see* NRS 34.726(1); *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (en banc), *amended on rehearing on unrelated grounds*, 432 P.3d 167 (2018) (en banc) (per curiam) (table), and such a deadline was not complied with here. However, the statute does not defeat merits review where a petitioner can show good cause and prejudice. *See, e.g.*, *State v. Boston*, 131 Nev. 981, 984, 363 P.3d 453, 455 (2015) (en banc); *Wilson v. State (Wilson II)*, 127 Nev. 740, 744, 267 P.3d 58, 60 (2011) (en banc). Mr. Howard can demonstrate both.

a. Mr. Howard Has Good Cause

There is good cause for missing the one-year deadline codified in NRS 34.726(1) if the claim was raised "within a reasonable time after it became available." *Wilson II*, 127 Nev. at 745, 267 P.3d at 61; *accord Boston*, 131 Nev. at 985, 363 P.3d at 455. One year is a "reasonable time" under NRS 34.726(1). *See Rippo*, 134 Nev. at 421, 423 P.3d at 1097.

A rote application of this test dictates a result in Mr. Howard's favor. Mr. Howard's claim is that the New York order nixing his robbery conviction infected his Nevada death sentence with constitutional infirmity. Vol. 1 at 11. By definition, he could not have offered that theory until the New York order appeared. Accordingly, his claim became available, at the earliest, on May 22, 2018, when the Queens County Supreme Court released its decision. Vol. 2 at

355. Mr. Howard filed the petition in this case on September 4, 2018. Vol. 1 at 1. That is well short of a year from May 22, 2018, and pursuant to *Rippo*, his petition is timely.

Despite this clear picture, the district court homed in on the length of time that elapsed after Mr. Howard's sentencing and before he litigated his robbery conviction in New York. Vol. 3 at 513 (insisting that Mr. Howard "should have raised that issue with the New York courts" earlier). In so doing, the district court misapprehended the meaning of the word "available." According to the first definition in a preeminent dictionary, the term signifies "present or ready for immediate use." *See* https://www.merriam-webster.com/dictionary/available [https://perma.cc/YJ6S-89G6]. A claim based on a conviction being invalidated is obviously not "ready for immediate use" when the conviction has not yet been invalidated. Following the plain language of this Court and the ordinary meaning of its terminology, Mr. Howard's claim was undeniably brought within a year of it being available, and it is thus timely.

Aside from having no foothold in binding precedent, the district court's test is unworkable. The district court insinuated that Mr. Howard's campaign against his robbery conviction in New York was founded on the absence of a sentence in that jurisdiction, and that as a result he could have sought recourse in Queens at any time after the jury found him guilty in absentia. Vol. 3 at 517–18 ("Petitioner

could have challenged the infirmity of his New York conviction at any time since trial."). Not so. The New York order was instead rooted in the unreasonable delay in sentencing Mr. Howard. Vol. 2 at 355 (characterizing Mr. Howard's "position" as that "he is entitled to relief afforded by [N.Y. Crim. Proc. Law § 380.30(1)] in that his sentence must be pronounced without reasonable delay" and subsequently agreeing with that position and vacating the conviction); *see* N.Y. Crim. Proc. Law § 380.30(1) ("Sentence must be pronounced without unreasonable delay."). According to the district judge, Mr. Howard should be faulted for not going into New York court right after his robbery trial, even though he would have had no vehicle to protest his conviction at that time. That is illogical in the extreme. The far more natural approach is to say that "available" means "available," and the claim had only to be brought within a reasonable time of the New York court acting, just as Mr. Howard did.

The cases cited by the district court on this subject do not compel a different result. Vol. 3 at 514–15. In the referenced cases, this Court characterized claims as previously "available" because the facts allowing them to be brought existed before the limitations period closed, which is not true here. For instance, in *Hathaway v. State*, 119 Nev. 248, 253–54, 71 P.3d 503, 507 (2003) (per curiam), the Court used, as examples of claims that are immediately available, situations where "counsel failed to inform the petitioner of the right to appeal," where the

defendant "received misinformation about the right to appeal," or where "counsel refused to file an appeal after the petitioner requested" one. Similarly, in *Pellegrini v. State*, 117 Nev. 860, 889–90, 34 P.3d 519, 538–39 (2001) (en banc) (per curiam), this Court considered a claim available earlier when it was based on the defendant's mental health at the time of the offense. These are all facts that arise before the conviction is final. That is, information about a defendant's mental state when the crime occurred is by definition information that has already come into being by the time of post-conviction. Likewise, a defendant who has been misled or defied by a lawyer about his appeal is aware of that shortly after trial. The lesson of such cases is that a claim is available when the factual basis for it is out there in the world at the time the statute of limitations expired, and had only to be collected and presented by the inmate. That is not Mr. Howard's case. The single fact giving rise to his claim is the vacatur of the New York conviction. And that fact had not been born in any form until the Queens court ruled.

Rather than the district court's preferred authorities, the more instructive cases here are those in which petitions were deemed timely because they were properly founded on changes in the law. *See Bejarano v. State*, 122 Nev. 1066, 1071, 146 P.3d 265, 269 (2006) (en banc) (involving a new case about double-counting felony aggravators in capital cases); *Boston*, 131 Nev. at 984, 363 P.3d at 455 (concerning a new case about juvenile life sentences). When this Court has

regarded such petitions as timely, it is because the prisoner raised his claim within a year of the favorable precedent appearing. *See Bejarano*, 122 Nev. at 1071, 146 P.3d at 269 (explaining that "a claim pursuant to [a new] decision was not reasonably available to Bejarano" until the decision was published); *Boston*, 131 Nev. at 985, 363 P.3d at 455 (noting that the "Supreme Court did not decide" the favorable new case until 2010, and "Boston filed his petition within one year of the Court's decision," which constituted "good cause for the late filing" assuming that he was correct about the meaning of the new case).

