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 REPLY BRIEF

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

Eighth Judicial District Court, Clark County

HENDRON LAW GROUP, LLC
LANCE J. HENDRON
Nevada Bar No. 11151
E-mail: lance@hlg.vegas
625 S. Eighth St.
Las Vegas, Nevada 89101
Tel: (702) 758-5858
Fax: (702) 387-0034

FEDERAL DEFENDER SERVICES OF IDAHO
JONAH J. HORWITZ (admitted *pro hac vice*)
Idaho Bar No. 10494
E-mail: Jonah_Horwitz@fd.org

DEBORAH A. CZUBA (admitted *pro hac vice*)
Idaho Bar No. 9648
E-mail: Deborah_A_Czuba@fd.org
702 West Idaho Street, Suite 900
Boise, ID 83702
Tel: (208) 331-5530
Fax: (208) 331-5559

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Opinions

Federal Circuit Court Opinions

State Cases

State Statutes

Other

I. INTRODUCTION

This is an easy case: Appellant Samuel Howard's death sentence rested on two aggravators and they have both been voided in final decisions by courts of competent jurisdiction. An aggravator is the most rudimentary requirement for a death sentence. Mr. Howard consequently cannot be executed. Because it nevertheless is intent on taking Mr. Howard's life, the State seeks to create complexity where none exists and to invent new rules of law that are entirely at odds with this Court's cases. Despite the State's best efforts at obfuscation, the fact remains that there are no aggravators left, and under the controlling precedent the death sentence must fall.

II. ARGUMENT

Mr. Howard has already dealt with the vast majority of points made by the State. *See generally* Appellant's Opening Brief, filed June 25, 2020 (hereinafter "Opening Brief" or "AOB"). Here, Mr. Howard will focus on the few arguments offered by the State that call for elaboration. He will begin with the procedural bars and then move to the merits.[1]

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

A. The Petition is Not Procedurally Barred

Turning to procedural bar, Mr. Howard will start with good cause, transition to prejudice, and end on actual innocence.

1. Mr. Howard Has Good Cause For Any Procedural Bar

The grounds for Mr. Howard's good cause is straightforward: his claim is based on a New York court order invalidating his prior conviction and it was brought within a year of that ruling. *See* AOB at 9–10. Repeating the district court's error, the State insists first and foremost that the claim was available earlier because Mr. Howard was previously "aware" that he had not been sentenced in New York. Answering Brief, filed Aug. 25, 2020 (hereinafter "Answering Brief" or "Ans. Br.") at 33.[2] But Mr. Howard's "awareness" did not make the claim available. Mr. Howard could not have filed a post-conviction petition in Clark County District Court with a statement like this: "I am aware that I have not been sentenced for my prior conviction and therefore the charges have been invalidated and my death sentence is unconstitutional." Unsurprisingly, the State offers no authority for this unusual understanding of what "available" means. Rather than Mr. Howard's subjective state of mind, the predicate for his challenge was plainly the New York order actually striking down his conviction. Mr. Howard submitted

[2] All citation conventions here are the same as in the Opening Brief.

his petition within a year of that event, and he consequently had good cause for any bar.

Sensing this flaw in its reasoning, the State subtly shifts from a focus on Nevada procedural law to a focus on *New York's* rules. As the State puts it, Mr. Howard "could have and should have raised [his] issue with the *New York* courts decades ago." Ans. Br. at 33. The State's point is better addressed to the New York courts. They are the arbiters of timeliness in their cases. If they felt Mr. Howard's challenge to his robbery conviction was late, they could easily have refused to entertain it. Instead, they vacated the conviction, as was their prerogative. A New York court saw fit to erase Mr. Howard's New York conviction, and the only question here is what consequences that carries with it.

As in virtually all other regards, *Johnson v. Mississippi*, 486 U.S. 578 (1988), provides helpful guidance on this point. While striking down the prior conviction there, New York's high court observed that "the passage of time [did] not bar appeal in the unusual circumstances" presented, "which include the possible use of the conviction as an aggravating factor leading to a death sentence." *People v. Johnson*, 506 N.E.2d 1177, 1178 (N.Y. 1987) (per curiam). The New York courts have the right to ascertain for themselves whether their own convictions should stand or not. It is reasonable for them to decide that their intervention is warranted when an infirm conviction would otherwise send a man

to his death. That judgment ought to be respected, even if the State here disagrees with it.

To deny Mr. Howard relief in this appeal on the theory that he fell short of some unspecified deadline in his New York proceedings, as the State wishes, would be to doubly disrespect the courts of that separate sovereign: once because the New York courts themselves never suggested any such timeliness problem, and a second time because Mr. Howard would then be executed despite a definitive declaration from the New York courts that he should be "restored, in contemplation of law, to the status occupied before the [robbery] arrest and prosecution." Vol. 2 at 358.[3] Such a result would be radically inconsistent with the constitutional imperative to accord full faith and credit to the judgments of other state courts. *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)).

