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### Moore v. State of Nevada, 134 Nev. Adv. Op. 35 (May 17, 2018)

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*Moore v. State of Nevada*, 134 Nev. Adv. Op. 35 (May 17, 2018)<sup>1</sup>

## CRIMINAL PROCEDURE: POSTCONVICTION PETITIONS

### **Summary**

The Court determined that the district court did not err when it denied Moore's procedurally barred postconviction petition for a writ of habeas corpus without an evidentiary hearing to determine if Moore could overcome the procedural bars.

### **Background**

Moore was convicted of first-degree murder and sentenced to death.<sup>2</sup> One witness against Moore, Angela Saldana, worked with law enforcement and her uncle to obtain information about the murders. The parties knew about this relationship during the trial. Moore directly appealed his conviction and the court issued a remittitur.

Moore sought postconviction relief in multiple actions. On September 19, 2013, more than a year after remittitur, Moore filed a postconviction petition for a writ of habeas corpus, which is the subject of the present controversy. The State of Nevada moved to dismiss Moore's petition and plead laches, or prejudice to the State in accordance with NRS 34.800(2).<sup>3</sup>

Moore argued that 1) the State unlawfully withheld evidence that Saldana's participation was involuntary and she was fed information from police records for her testimony, 2) Moore had ineffective counsel throughout his prior postconviction petition, and 3) Moore is innocent of the death penalty.

### **Discussion**

Moore's petition was untimely filed due to his filing over a year after remittitur was issued on his direct appeal,<sup>4</sup> and was successive due to his filing for postconviction relief prior to the present petition.<sup>5</sup> Therefore, Moore's petition must be dismissed unless he proves good cause for failing to timely file the petition and that he was prejudiced in earlier petition adjudications.<sup>6</sup> Because the State plead laches, there is a rebuttable presumption of prejudice to the State that Moore had to overcome.<sup>7</sup>

### *Brady v. Maryland*

Moore claims that the State withheld evidence in violation of *Brady v. Maryland*.<sup>8</sup> The petitioner must prove that "the evidence at issue is favorable to the accused; the evidence was

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<sup>1</sup> By Casey Lee.

<sup>2</sup> See *Flanagan v. State*, 112 Nev. 1409, 1412, 930 P.2d 691, 693 (1996).

<sup>3</sup> See NEV. REV. STAT. § 34.800(2) (2017).

<sup>4</sup> See NEV. REV. STAT. § 34.726(1).

<sup>5</sup> See NEV. REV. STAT. § 34.726(1); NEV. REV. STAT. § 34.810(1)(b).

<sup>6</sup> See NEV. REV. STAT. § 34.726(1); NEV. REV. STAT. § 34.810(1)–(3).

<sup>7</sup> See NEV. REV. STAT. § 34.800(2).

<sup>8</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.”<sup>9</sup>

First, the Court points out that Moore’s *Brady* claim was pled insufficiently. Moore fails to identify specific information that the State was withholding and why he did not raise the claim sooner. Moore cannot force the district court to hold an evidentiary trial by withholding information about his claim.<sup>10</sup>

Second, the Court determined that Moore’s *Brady* claim is unfounded. If proved, Moore’s assertion that Saldana’s testimony was coerced would fulfill the first two *Brady* elements: favorable to Moore and withheld by the State.<sup>11</sup> However, Moore failed to prove that the testimony would be material. Moore failed to prove that Saldana’s testimony was needed to corroborate accomplice testimony.<sup>12</sup> The other witnesses were not accomplices,<sup>13</sup> and Saldana’s testimony would still be admissible even if it was impeached. Additionally, Moore failed to prove that the omitted evidence impeaching Saldana would create a reasonable doubt in the mind of the jury in a way that would have changed Moore’s conviction or sentencing.<sup>14</sup>

#### *Ineffective assistance of postconviction counsel*

A petitioner sentenced to death is entitled to effective assistance of counsel for his first postconviction proceeding.<sup>15</sup> Ineffective assistance can excuse procedural bars to further postconviction proceedings.<sup>16</sup>