Importantly, in neither *Bejarano* nor *Boston* did the Court ask whether the petitioner previously made the argument that later led to the change in the law, the approach the State is pushing here. Put differently, the Court did not pose the question of whether Mr. Bejarano had in a previous proceeding challenged the double-counting of aggravators or whether Mr. Boston in a previous proceeding challenged his life sentence as unconstitutional because of his age. As just stated, the Court inquired only into whether the inmates had advanced their claims within a year of the new cases upon which they were founded.

The same framework governs Mr. Howard's claim. He asserted his claim as soon as the new order enabling it had been issued, and that is all the law required. If the district court were right that Mr. Howard had an obligation to make the underlying argument about the delayed sentence to a New York court earlier than

he did, then Mr. Bejarano would have had an obligation to attack the double-counting earlier and Mr. Boston would have had an obligation to present the youth-based Eighth Amendment theory earlier. After all, they were just as capable of doing so as Mr. Howard was of proceeding in New York's courts. The district judge's logic cannot be squared with this Court's methodology.

Admittedly, *Bejarano* and *Boston* deal with good cause in the context of an unavailable "legal basis," in the sense that the caselaw was not yet there to substantiate the claim. *Boston*, 131 Nev. at 984–85, 363 P.3d at 455; *accord Bejarano*, 122 Nev. at 1072, 146 P.3d at 270. But this Court has said that good cause "may be established where the factual or legal basis for the claim was not reasonably available." *Bejarano*, 122 Nev. at 1072, 146 P.3d at 270. There is no reason to treat the two differently, and good cause is present under Nevada precedent.

Apparently dissatisfied by Nevada precedent, the district court looked to U.S. Supreme Court opinions construing cause in the federal habeas context. Vol. 3 at 518. Such cases have no bearing here, where the only issue is whether Mr. Howard has cause under Nevada law. *See Brown v. McDaniel*, 130 Nev. 565, 574–75, 331 P.3d 867, 874 (2014) (en banc) (refusing to construe Nevada law on its post-conviction bars as identical with U.S. Supreme Court precedent on the corresponding defaults in federal habeas).

In addition to inapposite federal cases, the district court turned to estoppel principles to avoid the merits of Mr. Howard's claim. Specifically, the district court relied upon *Witter v. State*, 135 Nev. 412, 452 P.3d 406 (2019) (en banc). Vol. 3 at 518–19. Although the district court characterized *Witter* as "indistinguishable" from the present case, Vol. 3 at 519, the two are in fact quite easily distinguished. In *Witter*, the petitioner was estopped from asserting that his Nevada conviction was not final because he had treated it as final in a number of appellate and post-conviction proceedings. 135 Nev. at 415–16, 452 P.3d at 408–09. To the district court's mind, Mr. Howard likewise implied the finality of his New York judgment by contesting his Nevada convictions and sentence. Vol. 3 at 519. But the district court never identified how Mr. Howard's *Nevada* litigation suggested in any way the finality of his *New York* judgment. That is because no connection exists.

Unlike Mr. Howard, Mr. Witter's estoppel was plain. As a general matter, a judgment is only appealable if it is final. *See, e.g.*, *Lee v. GNLV Corp.*, 116 Nev. 424, 426–27, 996 P.2d 416, 417–18 (2000) (per curiam). By appealing his judgment, Mr. Witter therefore conveyed his belief that it was final. *See Witter*, 135 Nev. at 415–16, 452 P.3d at 408–09. Mr. Howard did nothing of the sort with respect to his New York conviction, which is the only judgment that matters for purposes of the present discussion. Rather, he attacked his *Nevada* judgment.

Such a move implies nothing about the finality of the New York proceeding. It simply recognizes the undeniable reality that Mr. Howard had in fact been convicted and sentenced to death in Nevada. He regarded the convictions and sentence as unlawful, so he exercised his constitutional and statutory rights to challenge them through the appropriate Nevada vehicles. By so doing, he made no statement of any kind about the New York case. In ruling otherwise, the district judge misapplied the unambiguous precedent of this Court.

b. Mr. Howard Can Show Prejudice

Once good cause has been established, prejudice becomes the next hurdle. *See Wilson II*, 127 Nev. at 745, 267 P.3d at 61. Mr. Howard surmounts it with ease.

"To demonstrate actual prejudice," Mr. Howard "must show error that worked to his actual and substantial disadvantage." *Boston*, 131 Nev. at 985, 363 P.3d at 455. It is difficult to imagine a situation in which prejudice is as apparent as it is here. In the absence of the invalid New York robbery conviction, there are now no aggravating factors left. Aggravators are constitutionally and statutorily required for the imposition of a death sentence. *See Sawyer v. Whitley*, 505 U.S. 333, 341–42 (1992); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988); NRS 200.033. Consequently, once the New York aggravator is removed from the

equation, there is nothing to support the death penalty. As a result, Mr. Howard was actually prejudiced.

Below, Mr. Howard refutes the district court's theory that actual innocence has not been established because testimony about the underlying conduct in New York was presented to the jury. See *infra* at Part VII.A.4. To the degree the district court intended the theory to go to prejudice as well, it is refuted for the same reasons. For present purposes, Mr. Howard will add only that even if this Court accepts the district judge's erroneous belief that testimony about conduct can posthumously revive a vacated conviction, there is still prejudice. This is so because the jury was in fact repeatedly told by the prosecutors and their witnesses that Mr. Howard had been convicted.

