

**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, and THE  
STATE OF NEVADA,

Respondents.

Supreme Court Case Nos. 81278,  
81279

Electronically Filed  
Oct 01 2020 08:05 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Underlying Case:  
Clark County Dist. Ct.  
Nos. 81C053867, A-18-780434-W

**APPELLANT’S UNOPPOSED MOTION TO EXPEDITE**

Pursuant to Nevada Rule of Appellate Procedure 2 and the Court’s inherent authority to manage its own docket, Appellant Samuel Howard respectfully requests that the instant appeal be expedited and resolved by January 23, 2021.

In the case at bar, Mr. Howard is challenging his death sentence on the ground that the prior conviction representing the final remaining aggravating circumstance has been vacated by the New York court that imposed it. *See generally* Appellant’s Opening Brief, filed June 25, 2020. Mr. Howard has pending in the Ninth Circuit a habeas appeal in case number 10-99003 contesting the same sentence, as well as the underlying Nevada convictions. *See generally Howard v. Gittere*, 392 F. Supp. 3d 1205 (D. Nev. 2019) (reflecting some of the issues in the appeal); *Howard v. Filson*, No. 2:93-cv-1209, 2016 WL 7173763 (D.

Nev. Dec. 8, 2016) (same). In the federal habeas appeal, the Ninth Circuit stayed the proceedings sua sponte on April 7, 2020 until the instant case concludes. *See* Ex. 1.<sup>1</sup> On June 2, 2020, Mr. Howard asked the Ninth Circuit to lift the stay in its entirety, or in the alternative to do so at least with respect to the guilt-phase issues. *See* Ex. 2. The Ninth Circuit denied the motion without prejudice in an order dated July 27, 2020. *See* Ex. 3. However, the Ninth Circuit permitted Mr. Howard to renew his request to lift the stay if this Court does not dispose of the current appeal by January 23, 2021. *See id.*

Because he desires to have his federal habeas claims adjudicated as promptly as possible, Mr. Howard intends to take the Ninth Circuit up on its invitation if this Court has not ruled on the current appeal by then. Nevertheless, Mr. Howard believes it would be most economical for all involved if this Court were to render its decision in the appeal, which is now fully briefed, by January 23, 2021. If the Court ultimately grants Mr. Howard relief, the parties and the Ninth Circuit would be spared the time and energy they would otherwise have to devote to dealing with the attack on the death sentence in the federal habeas case. And if this Court ended

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<sup>1</sup> The Ninth Circuit appeal discussed above does not raise the same issue that is presented in this case, i.e., the claim based on the New York court order striking the prior conviction. Rather, the issue is pending in two separate federal proceedings, in Ninth Circuit case number 19-70384 and District of Nevada case number 19-247. Those cases are also stayed until the instant appeal ends. They will presumably remain so even if the Ninth Circuit lifts the stay in case number 10-99003, as Mr. Howard intends to ask it to do in January 2021.

up denying relief, it would conclusively end all remaining state-court litigation in this extremely old case and it would allow the Ninth Circuit appeal to move forward without raising any potential comity problems. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) (“[S]tate courts are the principal forum for asserting constitutional challenges to state convictions.”). In either event, a decision by January 23, 2021 would facilitate the efficient and orderly disposition of Mr. Howard’s cases in state and federal court.

Because he wishes to avoid any more delay in his cases, Mr. Howard has been quite diligent in his prosecution of the action under review. He did not seek a single extension in the district court. On appeal, he filed his opening brief more than three months before the first deadline. Although he sought an extension on his reply brief due to the personal circumstances of his attorneys, he nevertheless was able to submit the pleading by its original due date. Mr. Howard’s diligence has created a situation where it is feasible for the Court to issue an opinion by January 23, 2021 and thereby to avoid unnecessary litigation in the Ninth Circuit over whether the habeas appeal can advance.

Although Mr. Howard recognizes that this Court has a full docket, he respectfully suggests that his case is an appropriate one for expediting. The offense for which Mr. Howard was convicted took place more than forty years ago. *See Howard v. State*, 102 Nev. 572, 573, 729 P.2d 1341, 1342 (1986) (per curiam).