Partly, the State's confusion in this area arises from its overbroad characterization of Mr. Howard's claim. According to the State, Mr. Howard's position is that he could not have advanced a claim "regarding his New York conviction" until the order was issued nullifying it. Ans. Br. at 33. Not so. There

[3] Citations in the format above are to the Joint Appendix, filed June 25, 2020.

are certainly *some* claims concerning the conviction that could have been raised before the order came into existence. One such claim is discussed in the next paragraph. Nevertheless, it remains the case that Mr. Howard could not have brought his *current* claim before the New York order was entered. The claim is entirely predicated on the fact that a New York judge eliminated the conviction. *See* Vol. 1 at 11. It obviously could not have been litigated before the elimination occurred.

Going one step beyond the implausible view that Mr. Howard could have claimed the benefit of an order years before it was signed, the State contends that he actually did proffer such a challenge in 2007. Ans. Br. at 33. The State is mistaken. In the earlier proceedings cited by the State, Mr. Howard attacked his death sentence on the ground that because no sentence was imposed in New York, he *never* had a conviction within the meaning of Nevada law. *See Howard v. State*, No. 57469, 2014 WL 3784121, at *5 (Nev. July 30, 2014). Today, Mr. Howard is targeting the death sentence on the basis that even if there was such a conviction at the time of his trial, it has been eradicated by the New York court's order. It is simply false to aver, as the State does, that Mr. Howard "is still claiming that he was not convicted of robbery." Ans. Br. at 33. He is claiming now that even *if* he was legitimately convicted forty years ago, the conviction has been wiped clean by the court that imposed it. There would be nothing illogical

about this Court holding that the conviction existed at one time and no longer does. *But see infra* at 28 (explaining how, under *Johnson*, Mr. Howard's prior conviction must be regarded as a nullity now because of its ultimate vacatur).

For the same reasons, the State's invocation of res judicata, *see* Ans. Br. at 33–34, is erroneous. Res judicata only applies when a party seeks to relitigate a claim that has already been resolved against him. *See, e.g.*, *Dermody v. City of Reno*, 113 Nev. 207, 214, 931 P.2d 1354, 1359 (1997) (per curiam). Here, the claims are manifestly different, so the doctrine is neither here nor there. Contrary to the State's account, Mr. Howard is not here making "a more detailed and precisely focused argument . . . after reflection upon the previous proceedings." Ans. Br. at 34. He is making an entirely new argument based on an entirely new and unquestionably significant event—a final judgment from a competent court of a sister jurisdiction that his prior conviction is "vacated." Vol. 2 at 355.

The State intimates that the record on good cause is incomplete because there is no evidence as to "how his New York conviction was invalidated." Ans. Br. at 39. That is incorrect. The record shows that Mr. Howard filed a motion to vacate his conviction in the appropriate New York court, and that it was granted. Vol. 2 at 351–55. No more is necessary. With respect to good cause, Mr. Howard's duty is only to demonstrate that the claim was raised "within a reasonable time after it became available." *Wilson v. State*, 127 Nev. 740, 745,

267 P.3d 58, 61 (2011) (en banc). By pointing to the order that made his claim possible, Mr. Howard satisfied that duty. The State's contention that he was obliged to provide more documentation of the New York case—or that an evidentiary hearing on that issue would be beneficial—is untethered to any Nevada authority.

In his Opening Brief, Mr. Howard compared his good-cause situation to that of petitioners who successfully relied on new caselaw years after their convictions became final. *See* AOB at 12–13 (examining *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006) (en banc), and *State v. Boston*, 131 Nev. 981, 984, 363 P.3d 453, 455 (2015) (en banc)). The State posits that *Bejarano* and *Boston* did not involve situations where the petitioners improperly waited to bring their claims. *See* Ans. Br. at 42–43. Yet how is Mr. Howard's posture any different? Mr. Boston's conviction became final in 1989 and he did not file his petition based on the new triggering event until 2011. *See Boston*, 131 Nev. at 983, 353 P.3d at 454. In Mr. Bejarano's case, the relevant petition was filed fifteen years after remittitur. *See Bejarano*, 122 Nev. at 1072, 146 P.3d at 269. Neither opinion suggests that the petitioners earlier asserted the theories upon which they ultimately prevailed. If there is, as the State maintains, a responsibility on the shoulders of post-conviction petitioners to act diligently to *create* the predicate for their claim, rather than to merely act diligently once the predicate exists, then Messrs. Bejarano and

Boston would have been compelled to make out their respective claims before the caselaw evolved in their favor. Any such burden would be a novel proposition in Nevada law, and accordingly could not properly be invoked against Mr. Howard when he had no advance notice. *See* AOB at 34.

To the State's mind, Mr. Howard is estopped from pursuing his current challenge because he previously implied that his New York judgment was final. *See* Ans. Br. at 46. Fatally, though, the State does not identify a single word in any pleading ever filed by Mr. Howard that would have indicated to a reasonable reader that he regarded the New York conviction as final. It is telling that for the State's argument to work it has to demolish a strawman theory that Mr. Howard "never made any mention of the New York case while challenging his Nevada sentence." *Id*. Of course Mr. Howard mentioned the New York case in his Nevada litigation—it constituted one of the two aggravators underlying his death sentence. Still, recognizing the existence of an aggravator hardly implies that it will be lawful for all eternity.

