

No. \_\_\_\_\_

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OCTOBER TERM, 2017

**In the Supreme Court of the United States**

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RANDOLPH LYLE MOORE, Petitioner,

v.

WILLIAM GITTERE, Warden;  
ADAM LAXALT, Attorney General, State of Nevada, Respondents.

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On Petition for Writ of Certiorari to the  
Nevada Supreme Court

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**PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE**

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RENE L. VALLADARES  
Federal Public Defender of Nevada  
RANDOLPH M. FIELDER  
*Counsel of Record*  
Assistant Federal Public Defender  
411 E. Bonneville, Ste. 250  
Las Vegas, Nevada 89101  
(702) 388-6577  
(702) 388-5819 (Fax)  
randolph\_fieldler@fd.org

Counsel for Petitioner

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## QUESTIONS PRESENTED

(Capital Case)

While prosecuting Randolph Moore for capital murder, the prosecutors in this case relied heavily on testimony from Angela Saldana—the only State witness to testify against Moore who was not involved in planning or carrying out the homicides. But State actors intimidated Saldana, coached her testimony, and offered her significant benefits, and the State failed to disclose this to Moore or his attorneys. After discovering this withheld information, Moore petitioned for a writ of habeas corpus in Nevada state court, claiming that the State’s improper actions had deprived him of due process and a fair trial. But the Nevada Supreme Court affirmed the state trial court’s denial of relief, reasoning that Saldana’s testimony was not “crucial” to the State’s case, would not have “affected the outcome” of the trial, and did not “affirmatively undermine” other evidence presented to the jury.

The questions presented are:

1. Does *Brady v. Maryland*, 373 U.S. 83 (1963), require a defendant to prove that withheld evidence is crucial to the State’s case?
2. Does *Brady v. Maryland*, 373 U.S. 83 (1963), require a defendant to prove that withheld evidence would affect the outcome of a trial?
3. Does *Brady v. Maryland*, 373 U.S. 83 (1963), require a defendant to prove that withheld evidence affirmatively undermines other evidence presented to the jury?

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page. The named respondents represent the interests of the State of Nevada.

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## PETITION FOR WRIT OF CERTIORARI

As is often the case in Nevada, the team prosecuting Moore for capital murder failed to turn over evidence that could have been used to impeach the State's star witness—evidence showing that State actors had threatened the witness, promised her benefits, and coached her testimony. Under well-established precedent from this Court, the State's failure to turn over this evidence violated Moore's right to due process. But the Nevada Supreme Court read this Court's cases as imposing a higher standard for materiality—requiring that the evidence be “crucial” to the State's case, “affect[ ] the outcome” of the proceeding, and “affirmatively undermine[ ]” other evidence presented to the jury.

This case warrants certiorari review. Granting Moore's petition for certiorari provides this Court with the opportunity to correct the Nevada Supreme Court's erroneous application of this Court's well established jurisprudence concerning the Due Process Clause and the State's disclosure requirements. And granting Moore's petition for writ of certiorari allows this Court to rectify a systemic practice in Nevada—State actors routinely violate the rights of capital defendants by, among other actions, withholding material evidence from the defendant.

## OPINIONS BELOW

The initial decision of the Nevada Supreme Court affirming the denial of Moore's state post-conviction petition for writ of habeas corpus is unpublished and is found at Appendix A. The Nevada Supreme Court reissued the decision as a published opinion, *Moore v. State*, 417 P.3d 356 (Nev. 2018). *See* App. C. The

Nevada Supreme Court’s order denying the petition for rehearing is unreported and is found at Appendix B.

## **JURISDICTION**

The Nevada Supreme Court issued its initial order of affirmance on February 9, 2018, denied a timely petition for rehearing on April 27, 2018, and reissued the order of affirmance as a published decision on May 17, 2018. On July 17, 2018, Justice Kennedy extended the time to file a petition for writ of certiorari until and including September 24, 2018. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL PROVISIONS**

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

## **STATEMENT OF THE CASE**

During the 1980s, Clark County, Nevada, suffered from a blight of prosecutorial misconduct. This case represents the worst of that misconduct. It involves a prosecutor—Dan Seaton—whose lasting contribution to Nevada’s jurisprudence has been his notorious and brazen prosecutorial misconduct.<sup>1</sup> It

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<sup>1</sup> See *Howard v. State*, 800 P.2d 175, 180–81 & n.1 (Nev. 1990) (listing examples of Seaton’s misconduct and referring him to disciplinary board), *abrogated on other grounds by Harte v. State*, 13 P.3d 420, 432 n.6 (Nev. 2000); *Santillanes v. State*, 765 P.2d 1147, 1149 (1988) (“[W]e hereby direct the District Attorney of Clark County to take whatever administrative action may be necessary to assure that Mr. Seaton’s prosecutorial misconduct, so frequently repeated heretofore,



involves a scheme by a state investigator, the star witness's uncle, to coerce and coach that witness's testimony. And it involves a district attorney's office flouting a defendant's due process rights by refusing to turn over evidence of this coercion and coaching.

**A. Robert Peoples meets and becomes indebted to State investigator Beecher Avants**

Angela Saldana's testimony was the product of a cozy and codependent relationship: that of her uncle, Robert Peoples, and a State investigator, Beecher Avants. Peoples was a lifelong criminal, racking up juvenile and adult convictions and arrests throughout the western United States. In 1943, when Peoples was twelve years old, he was arrested for robbing a store. Eight years later, at twenty years of age, he was convicted of federal marijuana charges. The next year, he was arrested for a firearm violation, and two years after that he was arrested for larceny by conversion. That same year, Peoples was convicted of driving under the influence of drugs or alcohol and attempted extortion. Peoples served part of his sentence for attempted extortion in San Diego County, but he escaped. He was soon rearrested however, and convicted of transporting stolen vehicles across state lines. After serving that sentence, along with a short jail stint for fighting, Peoples was again arrested for armed robbery.