In its opening statement, the prosecution made sure to inform the jury that Mr. Howard had been "convicted in absentia in the Queens Supreme Court on July 13, 1979, in the State of New York." Vol. 2 at 286. While examining the detective from the New York case, the prosecution took care to elicit the same fact through his testimony. Vol. 2 at 310 ("Q. Do you know of your own knowledge what the outcome of that trial was? A. He was convicted. Q. And what was he convicted of? A. He was convicted of Robbery One."); Vol. 2 at 314 ("Q. And again for the record, do you know of the fact of whether or not he was convicted? A. Yes, he was."). And finally, at closing argument, the prosecution hammered

away at the conviction. Vol. 2 at 402 ("We are talking about someone who is now shown to have committed a violent felony against a nurse for which he has been convicted, and there was absolutely no provocation for that."); Vol. 2 at 403 ("He was convicted in absentia of robbery with use of a weapon and of theft of a motor vehicle."); Vol. 2 at 404 ("You heard the testimony of Detective John McNicholas, that the defendant was convicted of these crimes. . . . Mr. Howard had previously been convicted of a crime involving the use of violence even before he came to Las Vegas in 1980, and that is the circumstance that aggravates murder in the first degree, and that's been proven beyond a reasonable doubt.").

The existence of a conviction is itself a highly aggravating piece of information for a jury, and here it caused prejudice quite apart from the underlying facts of the offenses. *See State v. Bowman*, 337 S.W.3d 679, 692 (Mo. 2011) (en banc) (granting sentencing relief on a comparable claim because "[e]ven if the prosecution's evidence regarding the underlying facts of Bowman's two prior murder convictions were properly admissible as non-statutory aggravating prior bad acts, the Court cannot assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that Bowman previously had been convicted of two murders"); *State v. McFadden*, 216 S.W.3d 673, 678 (Mo. 2007) (en banc) (similar).

In summary, this was a short sentencing in which the prosecution pervasively employed the fact of the New York conviction to secure a death sentence. Any reasonable juror would have been greatly affected by the knowledge that a separate state's criminal justice system had officially placed a black mark on Mr. Howard's record before the Nevada murder occurred. No matter what framework the Court applies, the error here "worked to" Mr. Howard's "actual and substantial disadvantage," *Boston*, 131 Nev. at 985, 363 P.3d at 455, and prejudice has been shown to excuse the petition's untimeliness.

2. The Petition is Not Barred as Successive or Waived

The district court felt that Mr. Howard's petition was waived under NRS 34.810(1)(b)(2) barred by NRS 34.810(2) as an abuse of the writ. It is neither.

NRS 34.810(1)(b)(2) provides that a petition should be dismissed if the claim could have been "[r]aised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief." For the reasons outlined above, Mr. Howard's petition could not have been filed until the New York order was issued in May 2018. *See supra* at Part VII.A.1.a. Before that, his most recent post-conviction proceeding was commenced in October 2016. Vol. 3 at 508. Section 34.810(1)(b)(2) is, by its own terms, inapplicable.

So is NRS 34.810(2), which states, in full:

> A second or successive petition must be dismissed if the judge or justice determines [1] that it fails to allege new or different grounds for relief and

> that the prior determination was on the merits or, [2] if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Mr. Howard's claim does not fall within either prong of the provision. It does "allege new or different grounds" for relief and thus escapes the first prong. On the second prong, a claim is an abuse of the writ if it "could . . . have been raised earlier." *Bejarano*, 122 Nev. at 1072, 146 P.3d at 269. Based as it was on the recent New York order, Mr. Howard's claim could not have been. Given the statute's plain language, Mr. Howard's petition is not barred by NRS 34.810(2).

In the dismissal order, the district judge alluded to this Court's 2014 denial of a claim challenging the prior-conviction aggravator to show that the claim was available earlier. Vol. 3 at 517–18. The conclusion does not flow from the premise. As relevant here, this Court in 2014 rejected a claim that the aggravator was invalid because there was no judgment and sentence in New York, which were—Mr. Howard posited—necessary for a conviction as a matter of Nevada law. *See Howard III*, 2014 WL 3784121, at *5. That is quite distinct from the present claim, which is that the conviction has definitively been vacated by the New York courts, thereby destabilizing his death sentence. Mr. Howard did not make the latter claim in 2014, and it would have been impossible to do so, as the vacatur had not yet occurred. Thus, Mr. Howard neither did, nor could have, lodged the claim earlier, and NRS 34.810(2) is inapplicable.

Since Mr. Howard's petition is not covered by either NRS 34.810(1)(b)(2) or by NRS 34.810(2), the district court's reliance on those provisions can be rejected out of hand. However, if the Court disagrees and regards the provisions as in play, Mr. Howard can show good cause and prejudice to overcome the bars for the same reasons surveyed above. *See supra* at Part VII.A.1; *see also Bejarano*, 122 Nev. at 1072, 146 P.3d at 269–70 (applying the same good cause and prejudice analysis for defaults under both the timeliness provision of NRS 34.726(1) and the successive provisions of NRS 34.810). However the Court approaches the questions of successiveness and waiver, they do not foreclose relief.

3. The Petition is Not Barred by Laches

The district court's laches theory, Vol. 3 at 511–12, is even more misguided than on timeliness and successiveness.

Nevada's laches rule permits a court to dismiss delayed petitions where the lag has prejudiced the State in certain respects. *See* NRS 34.800. The most sensible way for the Court to dispatch the laches defense is for it to simply find, in an exercise of discretion, that the doctrine was not meant to be used in a scenario like this one. Notably, laches allows, but does not require, a court to dismiss a petition for delay. *See* NRS 34.800(1) ("A petition *may* be dismissed if" the specified grounds are satisfied). Such a dismissal ought not to be ordered here.

The laches statute has two components. NRS 34.800(1)(a) authorizes dismissal where the delay "[p]rejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." For two straightforward reasons, this prong has no role to play here.

First, the State has not shown that a delay impaired in any respect its ability to oppose the petition. Below, it offered twelve words on that front: "the State is prejudiced in its ability to answer the Sixth Petition." Vol. 1 at 37. That bare statement, with no elaboration or explanation, is woefully inadequate. A review of the State's motion to dismiss reveals that, contrary to its naked assertion otherwise, it had no difficulty responding to Mr. Howard's petition. Resolution of the petition turns almost entirely on a pure question of law, namely, whether the invalidation of the prior conviction renders the death sentence unconstitutional. To respond to the petition, the State had to do nothing more than basic legal research. It is just as capable of doing the research now as it was at any time in the past, if not more so.