The State's emphasis on Mr. Howard's prior litigation is especially unhelpful to its cause when one looks at the few particulars it offers. Ironically, the only claim the State ever mentions in particular as implying the soundness of the robbery conviction is Mr. Howard's previous contention that the New York case was *not* final, because he had never been sentenced. *See id.* The State does

not clarify how that claim could possibly be read to imply the opposite of what it expressly asserted.

And even if Mr. Howard had implied the finality of the New York conviction, it is not certain why the State sees that as problematic. Why could a petitioner not agree that a conviction was final *until* it was vacated, and then consider it invalid? For instance, in *Johnson*, there is nothing to suggest that the defendant characterized his prior conviction as unlawful *before* he appealed from his death sentence. *See* 486 U.S. at 582–83. If Mr. Howard implied the finality of his New York conviction by appealing his Nevada death sentence, Mr. Johnson did the same with respect to his Mississippi judgment. Mr. Johnson's litigation did not preclude relief at the U.S. Supreme Court. Neither should Mr. Howard's preclude relief here.

Finally, *Witter v. State*, 135 Nev. 412, 452 P.3d 406 (2019) (en banc), cannot bear the weight placed upon it by the State. As pointed out in the Opening Brief, the petitioner in *Witter* implied the finality of a *Nevada* judgment by appealing from that judgment in *Nevada*. *See* AOB at 15. Such an implication was generated because a defendant cannot appeal a Nevada judgment unless it is final. *See id.* By contrast, there is no authority for the proposition that Mr. Howard's *Nevada* litigation implied the finality of his *New York* judgment. *See id.* Mr. Howard's Nevada litigation implied only that he had been sentenced to death, and

desired not to be executed. Nothing more. The State's attestations to the contrary have no foundation in Nevada law.

2. Mr. Howard Can Show Prejudice For Any Procedural Bar

The prejudice that flows to a defendant who is sentenced to death on the basis of two invalid aggravators is unquestionable. Deprived of any plausible counterargument on that front, the State simply changes the definition of prejudice from the one set by this Court to an unfounded one that suits its own purposes more. The real test for prejudice is whether the error "worked to [the petitioner's] actual and substantial disadvantage." *Boston*, 131 Nev. at 985, 363 P.3d at 455; *accord Crump v. Demosthenes*, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997) (per curiam). Even the State does not go so far to say that a claim which removes the final remaining aggravator somehow fails to reach that bar, so it instead offers the non-sequitur that "any prejudice was brought on by [Mr. Howard] himself." Ans. Br. at 58. That is a statement about good cause, which is addressed elsewhere. *See supra* at Part II.A.1. It has nothing to do with prejudice, i.e., with whether Mr. Howard was harmed by the use of an invalid aggravator at his capital sentencing, which he manifestly was. The State's refusal to grapple with the controlling test constitutes a forfeiture, and the prejudice question must be answered in Mr. Howard's favor. *See Grace v. Eighth Jud. Dist. Ct.*, 132 Nev. 511, 519 n.4, 375

P.3d 1017, 1022 n.4 (2016) (en banc) (declining to consider an argument because the State inadequately examined it in its brief).

The preceding reasoning reveals the tenuousness of the State's discussion of *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003). According to the State, "*Armstrong* is completely distinguishable from this case as any prejudice was brought on by Appellant himself." Ans. Br. at 58. There is no daylight between the two cases in this regard. In *Armstrong*, the defendant challenged his prior conviction in Massachusetts after his Florida death sentence became final on direct appeal. 862 So. 2d at 717. If it shared the State's view, the Florida Supreme Court would have found no prejudice because of that timeline. Instead, it did the opposite, conducted a genuine prejudice analysis by considering the effect of the error on the proceedings, and vacated the death sentence. *Id.* at 717–18. This Court should look through the State's misdirection on prejudice and do the same.

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

Mr. Howard has the rare, classic actual-innocence case: there are no more aggravators left to sustain his death sentence, making him ineligible for the punishment. *See generally* AOB at 23–34. Grasping at straws in rebuttal, the State seems to deny that Nevada has an actual-innocence exception at all, despite a wall of precedent to the contrary; invents a diligence requirement for actual innocence, despite the fact that the U.S. Supreme Court has expressly rejected one; and resists

the New York vacatur as a grounds for actual innocence even though it plainly destroys Mr. Howard's eligibility for death and thus represents a paradigmatic basis for actual innocence.

a) Actual Innocence in Nevada is a Gateway to the Merits

Beginning with first principles, the State oddly seems to challenge the very core of actual-innocence doctrine by contesting Mr. Howard's use of the term "gateway." Ans. Br. at 49–51. The well-established expression merely reflects that actual innocence serves as a conduit to merits review for an otherwise procedurally barred claim. *See* Ans. Br. at 49–51. If the State believes actual innocence is not a gateway in this sense, its perspective is inconsistent with black-letter Nevada law. Nevada opinions on actual innocence pervasively utilize the "gateway" phraseology. *See Rippo v. State*, 134 Nev. 411, 444, 423 P.3d 1084, 1112 (2018) (en banc); *Berry v. State*, 131 Nev. 957, 960, 363 P.3d 1148, 1150 (2015); *Lisle v. State*, 131 Nev. 356, 367, 351 P.3d 725, 733 (2015) (en banc).