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does not again recur."); *Flanagan v. State*, 754 P.2d 836, 837–40 (Nev. 1988) (vacating Moore's and codefendant's death sentences because of "troubling and recurring issue of prosecutorial misconduct").

Peoples's criminal lifestyle reached its apex in 1965, when Peoples murdered his girlfriend and stashed her in a car with her two children. He was convicted in Nevada of premeditated murder and sentenced to life without the possibility of parole (later reduced by the Board of Pardons to life with the possibility of parole).

While Peoples was serving the life sentence for murder, he met Beecher Avants, a homicide detective who was dating Peoples's sister. Avants arranged to secure Peoples's release from prison—after Peoples had served only ten years of his life sentence—and, in exchange, Peoples entangled himself in Gramby Hanley's life. Peoples had also met Gramby Hanley while in prison. Peoples convinced Gramby Hanley, his father and alleged coconspirator Tom Hanley, and their attorneys that he was working for the defense. Peoples then seduced Tom Hanley's wife, Wendy Hanley, and persuaded her to lead him to the victim's clothing and jewelry, while Avants spied from an aircraft. With Peoples's help, Gramby and Tom Hanley were convicted. Peoples was paid for his assistance, and, after Tom Hanley's imprisonment, Peoples married Wendy Hanley.

Peoples's relationship with Avants did not end with the Hanleys' convictions. Peoples helped Avants—unofficially—in several additional cases and worked on Avants's campaign for Clark County Sheriff; in exchange, Avants protected Peoples from the consequences of his continuing criminal conduct. For example, after Peoples stabbed his sister's abusive partner, Avants threatened the partner at gunpoint in an effort to get charges dismissed against Peoples. Peoples and Avants helped each other.

**B. Peoples threatens Saldana and coaches her testimony and statements to police; the State fails to disclose this to the defense**

On November 6, 1984, the bodies of Carl and Colleen Gordon were found in their home. A short time later, Peoples told Avants that Saldana, his niece, was dating one of the suspects. Within a day, Avants, who then was the chief investigator for the Clark County District Attorney's office, visited Peoples, and the two men concocted a plan to have Saldana "solve" the case.<sup>2</sup> This plan required first that Peoples bring Saldana under his control; he did so by threatening Saldana that if she did not cooperate, she would be charged with conspiracy and executed. One month after the homicides, Saldana gave a statement to the police implicating Moore and others, leading to their arrests. That statement included information Peoples learned from police reports—provided by Avants—and passed on to Saldana.

Peoples and Avants's coercion of Saldana did not end after the arrests. Peoples continued feeding her information to present to the police and jury. Peoples would tell Saldana: "You're going to do this," and then tell her exactly what to say. Peoples would talk to Saldana for hours about the evidence in the case and rehearse her testimony. And Peoples continued threatening Saldana with prison if she failed to do exactly as he instructed. Avants visited Peoples several times during this

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<sup>2</sup> Avants, along with others, had lost his job as a homicide investigator for the Las Vegas Metropolitan Police Department because of corruption and lack of cooperation with federal law enforcement.

period, providing him with boxes of documents that Peoples could later provide to Saldana.

In addition to the threats and coaching, Peoples also promised substantial financial benefits to Saldana in exchange for her testimony, along with a position as an undercover investigator in Las Vegas schools.

**C. The State relies on Saldana's testimony at trial, and the jury convicts Moore and sentences him to death**

The State primarily used the statements of each coconspirator to obtain convictions for the others. There was one exception, however: Saldana. Saldana testified that: (1) Moore and his coconspirators had met in Moore's apartment; (2) while there they planned to kill the Gordons and make it look like a robbery; (3) they had carried out their plan, with Moore carrying a gun, attempting to break into the house, and shooting Carl Gordon; and (4) that they were motivated by inheritance and insurance proceeds.

The State referred to Saldana repeatedly, in both the opening statement and closing argument, emphasizing her importance because she was not a coconspirator:

There was one other person who wasn't present [at the crime] who took the stand and told you.

That was Angela Saldana. And she told you what happened in the last conspiratorial meeting throughout what she had heard from Dale Falangan in the trailer that day. Dale had told her the whole deal and she wasn't there.

She just heard this secondhand, what is typically hearsay but allowed in because it is a co-conspirator statement. It is the act of one that binds all or the statement of one which binds all.

So we have four people who were there and heard the words spoken. Actually, a fifth, Dale Flanagan, as told through the sixth, Angela Saldana.<sup>3</sup>

After the State emphasized Saldana's "damaging" and "incriminating" statements during closing argument, the jury convicted Moore and sentenced him to death.

**D. Peoples at the behest of Avants continues coercing Saldana's statements and testimony; the State fails to disclose this to the defense**

Peoples's intimidation and coaching of Saldana did not end with the first trial. Because of the "troubling and recurring issue of prosecutorial misconduct" during Moore's first penalty hearing, the Nevada Supreme Court granted a new penalty hearing. *See Moore v. State*, 754 P.2d 841 (Nev. 1988) (adopting reasoning of *Flangan*, 754 P.2d 836). Peoples's stepdaughter visited his apartment during this time, where she saw boxes of paperwork with the name of Moore's codefendant and heard Peoples talking to Saldana for hours at a time about the reports in those boxes. He also told Saldana "over and over" that she needed to testify in the second penalty hearing the same as she had in the first trial. And Peoples continued threatening Saldana, telling her, "You have to do this. You got paid, if you don't do it you're going to fry. They will put you in the electric chair." Saldana complied with Peoples's demands, again testifying that Moore and the other coconspirators met at Moore's apartment, drove over to the Gordons' house, broke in, and killed the Gordons for inheritance and insurance proceeds

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<sup>3</sup> Under Nevada law, the State needed to corroborate accomplice testimony with independent evidence. *See* NRS 175.291; *Heglemeier v. State*, 903 P.2d 799, 803–04 (Nev. 1995).