Second, even if one takes as true the State's implausible and wholly unsupported view that it was prejudiced in responding to the petition, "the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the

State occurred." NRS 34.800(1)(a). Mr. Howard's petition is based on the Queens order and he took every step he could to get it timely filed after the order was issued. Consequently, assuming arguendo that the State was somehow prejudiced in responding, the prejudice is eclipsed by Mr. Howard's diligence.

The other element of the laches statute authorizes dismissal where the delay "[p]rejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b). This element is best disposed of with reference to *State v. Powell*, 122 Nev. 751, 758–59, 138 P.3d 453, 458 (2006) (en banc), which shows that Nevada courts are not to utilize laches to bar a petition where the petitioner acted promptly as soon as the factual predicate for the claim was available to him. Plus, there is a fundamental miscarriage of justice, as there are no valid aggravators left, which means that Mr. Howard is, as a legal matter, actually innocent of the death penalty. *See infra* at Part VII.A.4.

In overview, the district court's invocation of laches widely misses the mark.

4. Any Procedural Bar is Excused by Actual Innocence of the Death Penalty

In the event the Court regards any of the preceding procedural bars as an obstacle to the petition, the default should be forgiven because Mr. Howard's claim renders him actually innocent of the death penalty. *See Lisle v. State*, 131 Nev.

356, 361–62, 351 P.3d 725, 729–30 (2015) (en banc) (reiterating that actual innocence overcomes any procedural bar).

The district court was unpersuaded by Mr. Howard's actual innocence, Vol. 3 at 520–25, but its reservations are insubstantial.

As a general matter, the district court's objection was that the jury heard evidence about some facts associated with the New York conduct with which Mr. Howard was charged, and that was good enough. Vol. 3 at 521–24. The district court misunderstood the law. At the time Mr. Howard was tried—and today—the aggravator at issue required a showing that he had been "*convicted* of . . . a [violent] felony." *Howard v. Filson (Howard IV)*, No. 2:93-cv-1209, 2016 WL 7173763, at *1 (D. Nev. Dec. 8, 2016) (quoting NRS 200.033(2) (1979)); *accord* NRS 200.033(2)(b). Mr. Howard's claim flows from the vacatur of his conviction. Vol. 1 at 11. Jurors cannot find the aggravator without a conviction, regardless of what the State told them about Mr. Howard's behavior in New York. That is all it takes to see his actual innocence.

In closing its eyes to Mr. Howard's actual innocence, the district court got hung up on the comments the prosecutors made at trial, the testimony given at sentencing, and the instructions provided to the jury. Vol. 3 at 521–24. Again, though, the district court looked at the case through the wrong lens. Actual innocence turns on whether the petitioner has proven that, "but for a constitutional

error, no reasonable juror *would* have found him death eligible." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. A defendant is only eligible for the death penalty if one or more statutory aggravating circumstances are found. *See Lisle*, 131 Nev. at 365–68, 351 P.3d at 732–34; NRS 175.554(3); Vol. 2 at 367 (indicating that the jury was instructed that it could "impose a sentence of death only if it" found "at least one aggravating circumstance"). Here, the error is the consideration of a conviction that was later nullified and that stands now as the sole surviving aggravator. As a consequence, the question—for actual innocence purposes—is not, as the district court would have it, what the jury was told about the New York robbery. The question is what *would* the jury have been told had the New York conviction already been vacated. On that crucial question, the district court was silent. Presumably, that is because the prosecutor would have told the jury nothing about the conviction, since it would have been a legal nullity.

Indeed, the case would not have even reached the capital sentencing phase then because the State would have been deprived of any aggravators to pursue. *See* SCR 250(4)(c) (requiring the State to file a notice of intent to seek the death penalty prior to any sentencing that alleges "all aggravating circumstances which the state intends to prove"); *see also Kirksey v. State*, 107 Nev. 499, 503, 814 P.2d 1008, 1010 (1991) ("Kirksey correctly asserts that he must be given notice prior to the penalty hearing of each aggravating circumstance that the state will seek to

prove at the penalty hearing."); *Wilson v. State (Wilson I)*, 99 Nev. 362, 370 n.4, 664 P.2d 328, 332 n.4 (1983) (quoting a statute from the time of Mr. Howard's sentencing that allowed the prosecution to assert an aggravator, "other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing").

Furthermore, although the district court was right that the prosecutor "argued that the jury needed to make its own independent judgment regarding the existence of the prior violent felony aggravating circumstance," Vol. 3 at 523, he certainly did not make the implausible suggestion that it could do so without a valid conviction. The prosecutor's perspective was that "the mere recitation of what the conviction was for is not, in the state's mind, adequate to comply with" its "burden of proof." Vol. 2 at 276. Stated differently, the prosecutor thought he needed more than just the conviction. That does not signify the nonsensical proposition that the conviction itself was unnecessary to prove that Mr. Howard had a conviction. *See, e.g.*, *State v. Autry*, 103 Nev. 552, 556, 746 P.2d 637, 640 (1987) (per curiam) (explaining what it means for an element to be "necessary but not sufficient").

The State had good reason to proffer evidence to the jury about the facts underlying the New York robbery. Under the controlling statute, it was required to prove that Mr. Howard had been "convicted of . . . a felony involving the use or

threat of violence." *Howard II*, 2016 WL 7173763, at *1 (quoting NRS 200.033(2) (1979)); *accord* NRS 200.033(2)(b); Vol. 2 at 282 (containing the Court's quotation of the statute, which provided that the "murder was committed by a person who was previously convicted of another murder or a felony involving the use or threat of violence"); Vol. 2 at 285 (including the prosecutor's characterization to the jury of the aggravator as requiring a showing "that the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence"); Vol. 2 at 368–69 (establishing that the jury was told by the trial court that the aggravator required that the murder be "committed by a defendant who was previously convicted of a felony involving the use or threat of violence").