The phraseology tracks the substance of the caselaw. As reaffirmed by every Nevada Supreme Court decision dealing with the doctrine, the central purpose of actual innocence is to excuse procedural bars when the petitioner can demonstrate that his constitutional claim renders him ineligible for the death penalty. *See, e.g.*, *Moore v. State*, 134 Nev. 262, 268, 417 P.3d 356, 362 (2018) (per curiam); *Lisle*, 131 Nev. at 361, 351 P.3d at 729–30; *Leslie v. Warden*, 118

Nev. 773, 780, 59 P.3d 440, 445 (2002) (en banc). With a constitutional claim founded on the absence of any aggravators, Mr. Howard falls at the heart of the actual-innocence exception.

The State's misunderstanding of the basic meaning of the doctrine is echoed by its misunderstanding of the interplay between a petitioner's actual-innocence theory and his underlying constitutional claim. Most problematically, the State is under the impression that Mr. Howard must show "that his actual innocence claim amounts to cruel and unusual punishment." Ans. Br. at 49. Put differently, the State construes Mr. Howard's pleadings as asserting actual innocence *as a constitutional claim*. In so construing, the State mischaracterizes both the nature of the procedural history and the nature of the law.

To start with the procedural history, Mr. Howard does not have an "actual innocence claim." As unambiguously articulated in the petition, and as consistently argued thereafter, Mr. Howard's *claim* is that his death sentence is cruel and unusual and thus unconstitutional because the final aggravator has been taken away. Vol. 1 at 11. Actual innocence is simply one of Mr. Howard's arguments for excusing any procedural bars that might apply.

Mr. Howard's tack is in complete harmony with the law. As affirmed in the Nevada cases cited just now, actual innocence is simply a means to circumvent procedural bar. *See supra* at 12–13. It is not a constitutional claim, i.e., it does not

allege the violation that renders the sentence illegal. Simply put, the actual-innocence theory need not make out a constitutional claim. It must only clear the way for the constitutional claim to be heard. Here, Mr. Howard has an irrefutable actual-innocence theory because he has no aggravators, and he has an irrefutable constitutional claim because the facts of his case are virtually indistinguishable from *Johnson*.

When the State segues to a more detailed interpretation of the Nevada caselaw on actual innocence, its analysis does not improve. For starters, the State's elaborate parsing of the facts in *Lisle*, *see* Ans. Br. at 50–51, is a red herring. *Lisle* is significant not because of its facts, but because of the framework it outlines for actual innocence. As just stated, Mr. Howard fits squarely within that framework. If anything, the fact that Mr. Lisle's actual innocence theory was rejected only underscores how compelling Mr. Howard's is. By the State's own telling, Mr. Lisle fell short of the standard because his claim implicated the weighing stage of Nevada's capital sentencing process and not the eligibility stage. *See id.* at 50. To repeat, Mr. Howard's claim is all about eligibility: his final remaining aggravator is gone. *Lisle*'s reasoning directly highlights how unassailable Mr. Howard's actual-innocence theory is.

b) Actual Innocence Does Not Require Diligence

In regards to the diligence requirement for actual innocence that is asserted by the State, opposing counsel's largest obstacle is the U.S. Supreme Court's adamant disagreement. The highest court in the country has definitively held that actual-innocence doctrine does *not* include a diligence element. *See McQuiggin v. Perkins*, 569 U.S. 383, 398–99 (2013). No doubt seeing how devastating *McQuiggin* is to its theory, the State buries it in a footnote while halfheartedly trying to escape the holding with two insubstantial arguments. *See* Ans. Br. at 47 n.12.

First, the State contends that *McQuiggin* does not govern the case because it applies only in federal court. *See id.* Though it is true that *McQuiggin* is not automatically precedential here, the State's point of view is made irrelevant by the fact that Nevada has *chosen* to adopt the U.S. Supreme Court's approach to actual innocence in a long and unbroken line of cases. Most significantly, this Court has cited with approval *McQuiggin* itself, including its discussion of delay. *See Berry*, 131 Nev. at 972, 363 P.3d at 1158. *McQuiggin* and its rejection of the diligence requirement for actual innocence have accordingly been incorporated into Nevada law, even if they did not have to be.