In 1992, this Court concluded that Moore's second penalty phase also suffered from error, this time improper prosecutorial references to Moore's religion, *Moore v. Nevada*, 503 U.S. 930 (1992) (per curiam), and the Nevada Supreme Court remanded for a third penalty hearing, *Flanagan v. State*, 846 P.2d 1053 (1993). Saldana told her aunt, Wendy Hanley, that she was expecting \$10,000 for her testimony. And Saldana at the penalty hearing repeated for the third time the information fed to her from Avants and Peoples.

**E. The trial court erroneously denies Moore's petition for writ of habeas corpus without an evidentiary hearing, and the Nevada Supreme Court misapplies *Brady* and affirms**

Evidence of Peoples and Avants's course of intimidation and coercion came to light and Moore petitioned for a writ of habeas corpus in state court, claiming that the State's failure to turn over this information violated Moore's right to due process.

The state trial court denied Moore's petition for writ of habeas corpus without holding an evidentiary hearing, and the Nevada Supreme Court affirmed. The court agreed with Moore that evidence Peoples coached and coerced Saldana's testimony was favorable to the defense. But the court held that the evidence was not material, explaining that Saldana's testimony was not "crucial," would not have "affected the outcome" of the trial, and did not "affirmatively undermine" other evidence presented to the jury.

## REASONS FOR GRANTING THE PETITION

The published decision in this case reflects a long line of Nevada Supreme Court cases imposing onerous requirements on *Brady* claims, which substantially exceed this Court’s case law: that the evidence is “crucial,” would change the outcome of the proceedings, and “affirmatively undermines” other evidence presented to the jury. These requirements squarely conflict with this Court’s holdings. *See, e.g., Wearry v. Cain*, 136 S. Ct. 1002, 1006–07 (2016) (*per curiam*); *Kyles v. Whitley*, 514 U.S. 419, 434–36 (1995); *United States v. Bagley*, 473 U.S. 667, 678–82 (1985). By imposing this unreasonably high standard, the Nevada Supreme Court allows prosecutors to violate defendants’ rights, knowing that the state courts will uphold convictions no matter the egregiousness of the prosecutors’ conduct.

As it did in *Wearry*, this Court should grant the petition for writ of certiorari, vacate the Nevada Supreme Court’s decision, and remand for further proceedings, rather than “forcing [Moore] to endure yet more time on [Nevada’s] death row in service of a conviction that is constitutionally flawed.” *Wearry*, 136 S. Ct. at 1008. Doing so will bring the State back in line with controlling *Brady* jurisprudence and prevent ongoing erosion of due process protections in Nevada.

### **A. Certiorari review is warranted because the Nevada Supreme Court failed to apply this Court’s settled law**

This Court will review and summarily decide cases resulting from state court judgments when “lower courts have egregiously misapplied settled law.” *Wearry*, 136 S. Ct. at 1007; *see, e.g., Sears v. Upton*, 561 U.S. 945, 952–56 (2010) (per

curiam). The Nevada Supreme Court routinely misapplies this Court's *Brady* precedents, and it has done so again here.

In order to establish a *Brady* violation, the defendant must prove that: (1) the prosecution suppressed evidence favorable to the accused; and (2) the evidence is material. *See Kyles*, 514 U.S. at 432–33; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Giglio v. United States*, 405 U.S. 150, 153–55 (1972) (explaining that evidence is favorable to the accused either if it is exculpatory or if it can be used to impeach state's witnesses). Critically, this Court's precedents do not require defendants to show that withheld evidence would have changed the outcome of the trial or penalty proceeding; evidence is material if there exists “*any reasonable likelihood*” that the withheld evidence could have affected the jury's judgment. *Giglio*, 405 U.S. at 154 (emphasis added) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)); *see Wearry*, 136 S. Ct. at 1006 & n.6; *Kyles*, 514 U.S. at 434; *Bagley*, 473 U.S. at 682. In other words, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles*, 514 U.S. at 434. And a verdict can be unworthy of confidence even if other evidence in the record is sufficient to convict. *Id.* at 434–35 (“[I]t is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.”).



This Court recently reaffirmed the standard for materiality. In *Wearry*, a capital case, the state relied heavily on the testimony of two jailhouse informants but failed to disclose impeaching evidence about those informants. 136 S. Ct. at 1003–04. The state’s highest court denied the petitioner’s *Brady* claim, but this Court granted the petition for writ of certiorari, vacated the state court’s judgment, and remanded for further proceedings. *Id.* at 1008. This Court specifically noted that, had the state disclosed the impeachment evidence, there might still have been sufficient evidence to convict. *Id.* at 1006–07 & n.6. But this was immaterial; because this Court’s materiality standard requires only a showing that the withheld evidence undermines confidence in the verdict, the petitioner could prevail even if the evidence ultimately would make no difference to the jury’s decision. *Id.* at 1006–07 & n.6.