Testimony about the offense was relevant because it went to that second element—the presence of violence. In the prosecutor's own words, the testimony, "as opposed to any documentation," was "to show the jury beyond a reasonable doubt that the use of force and/or violence was used in the commission of that particular robbery." Vol. 2 at 277; Vol. 2 at 280 (reflecting that the prosecutor later added, in support of the same argument, that the bare fact of the charge and conviction did not "tell[] the jury enough about the nature of those acts to allow them to come to the conclusion that beyond a reasonable doubt the State has shown that there is a threat or use of violence"). The trial judge allowed the testimony

over the defense's objection on that very ground, to wit, because "[t]he particulars of the case" and "the evidence would go to the question of use of force or violence." Vol. 2 at 283.

That the testimony was used to prove that the offense was violent does not mean that it was unnecessary to prove that there was a conviction in the first place. Both were required, and one has been completely obviated by a binding judicial ruling that is entitled to full faith and credit from this Court. *See City of Oakland v. Desert Outdoor Advert., Inc*., 127 Nev. 533, 537, 267 P.3d 48, 50 (2011) (en banc) ("Under the Full Faith and Credit Clause of the United States Constitution, a final judgment entered in a sister state must be respected by the courts of this state." (citing U.S. Const. art. IV, § 1)).

Simply put, the district court's reliance on the discussion that did occur at trial about the robbery case is misplaced, for under a proper analysis none of that discussion would have taken place. There was a single aggravator and it is now gone. This is about as clear-cut a case of actual innocence of the death penalty as any court is likely to see.

Seeking to complicate that picture, the district court resorted to the line between "factual innocence" and "legal insufficiency," and claimed that Mr. Howard only asserted the latter. Vol. 3 at 521. What the district court misunderstood is that the purpose of this distinction is to limit actual-innocence

arguments to those situations where the individual is ineligible for the death penalty. *See Moore v. State*, 134 Nev. 262, 268–69, 417 P.3d 356, 362–63 (2018) (per curiam). To reiterate, that is exactly Mr. Howard's position. No nuanced discussion of the boundaries of actual innocence is necessary—Mr. Howard falls right in the middle of the doctrine. His is not a close case.

In another distortion of the doctrine, the district court rebuffed Mr. Howard's actual innocence theory because the New York judge's order invalidating the prior conviction was rooted in statutory—rather than constitutional—law. The district court's conclusion was doubly faulty. First, though the New York court cited a state statute for its dismissal of the conviction, the statute is itself grounded in constitutional concerns. *See People v. Harper*, 137 Misc. 2d 357, 362–65 (Crim. Ct. N.Y. Cty. 1987). And while the district court here dismissively described the New York judge's order as being based on a "technicality," Vol. 3 at 525, the rule animating that order—that sentences must be meted out within a reasonable amount of time—actually constitutes "an essential element of the criminal justice process." *Harper*, 137 Misc. 2d at 363.

Second, even if the order lacked a constitutional component, the fact would be irrelevant. Although the district court tied its constitutional requirement to *Schlup v. Delo*, 513 U.S. 298 (1995), Vol. 3 at 521, the case said the opposite. There, the Supreme Court approved of the fact that Mr. Schlup's actual-innocence

theory was *not* a constitutional claim. Instead, it was a "gateway" to overcome the bar on his underlying constitutional claim. *Schlup*, 513 U.S. at 315. Nevada law is to the same effect. *See Lisle*, 131 Nev. at 367, 351 P.3d at 734.

Mr. Howard's posture fits well within the confines of actual innocence drawn by *Schlup* and endorsed by this Court in *Lisle*. The invalidation of the New York conviction need not be of a constitutional nature, for it is simply the gateway. In other words, it is the circumstance that renders him actually innocent of the death penalty and excuses the default on his substantive claim. It is the substantive claim that must be constitutional. And it is: that Mr. Howard's death sentence is cruel and unusual because an aggravator has been eliminated, leaving nothing to support the penalty. Vol. 1 at 11. Mr. Howard's case fits squarely within the actual-innocence rule, notwithstanding the district court's misreading of *Schlup*.

Nor is there anything about *Johnson v. Mississippi* that requires the invalidation of the prior conviction to be on constitutional grounds. The result in *Johnson* was inspired by the "special need for reliability in the determination that death is the appropriate punishment in any capital case." 486 U.S. at 584. A death sentence founded on a prior conviction that is no longer in place is equally unreliable, regardless of whether it was removed for constitutional or statutory reasons. In either event, there is no foundation left for the death sentence.

The district court's handling of *Clem v. State*, 119 Nev. 615, 81 P.3d 521 (2003) (en banc) (per curiam), fares no better. As the district court understood it, *Clem* stands for the proposition that Mr. Howard's sentence cannot be unconstitutional now because his New York conviction had yet to be disturbed at the time of his Nevada trial. *Clem* does not support that construction. The issue in *Clem* was whether a change in precedential law would apply retroactively. *See* 119 Nev. at 621–26, 81 P.3d at 525–29. There is no similar question before the Court here. The pertinent development was not in the caselaw. It was in the status of the New York conviction, which was voided. The controlling precedent remains *Johnson*, and *Johnson* teaches that a death sentence violates the Eighth Amendment when the underlying conviction used in aggravation is nullified. *See* 486 U.S. at 584–87. *Johnson* is a pronouncement from the U.S. Supreme Court on the meaning of the federal constitution. As such, it must be obeyed by all courts. Even if *Clem* had purported to forbid such claims—which it did not—the ruling would be trumped by the U.S. Supreme Court's authority. *See, e.g.*, *James v. City of Boise*, 136 S. Ct. 685, 686 (2016).