It comes as no surprise that *McQuiggin*'s rejection of the diligence requirement would be grafted onto Nevada law, because its reasoning fits perfectly

with this state's post-conviction scheme. *McQuiggin*'s holding rests on the commonsense acknowledgment that actual innocence is intended to forgive untimeliness and it cannot meaningfully serve that function if it is at the same time defeated by delay. As the *McQuiggin* Court put the point, "[i]t would be bizarre to hold that a habeas petitioner who asserts a convincing claim of actual innocence may overcome the statutory time bar . . . , yet simultaneously encounter a court-fashioned diligence barrier to pursuit of her petition." 569 U.S. at 399. In Nevada, as in the federal court system, actual innocence excuses untimeliness. *See Mitchell v. State*, 122 Nev. 1269, 1274, 149 P.3d 33, 36 (2006). It follows that the State's view would create the same bizarreness in Nevada, if adopted by this Court, and it should be rebuffed for the same persuasive reason offered by *McQuiggin*.

More broadly, the State's insistence on a separation between Nevada law and that of the U.S. Supreme Court on actual innocence is belied by history. When actual innocence first appeared in a reported Nevada decision, it was accompanied by a citation to the U.S. Supreme Court. *See Hogan v. Warden, Ely State Prison*, 109 Nev. 952, 959, 860 P.2d 710, 715–16 (1993) (referring to *McCleskey v. Zant*, 499 U.S. 467 (1991)). Three years later, the doctrine was further developed in *Mazzan v. Whitley*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996) (per curiam), which relied entirely on four decisions from the U.S. Supreme Court for its discussion of actual innocence.

Over the course of the next two and a half decades, the Nevada cases on actual innocence continued to routinely cite U.S. Supreme Court opinions. *See, e.g.*, *Pellegrini v. State*, 117 Nev. 860, 887 nn.123–24, 34 P.3d 519, 537 nn.123–24 (2001) (en banc) (per curiam), *abrogated on other grounds by Rippo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12 (making reference to *Schlup v. Delo*, 513 U.S. 298 (1995), and *Sawyer v. Whitley*, 505 U.S. 333 (1992)); *Clem v. State*, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003) (en banc) (per curiam) (citing *Bousley v. United States*, 523 U.S. 614 (1998)); *Mitchell*, 122 Nev. at 1273 n.7, 149 P.3d at 36 n.7 (alluding to *Murray v. Carrier*, 477 U.S. 478 (1986), and other U.S. Supreme Court caselaw).

In short, Nevada's actual-innocence law emerged at its inception from the U.S. Supreme Court's; its features have always been defined with reference to U.S. Supreme Court precedent; and it has been intertwined with U.S. Supreme Court decisions over its entire lifespan. Furthermore, so far as Mr. Howard can ascertain, no Nevada opinion has ever deviated from the U.S. Supreme Court's approach to actual innocence. It strains credulity to suppose, as the State does, that Nevada has followed the U.S. Supreme Court on every question related to actual innocence for the last twenty-seven years but somehow silently distanced itself from the one holding that is on-point here.

Seeking to fill that gap, the State notes that "this Court has declined to import *other* similar equitable remedies from federal habeas law." Ans. Br. at 48 n.12. The State's remark only underscores the weakness of its position with respect to the remedy at issue now—actual innocence. No matter what the status is of other remedies, this Court has, as just demonstrated, enthusiastically imported actual innocence from federal habeas law. Notably, the sole case the State cites for this proposition, like the many listed earlier, went out of its way to *favorably* cite U.S. Supreme Court precedent on actual innocence. *See Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014) (en banc) (citing *Schlup* and *Calderon v. Thompson*, 523 U.S. 538 (1998)). *Brown* only goes to show how faithfully Nevada has adhered to U.S. Supreme Court precedence on actual innocence, and consequently how unlikely it is that there would be a diligence requirement here despite *McQuiggin*'s clear-cut statement to the contrary.

Apart from this inapposite caselaw, the only authority advanced by the State in support of its view on diligence is NRS 34.960. *See* Ans. Br. at 47. There is no need to belabor here the explanation in the Opening Brief. To summarize, the statute does not apply because it was enacted after the filing of Mr. Howard's petition, has never been relied upon by him in this case, and deals with inmates who allege freestanding claims that they are actually innocent of the charges, not—as here—actual innocence of the death penalty as a basis to overcome procedural

bars. *See* AOB at 32–33. Tellingly, the State does not even attempt to answer any of these points.

It is equally unfounded for the State to maintain that retroactivity principles prevent the Court from obeying the holding in *McQuiggin*. *See* Ans. Br. at 47 n.12. The retroactivity principle championed by the State is limited to "new *constitutional* rules of criminal procedure." *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality op.); *accord Colwell v. State*, 118 Nev. 807, 816, 59 P.3d 463, 469 (2002) (en banc) (per curiam). In other words, both Mr. Teague and Mr. Colwell argued that new cases should be applied retroactively to their convictions and sentences that rendered those judgments unconstitutional, and thus entitled the prisoners to relief.