Despite *Wearry*, *Kyles*, and other cases setting out this Court’s clear materiality standard, however, the Nevada Supreme Court rejected Moore’s *Brady* claim using a higher standard. The Nevada Supreme Court found immaterial the Saldanda evidence on the basis that her “secondhand testimony was not a crucial part of the State’s case.” App. C at 6. The court went on to note that “numerous witnesses testified that they observed Moore plan, commit, and confess to the murders, including witnesses who participated in the killings.” *Id.* This misapplies the materiality analysis because it fails to assess whether there can be confidence in the verdict in light of the suppressed evidence. *See Kyles*, 514 U.S. at 434. Even

assuming that Saldana's testimony was "not a crucial part of the State's case," it still undermined confidence in the verdict.<sup>4</sup>

The Nevada Supreme Court continued its misapplication of the materiality standard in analyzing whether the suppressed evidence was material to Moore's death sentence. *See* App. C at 6. The Nevada Supreme Court held that Moore failed "to demonstrate that the withheld evidence would have affected the outcome of the penalty hearing as it does not affirmatively undermine the evidence presented to the jury as to Moore's involvement, the motive for the murders, or the aggravating circumstances." *Id.* Again, this misapplies this Court's precedents; in focusing on the outcome of the proceedings and whether the suppressed evidence "affirmatively undermine[s] the evidence presented," the Nevada Supreme Court failed to ask the questions this Court's precedents require. *See Rippo v. Baker*, 137 S. Ct. 905, 907 (2017).

This is not an isolated misapplication of this Court's *Brady* precedents. The Nevada Supreme Court has repeatedly ruled that evidence is material only if it is "crucial" to the defense, i.e., it affirmatively undermines other evidence of guilt and would have affected the jury's verdict. *See, e.g., Reberger v. State*, 388 P.3d 961 2017 WL 176594, at \*2 (Nev. 2017) (unpublished disposition) (considering whether other evidence was sufficient to uphold conviction despite State's suppression of

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<sup>4</sup> Moreover, the Nevada Supreme Court's conclusion that the Saldana evidence was not "crucial" overlooks the fact that the other witnesses had substantial credibility problems. All of the witnesses who inculpated Moore were themselves implicated in the offense or received substantial benefits for their testimony. Thus, the witnesses all had strong incentive to testify against Moore, with the sole exception being Saldana.

evidence favorable to the defense); *Greene v. State*, No. 55971, 2016 WL 3524623, at \*1 (Nev. June 24, 2016) (unpublished disposition) (denying relief because withheld evidence was not “indispensable” and petitioner had not shown that result of trial would have been different had the State disclosed the evidence), *cert. denied*, 137 S. Ct. 2268 (2017); *McNelson v. State*, 381 P.3d 640, 2012 WL 1900106, at \*2 (Nev. 2012) (unpublished disposition) (denying *Brady* claim after determining that evidence was not “critical” and other evidence supported conviction); *Harris v. State*, 381 P.3d 618, 2012 WL 1655926, at \*1 (Nev. 2012) (unpublished disposition) (rejecting *Brady* claim using sufficiency-of-the-evidence test); *Snow v. State*, 373 P.3d 962, 2011 WL 3240819, at \*2 (Nev. 2011) (unpublished disposition) (requiring defendant to show that withheld evidence would have affected outcome of his trial); *Leonard v. State*, 373 P.3d 935, 2011 WL 5009403, at \*2 (Nev. 2011) (unpublished disposition) (denying relief because other evidence in the record supported conviction); *Steese v. State*, 960 P.2d 321, 330 (Nev. 1998) (rejecting *Brady* claim—brought by defendant who was later exonerated—because “[t]he State’s case . . . was strong”).<sup>5</sup>

Using the correct standard, the withheld evidence “undermine[s] confidence in the verdict” and thus is material for purposes of *Brady*. *Kyles*, 514 U.S. at 435; *see Wearry*, 136 S. Ct. at 1006–07; *Banks v. Dretke*, 540 U.S. 668, 698 (2004).

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<sup>5</sup> See Megan Rose, *Nevada Pardons Wrongfully Convicted Man Featured in V.F./Propublica Story*, Vanity Fair (Nov. 9, 2017), <https://www.vanityfair.com/news/2017/11/nevada-pardons-wrongfully-convicted-man-fred-steese>.

Because the State in prosecuting Moore was relying almost exclusively on testimony from coconspirators, Nevada law required the State to corroborate that testimony. *See* NRS 175.291 (“A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense . . . .”); *Heglemeier*, 903 P.2d at 803–04 (“In order for a defendant to be convicted on the testimony of an accomplice, the state must present other, independent evidence that tends to connect the defendant with the crime.”). That independent corroborating evidence was purportedly provided by Saldana—the only person to implicate Moore who had not also been implicated in the homicides.

Moreover, the withheld evidence corroborates a major defense theme: that the State obtained all of the witness testimony against Moore and his codefendants using improper tactics. Indeed, trial counsel could have been packaged the suppressed evidence with the impeachment that actually happened at trial. Saldana was subject to heavy cross-examination because of her romantic entanglements with people involved in the case: she sought a sexual and romantic relationship with codefendant Dale Flanagan to get incriminating information from him; another codefendant, Tom Akers believed they were in a relationship and proposed to her after being arrested; she has also previously been in a relationship with an officer who aided in the investigation. Saldana was also cross-examined about receiving \$2,000 for her testimony. The combined effect of this impeachment

evidence undermines confidence in the verdict. And it was not just the guilt phase that Saldana’s testimony mattered; the State relied extensively on Saldana’s testimony about Moore’s degree of involvement and motive in arguing for the death penalty.

**B. Certiorari review is warranted because of the extreme and unusual facts of this case**

When combined with a legal error, this Court will review decisions of state courts involving extreme, unusual facts. *See, e.g., Rippo*, 137 S. Ct. at 906; *Foster v. Chatman*, 136 S. Ct. 1737, 1754–55 (2016); *Wearry*, 136 S. Ct. at 1007–08; *see also Wellons v. Hall*, 558 U.S. 220, 220–21, 225 (2010) (per curiam) (noting “unusual facts of the case”). Three aspects of Moore’s case justify this Court’s review.

First, this case involves an extended campaign by State actors to coerce testimony, landing Moore on death row. That campaign included threats of incarceration and death, along with promises of substantial monetary benefits.