Aside from its misinterpretation of *Schlup* and *Clem*, the district court's substantive analysis of actual innocence revolved around four cases. Vol. 3 at 521–23. Not one of those opinions even uses the phrase "actual innocence"—let alone interprets it. *See Johnson*, 486 U.S. 578; *Spivey v. Head*, 207 F.3d 1263

(11th Cir. 2000); *Gibbs v. Johnson*, 154 F.3d 253 (5th Cir. 1998); *Gardner v. State*, 764 S.W.2d 416 (Ark. 1989) (per curiam). The cases do nothing to bolster the district court's counterintuitive position that a prisoner whose death sentence is supported by a single aggravating conviction that has been vacated is somehow still "eligible for the death penalty." *Lisle*, 131 Nev. at 362, 351 P.3d at 730. Mr. Howard is not, and actual innocence therefore overcomes any procedural bar that might otherwise apply, making merits review necessary.

Finally, the district court made reference to NRS 34.960(3)(a), and its requirement that actual-innocence petitions be brought diligently. Vol. 3 at 520. To the unclear degree that the district court was actually relying on this statute to deny the petition, it should not have. NRS 34.960 established a procedure for inmates to file a special petition asserting their actual innocence. *See* NRS 34.960(1). The bill containing NRS 34.960 was enacted in June 2019, *see* 2019 Nev. Laws Ch. 495, almost a year after Mr. Howard's petition was filed, Vol. 1 at 1. Mr. Howard did not invoke the statute in his petition or bring his claim under it. Vol. 1 at 1–15. On its face, the law deals with prisoners who are innocent of the charges, not—as Mr. Howard is—of their death sentence. *See* NRS 34.920 (defining "factual innocence"); NRS 34.960(1) (limiting petitions to those asserting "factual innocence"). Perhaps most significantly of all, the legislation explicitly provides that it only concerns actual innocence as a freestanding claim

and does not apply to situations where the petitioner is using actual innocence to overcome procedural bars on an underlying claim, *see* NRS 34.950, which is exactly what Mr. Howard is doing. NRS 34.950 manifestly has no purchase here.

While relying upon a statute that had no relevance, the district court unsurprisingly failed to cite a single case in which a petitioner was required to show diligence in presenting an actual-innocence theory. The omission is unavoidable, for this Court has never imposed such a requirement. Quite to the contrary, the Court routinely addresses actual-innocence arguments without breathing a word about diligence, even in collateral challenges brought years after the conviction became final. *See Rippo*, 134 Nev. at 444–45, 423 P.3d at 1112–13; *Moore*, 134 Nev. at 269, 417 P.3d at 363; *Brown*, 130 Nev. at 576, 331 P.3d at 875. Notably, Mr. Howard himself asserted actual innocence in his fourth post-conviction case, well after his death sentence became final, and this Court rejected the argument, again making no mention of diligence. *See Howard III*, 2014 WL 3784121, at *3–6. The silence is deafening, and no diligence requirement exists in connection with actual innocence.

The district court's insistence that diligence must be demonstrated for actual innocence likewise flies in the face of the structure of Nevada's post-conviction regime as a whole. That is, the core purpose of actual innocence is that it allows a petitioner to overcome the procedural bars which would otherwise apply. *See*, *e.g.*,

Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006) (en banc) (per curiam). Such bars of course include untimeliness and laches, both of which are triggered by delay. *See* NRS 34.726; 34.800. To agree with the district court that delay dooms actual innocence would be to say that actual innocence forgives defaults, but that it is nevertheless defeated by the very same fact that brings the defaults into play in the first place. The doctrine would be gutted and actual innocence would be rendered meaningless. That cannot be the law.

In the alternative, if the Court does make diligence a part of its law on actual innocence, it should not enforce the new rule against Mr. Howard. As explained, the Court has never made such a statement before. It has implied the opposite by addressing long-delayed claims of actual innocence, including in Mr. Howard's own case. As a consequence, it would be inequitable for the Court to hold such a novel principle against Mr. Howard when he had no notice of it and every reason to suppose the law was to the contrary. *See Pizzuto v. State*, 202 P.3d 642, 649 (Idaho 2008) (declining to apply a newly announced timeliness rule against a capital post-conviction petitioner because he had no advance notice of it); *see also State v. Weddell*, 118 Nev. 206, 215–16, 43 P.3d 987, 992–93 (2002) (en banc) (Rose, J., concurring in part) (similar). If such a rule is adopted now, its application ought to be prospective only.

B. The Petition is Meritorious

The district court did not truly engage with the merits of Mr. Howard's claim anywhere in its order, given that its entire discussion section was directed at the procedural bars. Vol. 3 at 510–25. That being the case, there is no decision to review, and thus no deference to afford. To the extent that some of the district court's language is suggestive of an inquiry into the merits, as outlined below, it does not implicate any disputed factual matters. Rather, the language is strictly focused on legal conclusions, primarily relating to the significance of the caselaw and the meaning of actual innocence. Accordingly, to the extent it is reviewing the district judge's order at all, *but see supra* at Part VII.A., this Court's merits analysis should be de novo, *see Huebler*, 128 Nev. at 197, 275 P.3d at 95.

The only content in the district court's order that could be read as going to the merits, even though it was placed confusingly in its section on actual prejudice, was a vain attempt to distance the instant case from *Johnson*. Vol. 3 at 521–24. Its effort was unavailing.

The difference between *Johnson* and the scenario presented now, in the district court's judgment, is that in the former the only evidence supporting the aggravator was a court document confirming the conviction, whereas here there was testimony at sentencing about the conduct with which Mr. Howard was

charged in New York. Vol. 3 at 521–22. Although the difference between the two cases does exist, it is legally meaningless.

In *Johnson*, three aggravating circumstances remained in the case when it reached the U.S. Supreme Court, only one of which was necessary to make the defendant eligible for the death penalty. *See Johnson*, 486 U.S. at 581 (observing that "the jury found three aggravating circumstances, any one of which, as a matter of Mississippi law, would have been sufficient to support a capital sentence"). Only one of those three aggravators was thrown into doubt by the *Johnson* appeal. *See id.* That meant that Mr. Johnson was eligible for a death sentence, regardless of whether his challenge to the prior-conviction aggravator succeeded or not.