That is not Mr. Howard's posture in relation to *McQuiggin*. The existence vel non of a diligence component in actual-innocence law goes only to Mr. Howard's basis for circumventing procedural bar—it does not go to the substantive matter of whether his death sentence violates the Constitution. *See Schlup*, 513 U.S. at 315 (characterizing an actual-innocence theory of this sort as "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits"); *accord Berry*, 131 Nev. at 966 & n.2, 363 P.3d at 1154 & n.2. Accordingly, the date of Mr. Howard's conviction has no bearing on whether *McQuiggin* can be

utilized. *See Charron v. Gammon*, 69 F.3d 851, 856 (8th Cir. 1995) (finding *Teague* irrelevant to a question concerning procedural default because its retroactivity analysis only comes into play in connection with "rules of *constitutional* law" (emphasis added)). If there were any date that mattered, it would be the filing of the post-conviction petition under review, since *McQuiggin* only speaks to how courts should adjudicate the procedural issues in such petitions. The petition was filed in 2018, Vol. 1 at 1, and *McQuiggin* was decided in 2013. There is no bar on applying the case.

As confirmation, consider the fact that it is common for Nevada cases to cite actual-innocence opinions from the U.S. Supreme Court that were issued after the petitioner's conviction became final. In *Berry*, to name one such case, this Court favorably referred to *McQuiggin* itself, even though the opinion was handed down fifteen years after the remittitur issued in the direct appeal. *See* 131 Nev. at 963, 972, 363 P.3d at 1152, 1158. Similarly, the *Pellegrini* Court cited *Schlup* and *Sawyer*, both of which were announced years after the conviction became final. *See* 117 Nev. at 887 nn.123–24, 34 P.3d at 537 nn.123–24. Neither *Berry* nor *Pellegrini* whispered a word about a potential retroactivity problem. That is because courts apply caselaw concerning how to process post-conviction petitions as soon as they are available, without regard to retroactivity. Retroactivity law is no foundation for the Court to ignore *McQuiggin*.

To compensate for a complete absence of favorable authority in support of its position on diligence and actual innocence, the State switches to a different doctrine altogether. In particular, the State observes in a passing footnote that a showing of *good cause* must include diligence. Ans. Br. at 43 n.11. Maybe, but good cause and actual innocence are *alternative* paths to merits review. *See*, *e.g.*, *Mitchell*, 122 Nev. at 1273–74, 149 P.3d at 36 (2006); *State v. Bennett*, 119 Nev. 589, 597, 81 P.3d 1, 7 (2003) (en banc). Diligence being necessary on one path does not mean that it is necessary on the other. That is especially so here, when diligence is arguably harmonious with the general parameters of good-cause law, yet "bizarre" as a piece of actual-innocence law. *McQuiggin*, 569 U.S. at 399.

c) The New York Vacatur is Grounds for Actual Innocence

In a last-ditch maneuver to avoid a grant of relief, the State protests the New York vacatur on qualitative grounds as a basis for actual innocence. It does so by concentrating on the difference between "factual innocence" and "legal insufficiency." Ans. Br. at 53. The State misses the mark, both under the federal law of actual innocence—which this Court has borrowed, *see* AOB at 30—and under state law.

On the state side, "a fundamental miscarriage of justice can be demonstrated by a showing that the defendant 'is actually innocent of the crime *or* is ineligible for the death penalty.'" *Leslie*, 118 Nev. at 780, 59 P.3d at 445 (quoting

Pellegrini, 117 Nev. at 887, 34 P.3d at 537). Mr. Howard's current claim does not contest his guilt—it targets his eligibility for the death penalty. And it is difficult to imagine a more conclusive showing of ineligibility than the elimination of both aggravators. Nor is there anything in Nevada's actual-innocence law that categorically rules out events like the New York vacatur. Just the opposite: this Court has stated that an actual-innocence showing can be "based on [the] legal validity of an aggravating circumstance." *Lisle*, 131 Nev. at 362, 351 P.3d at 730 (citing *Leslie* and *Bennett*). Mr. Howard's aggravator has been vacated by a court with the power to do so. It does not get any more legally invalid than that. Significantly, the U.S. Supreme Court characterized the prior conviction in *Johnson* as "invalid." 486 U.S. at 586. As discussed at length elsewhere, Mr. Johnson's prior conviction was in the exact same condition then as Mr. Howard's is now. Mr. Howard's prior conviction is accordingly legally invalid under the Nevada caselaw, making him actually innocent of the death penalty.

Federal law is to the same effect. There, the distinction drawn by the State between factual and legal innocence has teeth when it comes to questions of guilt, as in the first case cited by the State, which involved—importantly—a non-capital conviction. *See Bousley*, 523 U.S. at 623–24. As illustrated by the State's second citation, though, and as previously described, actual innocence of the *death penalty* is defined by eligibility. *See Sawyer*, 505 U.S. at 345 ("Sensible meaning is given

to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met."); *see also Cade v. Haley*, 222 F.3d 1298, 1308 (11th Cir. 2000) (explaining that actual innocence can "be proven not only through a demonstration of innocence of the capital crime itself but also through a showing that there was no aggravating circumstance or that some other condition of eligibility" for the death penalty "had not been met"). There is "no aggravating circumstance" here and Mr. Howard's is therefore a textbook case of actual innocence under federal law. Unlike *Bousley*, it is true that *Sawyer* is a capital case. But even in *Sawyer*, the only place the majority uses the phrase "factual innocence" is in a sentence summarizing the holding of an older case, which was—like *Bousley*—non-capital. *See Sawyer*, 505 U.S. at 339 (discussing *Kuhlmann v. Wilson*, 477 U.S. 436 (1986)). These cases do not purport to disturb the well-settled rule that actual innocence of the death penalty is present when no aggravators are in play any longer.