#### *Mitigating evidence regarding Moore’s upbringing*

Moore failed to demonstrate that counsel should have uncovered character witnesses in his favor when he himself fails to identify such witnesses in his brief.<sup>17</sup> Further, Moore failed to demonstrate prejudice as the jury heard substantially similar testimony at trial.<sup>18</sup>

#### *Mitigating evidence in the form of expert testimony*

Moore failed to demonstrate that counsel should have presented expert testimony regarding his mental health,<sup>19</sup> or that such evidence would have done more than “add[] an expert’s gloss” to the testimony presented.<sup>20</sup>

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<sup>9</sup> *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

<sup>10</sup> *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>11</sup> *See United States v. Scheer*, 168 F.3d 445, 449 (11th Cir. 1999); *see also Hunter v. State*, 29 So. 3d 256, 269 (Fla. 2008).

<sup>12</sup> NEV. REV. STAT. § 175.291 (requiring that accomplice testimony be corroborated).

<sup>13</sup> NEV. REV. STAT. § 175.291(2) (defining an accomplice as a person liable for the identical offense charged against the defendant).

<sup>14</sup> *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016); *State v. Huebler*, 128 Nev. 192, 2002, 275 P.3d 91, 98 (2012).

<sup>15</sup> NEV. REV. STAT. § 34.820(1).

<sup>16</sup> *Crump v. Warden*, 113 Nev. 293, 304–05, 934 P.2d 247, 253 (1997).

<sup>17</sup> *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *see also In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012).

<sup>18</sup> *See Wong v. Belmontes*, 558 U.S. 15, 23 (2009).

<sup>19</sup> *See generally Riley v. State*, 110 Nev. 638, 650–51, 878 P.2d 272, 280 (1994); *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997).

<sup>20</sup> *See Wong*, 558 U.S. at 24.

### *Additional expert testimony*

Moore failed to demonstrate that counsel should have presented an expert witness to question the connection between the guns in evidence and the bullet casings found at the scene, or how Moore's drug use could have undermined the mens rea requirement for first-degree murder because Moore himself failed to present such evidence.

### *Other ineffective-assistance claims*

Moore failed to demonstrate that 1) the prosecutors engaged in misconduct, 2) a juror did not speak English, or 3) the trial court failed to change venue because such claims could have been raised on direct appeal and were thus waived at the postconviction stage. Moore additionally failed to prove good cause and prejudice to overcome that bar because the failure of the district court to conduct an evidentiary hearing should have been raised on an appeal to that petition.<sup>21</sup>

### *Actual innocence*

A person is "actually innocent" of the death penalty if the record doesn't support such a penalty. Actual innocence means no rational juror could have found for the death penalty.<sup>22</sup> A showing of actual innocence excuses the procedural bar of failure to show good cause.<sup>23</sup>

The Court has previously rejected the argument that the aggravating circumstance that "the murder was committed by a person who knowingly created a great risk of death to more than one person" is unconstitutional.<sup>24</sup> Moore gave no reason to reconsider that decision. Additionally, there were more aggravating circumstances for which a jury to find for the death penalty.

The Court's failure to reweigh the aggravating circumstances analysis after the prior appeal is an argument for legal innocence, which cannot support a finding of actual innocence.<sup>25</sup>

### *Procedurally barred claims*

The court need not consider under a cumulative-error theory every claim previously raised and rejected,<sup>26</sup> and Moore fails to identify those claims.

## **Conclusion**

Moore failed to demonstrate that the district court erred by denying his procedurally barred postconviction petition without an evidentiary hearing.

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<sup>21</sup> See NEV. REV. STAT. § 34.810(1)(b).

<sup>22</sup> See *Lisle v. State*, 131 Nev. 356, 362, 351 P.3d 725, 730 (2015).

<sup>23</sup> See *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

<sup>24</sup> See *Flanagan v. State*, 112 Nev. 1409, 1421, 930 P.2d 691, 699 (1996).

<sup>25</sup> See *Mitchell v. State*, 122 Nev. 1269, 1273–74, 149 P.3d 33,36 (2006) ("Actual innocence means factual innocence, not mere legal insufficiency." (internal quotation marks omitted)).

<sup>26</sup> See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).