By virtue of the other two aggravators, the State would have been permitted at Mr. Johnson's sentencing to present evidence regarding the prior offense, even if the conviction had already been invalidated. *See Hodges v. State*, 912 So. 2d 730, 756 (Miss. 2005) (en banc) (clarifying that Mississippi law "does not limit the evidence that can be presented at the sentencing phase" to aggravators, and that evidence of unadjudicated bad acts can still be relevant at such a proceeding), *disagreed with on other grounds by Ross v. State*, 954 So. 2d 968, 987–88 (Miss. 2007). That being so, the U.S. Supreme Court in *Johnson* was operating in a context in which the submission of evidence about the underlying conduct in New York, apart from the proof of the conviction itself, was possible. It made sense,

then, for the Court to rely upon the fact that no such evidence was offered. The Court was in essence rejecting one conceivable defense for the opinion below: that other equally aggravating evidence about the prior offense might have led the jury to impose death even if there had been no conviction.

Here, no such rejection is necessary, because no such evidence was possible. There is only one aggravator left, and it has been struck down. No evidence about Mr. Howard's New York conduct is relevant, as no capital penalty-phase proceeding would have taken place at all had the vacatur already occurred, let alone one that delved into the robbery case. *See supra* at Part VII.A.4. In short, the reasoning from *Johnson* that the district court hung its hat on was necessary to grant relief in that case, but it is not necessary in this one.

Mr. Howard's reading of *Johnson* is reinforced by *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003). In that case, the defendant was sentenced to death in Florida after a penalty-phase proceeding in which "the State presented two witnesses to testify regarding Armstrong's 1985 Massachusetts conviction of indecent assault and battery on a child of the age of fourteen" in Massachusetts. *Id.* at 715. The victim of the Massachusetts offense testified at length about the details of the assault. *See id.* at 716–17. After the direct appeal in Florida, a Massachusetts court vacated the prior conviction. *See id.* at 717. Despite the testimony about the underlying conduct at the penalty phase, the Florida Supreme

Court had no trouble granting *Johnson* relief. *See id.* at 718. Such testimony was actually seen as strengthening the defendant's claim, as it made the prejudice even more apparent. *See id.* ("Given the nature of the crime underlying the vacated conviction—a sexual offense upon a child—and the detailed testimony given by the young victim of that crime at Armstrong's penalty phase, we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt.").

Although no harmless error inquiry is required here, in contrast to *Armstrong*, given the absence of any remaining aggravators, the Florida Supreme Court's well-reasoned opinion still shows at a minimum that the district judge below was wrong to confine *Johnson* to cases in which there was no testimony at the capital sentencing about the underlying offense.

The district judge claimed that other courts shared his gloss on *Johnson*, Vol. 3 at 522–24, but they do not.

For starters, the key statute in the district court's first cited authority, Vol. 3 at 522, obligated the government to prove that the defendant "committed another felony," *Gardner*, 764 S.W.2d at 419 (Purtle, J., dissenting). It was natural for the Arkansas Supreme Court to consider the statute satisfied by proof about the "nature of petitioner's conduct," *id.* at 418, because the provision was trained on

that conduct, i.e., on what actions the defendant committed. By contrast, the Nevada statute demands a conviction, *see supra* at Part VII.A.4., and testimony regarding what a defendant did says nothing about whether it led to a valid conviction.

Keeping in mind the language of the Arkansas statute, it is unsurprising that the *Gardner* court could point to its established "practice" of relying on evidence other than "proof of a conviction." 764 S.W.2d at 418. It is equally unsurprising that Nevada has the opposite practice. Its statute requires a conviction, so its caselaw does as well. *See Kirksey*, 107 Nev. at 504, 814 P.2d at 1011 (rebuffing a challenge to the aggravator in question because the record left "no doubt" that the defendant "was actually convicted of the robbery").

Gibbs, the district court's second citation, Vol. 3 at 522, is dealt with even more easily. The claim there was that the prosecution "relied upon inaccurate evidence of a prior offense," i.e., evidence that was presumably inaccurate at the time of trial. *Gibbs*, 154 F.3d at 258. There is no indication in *Gibbs* that a court subsequently reversed the aggravating conviction. Needless to say, that is the soul of Mr. Howard's claim. When inaccuracy is the issue, a court can logically emphasize "the testimony at trial of the victim," as *Gibbs* did. *Id*. When the validity of a conviction is the issue, as it is here, no such testimony can suffice,

because the victim—and any account of the crime—sheds no light on the purely legal question of whether the conviction remains lawful.

In the district court's final cited case, Vol. 3 at 523, the claim failed because of a lack of prejudice, *see Spivey*, 207 F.3d at 1282. The defendant before the Eleventh Circuit had multiple aggravators still in place at the time he asserted his *Johnson* claim. *See Spivey v. State*, 319 S.E.2d 420, 438 (Ga. 1984) (indicating that the jury had found a robbery-murder aggravator in addition to the prior-conviction aggravator). Georgia permits both statutory and non-statutory aggravation. *See Tharpe v. Head*, 533 S.E.2d 368, 370 (Ga. 2000). Under that scheme, at least one statutory aggravator must be present to render a defendant eligible for capital punishment. *See Arrington v. State*, 687 S.E.2d 438, 445 (Ga. 2009); *Hall v. Terrell*, 679 S.E.2d 17, 22 (Ga. 2009). Once a statutory aggravator has been established and the defendant is death-eligible, the jury can consider non-statutory aggravation "in its deliberations on the ultimate question of whether to impose the death sentence." *Ross v. State*, 326 S.E.2d 194, 203 (Ga. 1985), *overruled on other grounds by O'Kelley v. State*, 604 S.E.2d 509, 511–12 (Ga. 2004). Conduct linked to prior crimes is admissible as non-statutory aggravation, even when it does not lead to a conviction. *See Pace v. State*, 524 S.E.2d 490, 505 (Ga. 1999).