The State's misplaced focus on "factual innocence" is aptly refuted by *Magwood v. Warden, Ala. Comm'r, Dep't of Corr.*, 664 F.3d 1340 (11th Cir. 2011). There, the prisoner's death sentence was predicated on a single aggravator: the murder of a law enforcement officer. *See id.* at 1347. The inmate brought a due process challenge to the aggravator because it was not listed in the requisite

statute at the time of his trial. *See id.* at 1341–42. Since that claim would, if successful, take the sole aggravator off the table, the Eleventh Circuit forgave the procedural bar and proceeded to the merits. *See id.* at 1346–47. It did so *not* on the ground that Mr. Magwood was "factually innocent" of the aggravator, as the State here would have it. As it happens, the Eleventh Circuit's recitation leaves no doubt that Mr. Magwood was unambiguously *guilty* of the aggravator, i.e., he did kill a law enforcement officer. *See id.* at 1343. Nonetheless, the Eleventh Circuit found Mr. Magwood actually innocent of the death penalty, because the solitary aggravator had been removed from the equation by a legal claim, rendering him ineligible for capital punishment. *See id.* at 1346–47. The same logic applies to the case at bar.

It stands to reason that actual innocence of the death penalty would not hinge entirely on factual matters concerning the defendant's conduct, notwithstanding the State's opinion to the contrary. Many aggravators are not well-suited to the State's proposed test. For example, a number of states have made it an aggravator for an individual to commit a murder that is "heinous, atrocious, or cruel," or the like. Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill of Rts. J. 345, 364 & n.127 (1998). Such aggravators are unavoidably subjective. *See Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (discussing the

vagueness of a similar aggravator); *see also Maynard v. Cartwright*, 486 U.S. 356, 360 (1988) (comparable). As amorphous as they are, it makes little sense to ask whether a defendant is "factually innocent" of aggravators like these—i.e., whether the individual indeed committed the conduct proscribed by the aggravator. On the other hand, a legal deficiency in such an aggravator can still arise that disqualifies its application. That is the type of deficiency that infects the punishment here, and it renders Mr. Howard actually innocent of the death penalty.

Johnson itself corroborates Mr. Howard's approach to actual innocence, and disproves the State's. In *Johnson*, the defendant was not relieved of his death sentence because he was "factually innocent" of the prior conviction. The defect in the prior conviction was rather that it resulted from a proceeding in which Mr. Johnson was deprived of his right to appeal. *See Johnson*, 506 N.E.2d at 1178. At the U.S. Supreme Court, therefore, the Justices did not find fault with the death sentence because Mr. Johnson had proven that he never committed the conduct with which he was charged in New York, but because the vacatur of the prior conviction meant that, "unless and until petitioner should be retried, he must be presumed innocent of that charge." *Johnson*, 486 U.S. at 585. It was this state of affairs that led the U.S. Supreme to opine that "the New York conviction provided no legitimate support for the death sentence imposed on petitioner." *Id.* at 586; *accord State v. Bowman*, 337 S.W.3d 679, 683, 692 (Mo. 2011) (en banc)

(reversing a death sentence on *Johnson* grounds because a prior conviction had been vacated due to a coerced confession, without suggesting that the defendant was innocence of the previous charges); *State v. McFadden*, 216 S.W.3d 673, 677–78 (Mo. 2007) (same, where the prior conviction had been vacated due to biased jury selection).

Just as in Mr. Johnson's case, because a lawful New York court order obliterated his conviction, Mr. Howard must be presumed innocent of the robbery charges—a presumption that "serves an imperative function in [Nevada's] criminal justice system," as it does nationally. *Batin v. State*, 118 Nev. 61, 65, 38 P.3d 880, 883 (2002) (en banc). And *even more so* than in Mr. Johnson's case, there is "no legitimate support for the death sentence" in Mr. Howard's circumstances, because the New York conviction was the sole surviving aggravator for him, and only one of three for Mr. Johnson. *See Johnson*, 486 U.S. at 586. If there is "no legitimate support for the death sentence" as a binding matter of federal constitutional law under *Johnson*, it cannot possibly be that Mr. Howard is still eligible for capital punishment as a matter of state actual-innocence law. The State's newfangled account of actual innocence is unfaithful to *Johnson*—in addition to being incompatible with this Court's definition of the doctrine—and it must be rejected. With no lawful aggravators still in place, Mr. Howard is actually innocent of the

death penalty, and any procedural bar that would otherwise be in force is overcome.

In summary, if Mr. Howard is not entitled to relief on the basis of actual innocence, when his two aggravators have both been eradicated by unambiguous judicial rulings, it is hard to conceive of the doctrine ever being satisfied.