Second, the history of this case contains prejudicial errors and misconduct, of which the State’s *Brady* violations are just one. Starting with the guilt phase and continuing through post-conviction proceedings, this Court, the Nevada Supreme Court, and the state trial court all have acknowledged errors in Moore’s proceedings.

- Prosecutorial misconduct was pervasive during Moore’s guilt-phase and first penalty phase. Indeed, the Nevada Supreme Court reversed Moore’s death sentence because of “troubling and recurring . . .

prosecutorial misconduct,” which included inappropriate appeals to passion, references to future killings, comments on the defendants’ failure to testify, and expressions of personal beliefs. *Flanagan*, 754 P.2d at 837–40, reasoning adopted by Nevada Supreme Court in *Moore*, 754 P.2d 841. The court acknowledged that prosecutorial misconduct infected the guilt-phase, but found those errors harmless. *Id.*

- As to trial counsel’s performance during the guilt-phase, the prosecutor during the first post-conviction proceedings all but conceded that counsel was deficient, stating “I don’t want to go on record as saying that I concede that [trial counsel was ineffective,” noting “to the best of my recollection, it sounds to me like [trial counsel] didn’t do a very good job,” further noting “counsel did things that didn’t make much sense that were to his client’s detriment,” and stating “I stipulated that his performance was troubling.”<sup>6</sup> The Nevada Supreme Court found any deficiency was not prejudicial.
- The Nevada Supreme Court acknowledged that it was error for the State to use Moore’s religion during the guilt-phase, but found this error harmless. *Flanagan v. State*, 930 P.2d 691, 696 (Nev. 1996).

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<sup>6</sup> One egregious example of trial counsel’s deficient performance: trial counsel elicited testimony that Moore participated in Satanic practices, for no discernible reason. Counsel for Moore’s codefendants immediately moved for a mistrial.

- The Nevada Supreme Court acknowledged it was error, during the guilt-phase, for the trial court to require defense counsel to object off the record:

[W]e express disapproval of the district court's procedure in this regard. Parties are required to assert contemporaneous objections to preserve alleged errors for appellate review. Judge Mosley's unusual procedure frustrated the defense's ability to comply with this fundamental rule of appellate procedure. Additionally, it precluded the defense from securing any cautionary instructions to the jury should such instructions become necessary during the course of the trial.

This error, too, was harmless.

- After Moore's second penalty hearing, this Court granted Moore's petition for writ of certiorari, vacated the judgment, and remanded because of improper references to Moore's religious beliefs. *Moore*, 503 U.S. 930. The Nevada Supreme Court ordered a third penalty hearing.
- During the third penalty hearing in this case, the State relied on improper aggravating circumstances. During post-conviction proceedings, the trial court ordered a fourth penalty hearing, but this was vacated by the Nevada Supreme Court, which eventually found this error to be harmless.

Despite this proliferation of errors, Moore’s conviction and death sentence remain intact, and the Nevada Supreme Court failed to consider these other errors in determining the materiality of the suppressed evidence here.<sup>7</sup>

Third, the misconduct by State actors in this case exemplifies a systemic practice in Nevada—prosecutors violating defendants’ constitutional rights without reversal by the Nevada Supreme Court. *See Browning v. Baker*, 875 F.3d 444, 470 (9th Cir. 2017), *cert. denied sub nom. Filson v. Browning*, 138 S. Ct. 2608 (2018) (reversing in part denial of petition for writ of habeas corpus because of *Brady* violations by Nevada prosecutors); *Sechrest v. Ignacio*, 549 F.3d 789, 815 (9th Cir. 2008) (same because of misconduct by Nevada prosecutors); *Santillanes*, 765 P.2d at 1149 (“[W]e hereby direct the District Attorney of Clark County to take whatever administrative action may be necessary to assure that Mr. Seaton’s prosecutorial misconduct, *so frequently repeated heretofore*, does not again recur.” (emphasis added)); *Neal v. State*, 787 P.2d 764, 765 (Nev. 1990) (noting repeated admonishments to prosecutors to avoid improper comments); *Flanagan*, 754 P.2d at 837 (noting that this case, “once again, focuses our attention on the troubling and recurring issue of prosecutorial misconduct”); *McGuire v. State*, 677 P.2d 1060, 1065 (Nev. 1984) (imposing sanctions on prosecutors because of repeated misconduct).

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<sup>7</sup> This Court, in addition to granting relief, should hold that the state courts of Nevada have abdicated their jurisdiction over Moore.



## CONCLUSION

The Nevada Supreme Court consistently misapplies this Court's *Brady* jurisprudence, holding habeas petitioners to materiality standards that directly conflict with this Court's precedents. Prosecutors in Nevada are allowed to withhold exculpatory and impeachment evidence with impunity, leaving the Fourteenth Amendment toothless. The Nevada Supreme Court has demonstrated, unequivocally, that it will not hold prosecutors to their obligation to do justice. If federal due process is to have any meaning in Nevada, this Court must grant certiorari, vacate the Nevada Supreme Court's denial of Moore's *Brady* claim, and remand for the Nevada Supreme Court to apply the proper standards.

DATED this 24th day of September, 2018.