His direct appeal was decided almost thirty-five years ago. *See id.* There are now no aggravators left to support his death sentence, and there is nothing to stop this Court from putting an end to the lengthy and convoluted litigation that has been occurring non-stop since the State first charged Mr. Howard several decades ago. *See Young v. Ninth Jud. Dist. Ct.*, 107 Nev. 642, 648, 818 P.2d 844, 848 (1991) (per curiam) (expressing concern about the longevity of capital cases); *see also Pellegrini v. State*, 117 Nev. 860, 876, 34 P.3d 519, 530 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018) (en banc) (same).

In light of the above, Mr. Howard respectfully asks that the Court expedite this case and adjudicate it by January 23, 2021.

The undersigned contacted opposing counsel and were advised that the State consents to the instant motion, provided that oral argument is not scheduled for December 2020 or early January 2021. Mr. Howard has no objection to the State's request regarding the scheduling of oral argument.

DATED this 1st day of October 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/ Jonah Horwitz

JONAH J. HORWITZ, ESQ.  
Idaho Bar No. 10494  
702 West Idaho Street, Suite 900  
Boise, Idaho 83702

/s/ Deborah A. Czuba

DEBORAH A. CZUBA, ESQ.  
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 document on October 1, 2020. Electronic service of the document shall be made in accordance with the Master Service List to:

Jonathan E. VanBoskerck  
Chief Deputy District Attorney  
200 East Lewis Avenue  
Las Vegas, Nevada 89101  
[Jonathan.VanBoskerck@clarkcountyda.com](mailto:Jonathan.VanBoskerck@clarkcountyda.com)

/s/ L. Hollis Ruggieri

L. Hollis Ruggieri

*Samuel Howard v. William Gittere*, Case Nos. 81278, 81279  
Filed in Support of Motion to Expedite

# **Exhibit 1**

**(Order Staying Proceedings,  
Ninth Circuit Case Nos. 10-99003, 19-70384,  
dated April 7, 2020)**

FILED

UNITED STATES COURT OF APPEALS

APR 7 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SAMUEL HOWARD,

Petitioner-Appellant,

v.

RENEE BAKER, Warden, Director of  
Nevada Department of Corrections,

Respondent-Appellee.

Nos. 10-99003, 19-70384

D.C. No. 2:93-cv-01209-LRH-LRL  
District of Nevada,  
Las Vegas

ORDER

Before: THOMAS, Chief Judge.

Proceedings in 10-99003 and 19-70384 are hereby stayed pending final resolution of Mr. Howard's exhaustion petition that is now pending in Nevada state court. *See Howard v. Gittere*, No. A-18-780434-W and 81C053867 (Eighth Judicial District, Clark County, Nevada).

Within 14 days after the Nevada state courts finally resolve that petition, the parties shall file status reports here in 10-99003 and 19-70384. In the interim, the Clerk's Office shall administratively close the dockets for 10-99003 and 19-70384, pending further order of the Court.

*Samuel Howard v. William Gittere*, Case Nos. 81278, 81279  
Filed in Support of Motion to Expedite

# **Exhibit 2**

**(Appellant's Motion to Lift Stay,  
Ninth Circuit Case No. 10-99003,  
filed June 2, 2020)**



Samuel Richard Rubin  
FEDERAL PUBLIC DEFENDER  
Jonah J. Horwitz, ID Bar No. 10494  
Deborah A. Czuba, ID Bar No. 9648  
ASSISTANT FEDERAL DEFENDERS  
Federal Defender Services of Idaho  
Capital Habeas Unit  
702 W. Idaho, Suite 900  
Boise, Idaho 83702  
Telephone: (208) 331-5530  
Facsimile: (208) 331-5559  
ECF: [Jonah\\_Horwitz@fd.org](mailto:Jonah_Horwitz@fd.org)  
[Deborah\\_A\\_Czuba@fd.org](mailto:Deborah_A_Czuba@fd.org)

Attorneys for Petitioner-Appellant  
SAMUEL HOWARD

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SAMUEL HOWARD,

Petitioner-Appellant,

v.

WILLIAM GITTERE,<sup>1</sup>  
Warden, Ely State Prison,

Respondent-Appellee.