B. The Petition is Meritorious

The State has almost nothing to say about the merits of Mr. Howard's claim. Indeed, there is no heading in the Answering Brief that even refers to the merits. All of the headings in the State's brief are explicitly and exclusively addressed to procedural bars. Because the State did not clearly and adequately take up the merits in its briefing, it should be deemed to have forfeited the issue. *See, e.g.*, *Grace*, 132 Nev. at 519 n.4, 375 P.3d at 1022 n.4. Once the Court proceeds beyond the procedural bars, therefore, it should summarily grant relief and vacate the death sentence.

To the extent the State's comments on the procedural issues in the case could be seen as occasionally veering into merits territory, they are unpersuasive. First, the State criticizes Mr. Howard's claim on the ground that his "New York conviction was valid at the time" he was sentenced to death. Ans. Br. at 52. As with so many of the State's unsuccessful arguments, the criticism runs headlong into *Johnson*. In *Johnson*, the conviction was vacated by the New York courts

after the Mississippi death sentence became final on direct appeal. *See* 486 U.S. at 581–83. That sequence did not prevent the U.S. Supreme Court from concluding that the subsequent vacatur meant that the New York judgment was "not valid when it was entered." *See id.* at 585 n.6. If a conviction is retroactively rendered a nullity when it is vacated by a higher court due to the deprivation of a right to appeal, *see supra* at 25, it is certainly rendered a nullity when it is vacated by a lower court due to the failure to promptly impose a sentence. After all, since Mr. Johnson actually served time in prison on his New York offense, *see* 486 U.S. at 585–86, his conviction arguably reached a greater level of finality prior to its vacatur than did Mr. Howard's, whose case never reached the earlier stage of a punishment being imposed, *see People ex rel. Harrison v. Jackson*, 82 N.E.2d 14, 16 (N.Y. 1948) ("[T]here may be no judgment of conviction without sentence."). The *Johnson* Court determined that "it would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance." *Johnson*, 486 U.S. at 586. At a minimum, it is equally perverse here.

Lastly, insofar as the State's comments about the New York vacatur being non-constitutional, *see supra* at 13, or being based on a "technicality," Ans. Br. at 59, are intended to go to the merits, they are also irreconcilable with *Johnson*. As mentioned previously, the reason the prior conviction was invalidated in *Johnson* was that the defendant's right to an appeal had been denied. In criminal cases,

"there is no constitutional right to an appeal." *Abney v. United States*, 431 U.S. 651, 656 (1977). The right "is purely a creature of statute." *Id.* Mr. Howard's prior conviction was also vacated by the New York courts because a statutory right was transgressed—namely, the statutory right to be sentenced within a reasonable amount of time. *See* AOB at 11. In this respect, as in all relevant respects, Mr. Howard's case is effectively identical to *Johnson*. There is no way to uphold his death sentence while remaining true to the U.S. Supreme Court's binding precedent.

III. CONCLUSION

Procedurally, Mr. Howard is the epitome of actual innocence, having removed his final aggravator from the calculus. Substantively, the U.S. Supreme Court's precedent directly dictates a decision granting him relief, since he—as in *Johnson*—had a prior conviction invalidated by the New York courts after it was used to justify his death sentence. Given the strength and simplicity of Mr. Howard's challenge, his death sentence could be defensibly vacated in a one-paragraph, unpublished opinion. Regardless of whether the Court publishes its decision or not, it is unlikely other inmates will be able to claim the benefit of any such order, considering how unique his case is. In all events, though, Mr. Howard's own death sentence must be vacated, so as to prevent the execution of a man who has no aggravators remaining in his case.

DATED this 24th day of September 2020.

HENDRON LAW GROUP LLC

/s/ Lance J. Hendron

LANCE J. HENDRON, ESQ.
Nevada Bar No. 11151
625 S. Eighth St.
Las Vegas, Nevada 89101

FEDERAL DEFENDER
SERVICES OF IDAHO

/s/ Deborah A. Czuba

DEBORAH A. CZUBA, ESQ.
(*pro hac vice)*
Idaho Bar No. 9648
702 West Idaho Street, Suite 900
Boise, Idaho 83702

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 reply brief is 7,207 words, which is under the limits set for capital case reply 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.

DATED this 24th day of September 2020.

HENDRON LAW GROUP LLC

/s/ Lance J. Hendron
LANCE J. HENDRON, ESQ.
Nevada Bar No. 11151
625 S. Eighth St.
Las Vegas, Nevada 89101

FEDERAL DEFENDER
SERVICES OF IDAHO

/s/ Deborah A. Czuba
DEBORAH A. CZUBA, ESQ.
(*pro hac vice)*
Idaho Bar No. 9648
702 West Idaho Street, Suite 900
Boise, Idaho 83702

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 September 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:

Steven Wolfson
Clark County District Attorney
Jonathan E. VanBoskerck
Chief Deputy District Attorney
200 East Lewis Avenue
Las Vegas, Nevada 89101
Jonathan.VanBoskerck@clarkcountyda.com

/s/ L. Hollis Ruggieri
L. Hollis Ruggieri