Respectfully submitted,

Rene Valladares  
Federal Public Defender of Nevada

Randolph M. Fieldler  
*Counsel of Record*  
Assistant Federal Public Defender  
411 E. Bonneville, Ste. 250  
Las Vegas, Nevada 89101  
(702) 388-6577  
Randolph\_Fieldler@fd.org

Counsel for Petitioner

## CERTIFICATE OF SERVICE

I hereby declare that on 24th day of September, 2018, I served this Petition for Writ of Certiorari, including the appendix, on the State of Nevada by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

Steven S. Owens  
Chief Deputy District Attorney  
200 Lewis Avenue  
Las Vegas, NV 89101

Dennis C. Wilson  
Senior Deputy Attorney General  
555 E. Washington Avenue, Suite 3900  
Las Vegas, NV 89101

Respectfully submitted,

RENE L. VALLADARES  
Federal Public Defender of Nevada

RANDOLPH M. FIELDER  
*Counsel of Record*  
Assistant Federal Public Defender  
411 E. Bonneville, Ste. 250  
Las Vegas, Nevada 89101  
(702) 388-6577  
(702) 388-5819 (Fax)  
randolph\_fieldler@fd.org

Counsel for Petitioner

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## APPENDIX A

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Order of Affirmance, *Moore v. State*,  
Nevada Supreme Court, Case No. 66652  
(February 9, 2018)

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDOLPH MOORE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66652

**FILED**

FEB 09 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying appellant Randolph Moore's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court denied Moore's petition as procedurally barred without conducting an evidentiary hearing. We affirm.

Moore filed his petition on September 19, 2013, more than one year after remittitur issued from his direct appeal. *See Flanagan v. State*, 112 Nev. 1409, 1418, 930 P.2d 691, 697 (1996). Thus, the petition was untimely filed. *See* NRS 34.726(1). The petition was also successive because Moore had previously sought postconviction relief. *See* NRS 34.810 (1)(b); NRS 34.810(2).<sup>1</sup> Accordingly, the petition was procedurally barred absent a demonstration of good cause and prejudice. *See* NRS. 34.726(1); NRS 34.810(1)(b), (2), (3). Moreover, because the State pleaded laches, Moore was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

---

<sup>1</sup>*Moore v. State*, Docket No. 46801 (Order Affirming in Part, Reversing in Part, and Remanding, April 23, 2008); *Moore v. State*, Docket No. 55091 (Order of Affirmance, August 1, 2012).

To overcome the procedural bars, Moore argues that: (1) the State's withholding of impeachment evidence violated *Brady v. Maryland*, 373 U.S. 83 (1963), (2) his attorneys were ineffective throughout the litigation of his prior postconviction petition, and (3) he is actually innocent of the death penalty.<sup>2</sup>

*Brady v. Maryland*

Moore claims that the State violated *Brady* by failing to disclose evidence that would have impeached a witness who testified at his trial, Angela Saldana.<sup>3</sup> There are three components to a successful *Brady* claim: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). When a *Brady* claim is raised in the context of a procedurally barred postconviction petition, the petitioner has the burden of demonstrating good cause for his failure to present the claim earlier and actual prejudice. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). As a general rule, "[g]ood cause and prejudice parallel the second and third *Brady* components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." *Id.*

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<sup>2</sup>We reject Moore's request to remand this matter for the district court to make better findings regarding the procedural bars.

<sup>3</sup>Moore also argues that first postconviction counsel was ineffective for failing to uncover the evidence supporting his *Brady* claim. However, he provides no explanation as to how a reasonable postconviction attorney would have uncovered the evidence, and for the reasons explained below, the *Brady* claim fails.

Before discussing this claim in more detail, we note that it is inadequately pleaded. Before trial, the parties knew that Saldana had been working with law enforcement and her uncle, Robert Peoples, in order to obtain information about the murders. Since then, Moore has consistently challenged Saldana's role in the case. Although he alleges in his opening brief that he has recently discovered new facts putting the claim in a different light, he fails to identify with specificity which facts this court previously considered and which facts are new. Moore actually asserts that he is under *no obligation* to "distinguish between 'new' facts and facts which were known and previously presented." He is mistaken, as he bears the burden of demonstrating that relief is warranted, which means he must explain why he is raising this claim again, or if it is new, why he did not raise it sooner. *See* NRS 34.810; NRS 34.810(1)9(b). He also bears the burden of demonstrating that the district court erred, which means he must demonstrate that the State withheld material evidence and that he raised the claim within a reasonable time. *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012). Meeting these burdens requires being forthright: a party cannot force the district court to hold an evidentiary hearing by withholding information about a claim. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (recognizing that a petitioner is entitled to an evidentiary hearing regarding his claim if it is not belied by the record and, if true, would warrant relief).

Moore provided some clarity at oral argument in this court. Considering those assertions along with those raised in his opening brief, what forms the basis of his *Brady* claim is apparently the notion that rather than being a willing participant in the investigation into Moore's codefendant as previously believed, Saldana was forced to participate

against her will and was fed information by Peoples, who had access to police reports. Assuming, without deciding, that Moore raised this claim within a reasonable time, we nevertheless conclude that he fails to demonstrate that relief is warranted.

Accepting Moore's assertions as true, evidence that Peoples coached and coerced Saldana's testimony constitutes favorable evidence, see *United States v. Scheer*, 168 F.3d 445, 449 (11th Cir. 1999) (holding that by "withholding information regarding the prosecutor's threatening remarks to a key prosecution witness, the government failed to divulge material impeachment evidence that was, in essence, exculpatory by virtue of its ability to cast substantial doubt on the credibility of the witness"); see also *Hunter v. State*, 29 So. 3d 256, 269 (Fla. 2008) (evidence that the State threatened a witness with a life sentence if she failed to testify against the defendant satisfied the first two prongs of *Brady*), in the State's possession.<sup>4</sup> However, we conclude that the allegedly withheld evidence is not material. Moore asserts that the evidence was material because the State needed Saldana's testimony to corroborate the other witnesses pursuant to NRS 175.291 (requiring corroboration for accomplice testimony). But an accomplice is defined as one who is liable for the identical offense charged against the defendant, NRS 175.291(2), and several of the witnesses who testified against Moore were not liable for first-degree murder; further,

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<sup>4</sup>We note that Moore summarily concludes that the State possessed this evidence because "an investigator with the Clark County District Attorney's office was very involved with Mr. Peoples in coercing Ms. Saldana," but he admits that the investigator was not involved at all stages of the alleged coercion campaign and that the investigator and the other actors involved were acting outside of their official capacities. Nevertheless, because the district court did not hold an evidentiary hearing on this claim, we will assume that the evidence was in the State's possession.



impeaching Saldana would not have eliminated her testimony and therefore it still could have been used to corroborate the other witnesses.