These principles make sense of the Eleventh Circuit's rationale in *Spivey*. Mr. Spivey's *Johnson* claim did not call into question his eligibility for death, because the robbery-murder aggravator remained in force. Since he would still have been death-eligible even if the *Johnson* claim prevailed, the issue was whether the weighing process would have resulted in death. And at the weighing stage, the conduct associated with the prior crime would still have been fair game for the jury as non-statutory aggravation.

That rationale cannot be utilized in Mr. Howard's case. The prior conviction is the only aggravator remaining. Because the *Johnson* claim eliminates it, there is no death eligibility, and the inquiry does not get to the weighing stage. Hence, there is no room for the consideration of non-statutory mitigation. The conduct with which Mr. Howard was charged in New York is irrelevant, and the testimony given about it at his Nevada trial cannot save his unconstitutional death sentence.

Throwing out another red herring, the district court posited that "the mere fact of the adjudication" in the robbery case "was not at issue since Petitioner admitted the New York conviction." Vol. 3 at 524. For one thing, Mr. Howard was hardly competent to testify to whether or not he was convicted, since by all accounts he was absent from court when the New York jury reached its verdict. Vol. 2 at 353, 445. More to the point, it does not matter whether "the mere fact of the adjudication" was ever contested at trial—it is now being contested, because it

has now been established that no such adjudication legally exists, and that is the crux of a *Johnson* claim. In *Johnson* itself, there is no indication that the defendant questioned the fact of his prior conviction at his capital sentencing. *See* 486 U.S. at 580–81 (describing the penalty phase proceedings). Nor could he have: unlike Mr. Howard, Mr. Johnson was actually sentenced and incarcerated for the New York offense. *See id.* at 581. Clearly, a defendant need not challenge the fact of his conviction at trial in order to later raise a *Johnson* claim. All that he needs is a court order vacating the prior conviction, and Mr. Howard has that.

In a last-ditch attempt to salvage its defective death sentence, the district court commented that the prosecution at Mr. Howard's sentencing "never presented the jury with a judgment of conviction in the New York case." Vol. 3 at 524. As mentioned earlier, it is of no moment how the State proved the conviction at sentencing. His death sentence now rests on a conviction that has no lawful effect. That is more than enough under *Johnson*. As it happens, Mr. Johnson's prosecutor did not introduce a judgment of conviction either. He introduced a document reflecting Mr. Johnson's "commitment" to jail for the offense. *See Johnson*, 486 U.S. at 581. The minutes from the Queens case that the Nevada prosecutor presented to the jury here were used for the exact same purpose: to show that Mr. Howard had been convicted of robbery in New York. Vol. 2 at 313 ("Now, your objection, counsel, is overruled. It appears that the official minutes of

the court reflect that this individual was convicted of the offense which is corroborated by this officer's testimony."). Of note, the only relevant item in the minutes states that Mr. Howard "was found guilty in absentia by jury verdict." Vol. 2 at 445. Evidently, the prosecution understood that it was required to prove Mr. Howard's conviction, as that was the only role for the minutes to play. Because that conviction has been erased as a matter of law, the death sentence has no footing.

In sum, despite the district court's valiant efforts to create daylight between this case and *Johnson*, it is directly on point. Most significantly, in both cases, a death sentence was predicated on a prior conviction that was subsequently vacated. The similarities continue to an uncanny extent: both prior convictions were for violent felonies in the State of New York; both defendants were sentenced to death elsewhere in the early 1980s; both had their prior convictions later invalidated by New York courts; and both pursued post-conviction relief as a result in the jurisdiction that imposed their death sentences. Insofar as the cases diverge, the difference makes Mr. Howard's claim more compelling, for his now-void conviction is the only remaining basis for his death sentence, whereas Mr. Johnson had two other aggravators. The U.S. Supreme Court awarded Mr. Johnson relief, and Mr. Howard is entitled to it even more so.

In the alternative, if the Court agrees with the district judge that *Johnson* does not apply to Mr. Howard's fact pattern and that the Eighth Amendment does not compel relief, it should vacate his death sentence under the cruel-and-unusual-punishment and due process clauses of the Nevada Constitution. *See* Nevada Const. art. I §§ 6 & 8. "A state court is entirely free to read its own State's constitution more broadly than [the U.S. Supreme Court] reads the Federal Constitution." *City of Mesquite v. Aladdin's Castle Inc.*, 455 U.S. 283, 293 (1982); *accord Oregon v. Hass*, 420 U.S. 714, 719 (1975). *Johnson* was animated by the idea that "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment." 486 U.S. at 584. It was further motivated by the notion that capital "decisions cannot be predicated on mere caprice or on factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Id.* at 585. Even if the facts of *Johnson* differ from the present case in any meaningful respect, those principles have equal force here, where a death sentence now hinges on a single conviction that is no longer a conviction. In the event the Court denies relief under the Eighth Amendment, it should still invalidate the death sentence as under the state constitution.

VIII. CONCLUSION

Mr. Howard is the rare epitome of actual innocence of the death penalty: there are indisputably no aggravating circumstances left in his case. To execute a man when the most rudimentary requirement of a death sentence is missing would be the clearest possible violation of the Constitution. That manifestly unlawful act should be avoided, and Mr. Howard's death sentence must be vacated.

DATED this 24th day of June 2020.

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CERTIFICATE OF COMPLIANCE

We hereby certify that this brief 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 the brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 Times New Roman font, double-spaced. The brief is 12,763 words, which is under the limits set for opening briefs by NRAP 32(a)(7)(B)(ii).

Finally, we hereby certify that we have read this appellate brief and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the Nevada Supreme Court by using the electronic filing system on June 24th, 2020.

Participants in the case who are registered with the electronic filing system will be provided with automatic email notice that the brief has been filed and is available on the electronic service system document repository.

I have also emailed the foregoing document to the following people:

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