**CAPITAL CASE**

Case No. 10-99003

D.C. No. 2:93-cv-01209-LRH-LRL

APPELLANT'S MOTION TO LIFT  
STAY

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<sup>1</sup> William Gittere is now Warden of Ely State Prison. *See* [http://doc.nv.gov/Facilities/ESP\\_Facility/](http://doc.nv.gov/Facilities/ESP_Facility/). As such, he should be automatically substituted in as respondent-appellee in this matter for his predecessor. *See* Fed. R. App. P. 43(c)(2); Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts. The district court likewise amended the caption of the case below to make Mr. Gittere the respondent. *See* Dist. Ct. Dkt. 393 at 1.

To prevent further delay in this case, Appellant Samuel Howard respectfully asks the Court to lift the stay, Dkt. 104,<sup>2</sup> on all claims, or in the alternative to do so with respect to the guilt-phase issues.

The typical reasons for a stay in the habeas universe are absent here. Ordinarily, a habeas action is stayed so that claims can be exhausted in state court before they are litigated in the federal proceeding. *See generally Rhines v. Weber*, 544 U.S. 269 (2005). However, the claims at issue here are *not* pending in the single ongoing state case. *Compare* Dist. Ct. Dkt. 321<sup>3</sup> (federal habeas petition under review in this case), *with Howard v. Gittere*, 9th Cir., No. 19-70384, Dkt. 1-1 at 59–73 (current state post-conviction petition).<sup>4</sup> That is presumably why neither party asked the Court to issue the stay, which it instead did sua sponte. Because there is no overlap between the claims raised here and those pending in state court, there is no need for the case at bar to be stayed.

Importantly, the current state post-conviction claim is the subject of litigation in *other* federal cases. *See Howard*, 9th Cir., No. 19-70384; *Howard v. Gittere*, Dist. Nev., No. 2:19-cv-247. Those other cases are therefore appropriately

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<sup>2</sup> Citations in the format above are to this Court’s docket in the instant appeal.

<sup>3</sup> Citations in the format above are to the district court’s docket in the proceedings giving rise to the instant appeal.

<sup>4</sup> In the ongoing state post-conviction case, the district court recently denied the petition and Mr. Howard filed a notice of appeal on May 29, 2020.

stayed until the state litigation concludes. *See Howard*, 9th Cir., No. 19-70384, Dkt. 5; *Howard*, Dist. Nev., No. 2:19-cv-247, Dkt. 8. But those are the only stays needed, for those are the only cases involving claims that are still being exhausted. By contrast, any exhaustion that was going to occur with the claims in *this* case has already happened. The district court ruled on them, *see* Dist. Ct. Dkts. 294, 369, 393, and they are ripe for appellate review. There is simply no basis to postpone their resolution.

To appreciate the timeline of this case, consider that Mr. Howard was charged with the crime at issue here in May 1981. *See* Dist. Ct. Dkt. 336-3. The case at bar arises from Mr. Howard’s principal habeas challenge to his convictions and sentence. *See* Dist. Ct. Dkt. 321. As such, the appeal concerns claims that have been winding their way through the judiciary for substantial periods of time—some as long as four decades. For example, Mr. Howard asserted in his direct appeal in 1986 that trial counsel labored under an unconstitutional conflict because “one member of the Clark County Public Defender’s Office had been the victim’s patient, and another member had been an acquaintance of the victim.” *Howard v. State*, 729 P.2d 1341, 1342 (Nev. 1986) (per curiam). He will be alleging the same claim in this appeal. *See* Dist. Ct. Dkt. 294 at 14–15 (district court’s ruling on the issue below).

In light of the above, Mr. Howard believes it would be appropriate for the Court to lift the stay in its entirety and order briefing on both guilt-phase and sentencing claims alike. Indeed, that approach is the only one that would facilitate an expeditious conclusion to *all* of Mr. Howard’s primary habeas claims. *See Barefoot v. Estelle*, 463 U.S. 880, 887–88 (1983) (emphasizing the importance of deciding capital habeas cases “as certainly and swiftly as orderly procedures will permit”), *superseded by statute on unrelated grounds as recognized by Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

In the absence of such an order, Mr. Howard respectfully suggests in the alternative that the Court at least dissolve the stay as it concerns the guilt-phase issues.