Regardless, materiality for the purposes of *Brady* focuses on whether the withheld evidence might create a reasonable doubt in the mind of the jury, *Wearry v. Cain*, \_\_\_ U.S. \_\_\_, \_\_\_, 136 S. Ct. 1002, 1006 (2016) (“Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury.” (internal quotation marks omitted)); *Huebler*, 128 Nev. at 202, 275 P.3d at 98 (“Normally, evidence is material if it creates a reasonable doubt” (internal quotation marks omitted)), not whether it implicates a state statute requiring corroboration. Applying that test, Moore’s claim still fails. Saldana’s secondhand testimony was not a crucial part of the State’s case. In contrast, numerous witnesses testified that they observed Moore plan, commit, and confess to the murders, including witnesses who participated in the killings. See generally *Turner v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 1885, 1894 (2017) (concluding that withheld evidence was not material when it would have required the jury to believe that two witnesses falsely confessed even though their testimony was “highly similar” to that of other witnesses). Impeaching Saldana would not have undermined this testimony. In light of this, Moore seems to acknowledge that he played a role in the crime and that the jury would have so concluded even if the allegedly withheld evidence was presented to impeach Saldana, but he argues that it might have led to a different penalty determination because it might have caused the jury to doubt the *level* of his involvement or the *motive* behind the murders. Moore fails to demonstrate that the withheld evidence would have affected the outcome of the penalty hearing as it does not affirmatively

undermine the evidence presented to the jury as to Moore's involvement, the motive for the murders, or the aggravating circumstances.

For all of these reasons, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

*Ineffective assistance of postconviction counsel*

Moore contends that he demonstrated good cause and prejudice to excuse the procedural bars because postconviction counsel was ineffective. Because a petitioner sentenced to death is entitled to the appointment of counsel for his first postconviction proceeding, see NRS 34.820(1), he is entitled to the effective assistance of that counsel, and a meritorious claim that postconviction counsel was ineffective can provide cause to excuse the procedural bars, *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997).<sup>5</sup>

*Mitigating evidence regarding Moore's upbringing*

Moore argues that postconviction counsel should have found evidence to support the claim that trial counsel was ineffective for failing to present mitigating evidence regarding Moore's background. Moore fails to demonstrate deficient performance. See *Crump*, 113 Nev. at 304 & n.6, 934 P.2d at 254 & n.6 (applying the deficiency-and-prejudice test of *Strickland v. Washington*, 466 U.S. 668 (1984) to postconviction counsel). Although he provides a colorful narrative of his life, including quotes from witnesses and citations to the record, he routinely fails to identify who the witnesses are or how they came to know something about him. Having reviewed the

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<sup>5</sup>We note that the district court incorrectly concluded that some of Moore's ineffective-assistance claims were not raised within a reasonable time, as these claims were not available until the postconviction proceedings concluded.

included declarations, it seems these derelictions were intentional. Many of the alleged witnesses appear to have had little to no involvement in Moore's life, and he provides no explanation as to why a reasonable postconviction attorney conducting a reasonable investigation would have sought them out. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up."). Thus, although Moore has apparently uncovered many witnesses over the last several decades, he fails to demonstrate that postconviction counsel acted unreasonably by failing to do the same. *See In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012) ("[T]he mere fact that new counsel has discovered some background information concerning a defendant's family, educational or medical history that was not presented to the jury at trial in mitigation of penalty is insufficient, standing alone, to demonstrate prior counsel's actions fell below the standard of professional competence.").

Moore also fails to demonstrate prejudice. Trial counsel presented similar evidence about the same mitigating themes. Although no one testified about Moore's mother's contribution to his problematic childhood, and his drug use was only casually referenced, the jury heard about his difficult upbringing, the lack of a father figure, the traumatic deaths of his loved ones, and his compromised thinking around the time of the murders. Additional evidence might have provided more details about Moore's life, but it would not have altered the picture of Moore that trial counsel presented in any meaningful way. *See Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (denying relief where the sentencing jury was aware of the defendant's background and "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all").

*Mitigating evidence in the form of expert testimony*

Moore argues that postconviction counsel should have presented mitigating testimony from experts. Moore fails to demonstrate deficient performance and prejudice. Although he correctly points out that postconviction counsel faulted trial counsel for not presenting such testimony, Moore fails to demonstrate that the challenge to trial counsel's performance would have succeeded as he points to nothing in the record which establishes that trial counsel should have suspected that his mental health was at issue at the time. *See generally Riley v. State*, 110 Nev. 638, 650-51 878 P.2d 272, 280 (1994) (explaining that trial counsel was not ineffective for failing to have the defendant psychologically evaluated despite indications that the defendant had previously been hospitalized and had abused drugs); *see also Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) ("[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). Further, expert testimony regarding the "humanizing" evidence would merely have added an expert's gloss to the testimony the jury already heard. *See Belmontes*, 558 U.S. at 24. While it may have reinforced the mitigating theme that Moore committed the murders while in a period of emotional tumult, this theme was "neither complex nor technical. It required only that the jury make logical connections of the kind a layperson is well equipped to make." *Id.* We therefore conclude that the district court did not err by denying this claim without an evidentiary hearing.