Although a ruling in Mr. Howard’s favor from the Nevada state courts on his pending post-conviction petition would potentially moot his federal sentencing claims, the same is not true of the guilt-phase issues. The single claim before the Nevada courts relates only to Mr. Howard’s death sentence. *See Howard*, 9th Cir., No. 19-70384, Dkt. 1-1, at 59–73. Even if relief were granted on it in the state courts, therefore, the result would at most be a vacatur of Mr. Howard’s death sentence. *See Duest v. Singletary*, 997 F.2d 1336, 1337 (11th Cir. 1993) (*per curiam*) (explaining that the court had previously granted relief on a similar claim and set aside the death sentence, while affirming the conviction). No matter what

happens in state court at this point, Mr. Howard's convictions will remain undisturbed, and they will have to be dealt with here eventually. Accordingly, a stay on the guilt-phase issues is not justified by either the efficiency interest in avoiding unnecessary litigation or the comity interest in avoiding unnecessary intrusions on the state courts.

It follows that the Court should at least move forward on Mr. Howard's guilt-phase claims, regardless of what it decides to do with the sentencing issues. *See Dickey v. Davis*, No. 1:06-cv-357, 2019 WL 4393156, at \*2 (E.D. Cal. Sept. 13, 2019) (mentioning that the court had bifurcated the briefing so that the guilt-phase claims could be decided in advance of the sentencing claims). Mr. Howard has been consistently protesting the charges underlying this case since his 1982 arraignment, where he also notably demanded a speedy trial. *See* Dist. Ct. Dkt. 336-10 at 3–4. Now that he has accomplished any required exhaustion of his guilt-phase claims through the state judiciary and the federal district court, he is entitled to a determination of his rights. If he prevails, an unconstitutional trial will at last be remedied forty years after the fact. If he loses, finality will at last be brought to convictions that have been in a perpetual state of uncertainty for forty years. In either event, the strong judicial commitment to finality will be served. *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998) (discussing the importance of finality in the habeas context).

For the reasons stated, Mr. Howard respectfully asks the Court to lift the stay in its entirety or—in the alternative—that it lift the stay in connection with the guilt-phase claims, and in either case that it release a briefing schedule for whatever issues it deems fit for adjudication.<sup>5</sup>

Undersigned counsel have conferred with the attorney who represents the State in this appeal, Heather D. Procter, and she has indicated that she opposes the instant motion.

DATED this 2nd day of June 2020.

/s/ Jonah J. Horwitz

Jonah J. Horwitz

/s/ Deborah A. Czuba

Deborah A. Czuba

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of June 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

Heather D. Procter  
[hprocter@ag.nv.gov](mailto:hprocter@ag.nv.gov)

/s/ Jonah J. Horwitz

Jonah J. Horwitz

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<sup>5</sup> As Mr. Howard has outlined in an earlier pleading, he believes it would be proper for the Court to also expand the certificate of appealability when it issues a briefing schedule. *See* Dkt. 102 at 3–5.

*Samuel Howard v. William Gittere*, Case Nos. 81278, 81279  
Filed in Support of Motion to Expedite

# **Exhibit 3**

**(Order Denying Motion to Lift Stay,  
Ninth Circuit Case No. 10-99003,  
filed July 27, 2020)**

FILED

UNITED STATES COURT OF APPEALS

JUL 27 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SAMUEL HOWARD,

Petitioner-Appellant,

v.

RENEE BAKER, Warden, Director of  
Nevada Department of Corrections,

Respondent-Appellee.

No. 10-99003

D.C. No. 2:93-cv-01209-LRH-LRL  
District of Nevada,  
Las Vegas

ORDER

Before: SCHROEDER and CALLAHAN, Circuit Judges.

Appellant moves to lift the stay of proceedings in 10-99003. *See* Docket Entry No. 105. Appellant alternatively requests that the stay of 10-99003 be lifted as to his conviction claims but continued as to his sentencing claims. Appellant acknowledges that his appeal now pending before the Nevada Supreme Court could moot his penalty claims in 10-99003. *See Howard v. State of Nevada*, Nos. 81278, 81279 (6/30/2020 order: answer due 7/27/2020; reply due within 30 days after service of answer). Appellee opposes the motion to lift the stay in full.

Appellant's opposed motion to lift the stay of 10-99003 is denied without prejudice to filing a new motion in this Court if the state courts have not finally resolved his pending appeal within 180 days from the date this order is filed. This Court's April 7, 2020 order, staying 10-99003 and 19-70384, remains in effect.