*Additional expert testimony*

Moore argues that postconviction counsel should have argued that trial counsel was ineffective for failing to hire a criminalist, whose testimony would have cast doubt upon "the authenticity of the testimony regarding the guns, and whether the guns could be connected to the bullets or casings founds [sic] at the crime scene." Moore also argues that postconviction counsel should have argued that trial counsel was ineffective for failing to hire an expert in substance abuse, whose testimony would have undermined "the mens rea requirement for first-degree murder." Moore fails to demonstrate deficient performance or prejudice; he does not, for example, explain how testimony regarding guns and ammunition was used at trial, what conclusions an expert could have provided that would have changed the result, nor how expert testimony would have shown he did not meet the mens rea requirement for murder. These bare assertions are insufficient to warrant relief and therefore Moore fails to demonstrate that the district court erred by denying this claim without an evidentiary hearing.

*Other ineffective-assistance claims*

Moore also argues that postconviction counsel should have argued that: (1) the prosecutors engaged in repeated misconduct, (2) a penalty-phase juror was not proficient in English, and (3) the trial court failed to change venue. These claims were waived by the time of the first postconviction proceeding because they could have been raised on direct appeal and Moore failed to demonstrate good cause and prejudice for the

failure to do so. *See* NRS 34.810(1)(b).<sup>6</sup> Therefore, he fails to demonstrate that the district court erred by denying this claim without conducting an evidentiary hearing.

*Actual innocence*

Moore contends that the district court erred by denying his petition because he is actually innocent of the death penalty, which may excuse the failure to show good cause. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). In the death penalty context, actual innocence means that no rational juror would have found Moore eligible for the death penalty. *See Lisle v. State*, 131 Nev., Adv. Op. 39, 351 P.3d 725, 730 (2015).

Moore first asserts that he is actually innocent because 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 invalid on its face and unconstitutional as applied to him. This court has rejected these arguments, *see Flanagan v. State*, 112 Nev. 1409, 1421, 930 P.2d 691, 699 (1996), and Moore provides no cause to reconsider the decisions, *see Lisle*, 131 Nev., Adv. Op. 39, 351 P.3d at 730 (concluding that a petitioner was not entitled to relief on his actual-innocence challenge where he “points to no new evidence supporting his claim of actual innocence with respect to the aggravating circumstance[,] [n]or do his arguments present any issue of first impression as to the legal validity of the aggravating circumstance” (internal citation omitted)). Moreover, there remains another aggravating

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<sup>6</sup>Moore asserts that the district court’s failure to appoint an investigator and conduct an evidentiary hearing during the first postconviction proceeding constitutes good cause and prejudice. Any failure on the part of the district court should have been raised on the appeal from the denial of that petition.

circumstance and therefore Moore is still eligible for death such that he is not actually innocent of the death penalty. *See id.* at 734.

Moore also contends that he is actually innocent because this court did not appropriately conduct a reweighing analysis when resolving a prior appeal. This argument constitutes legal innocence rather than factual innocence and does not relate to death-eligibility. *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)). Therefore, we conclude that the district court did not err by denying this claim.

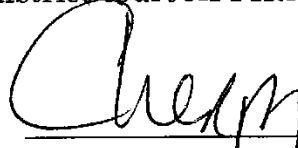
*Procedurally-barred claims*

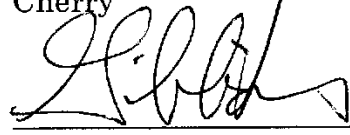
Moore argues that, under a cumulative-error theory, this court must consider other claims which were previously raised and rejected by this court. We disagree. Many of the claims are bereft of legal analysis or citations to controlling authority. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”). Further, Moore fails to identify the prior proceeding where the claim was raised, the nature of the error this court found, why this court concluded that the error was harmless, and how any error in this proceeding cumulates with the prior error. *See Reno*, 283 P.3d at 1223.<sup>7</sup>

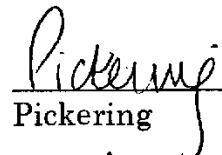
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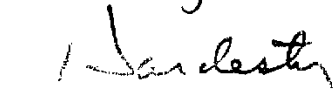
<sup>7</sup>Moore’s claim that lethal injection violates the Eighth Amendment is premature. *See McConnell v. State*, 125 Nev. 243, 249, 212 P.3d 307, 311 (2009).

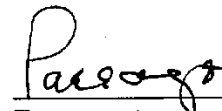
As Moore fails to demonstrate that the district court erred, we  
ORDER the judgment of the district court AFFIRMED.<sup>8</sup>


\_\_\_\_\_, J.  
Cherry

\_\_\_\_\_, J.  
Gibbons

\_\_\_\_\_, J.  
Pickering

\_\_\_\_\_, J.  
Hardesty

\_\_\_\_\_, J.  
Parraguirre

\_\_\_\_\_, J.  
Stiglich

cc: Hon. Michelle Leavitt, District Judge  
Federal Public Defender/Las Vegas  
Tiffani D. Hurst  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>8</sup>The Honorable Michael Douglas, Chief Justice, voluntarily recused himself from participation in the decision of this matter.



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**APPENDIX B**

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**Order Denying Rehearing, *Moore v. State*,  
Nevada Supreme Court, Case No. 66652  
(April 27, 2018)**

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDOLPH MOORE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66652

FILED


APR 27 2018

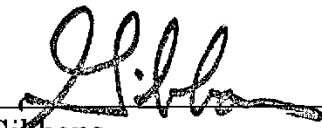
ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

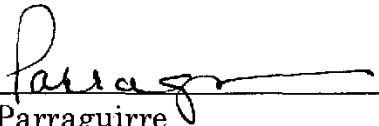
It is so ORDERED.<sup>1</sup>

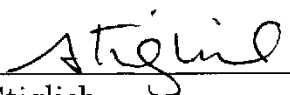
  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Stiglich

cc: Hon. Michelle Leavitt, District Judge  
Federal Public Defender/Las Vegas  
Tiffani D. Hurst  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

<sup>1</sup>The Honorable Michael Douglas, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

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## APPENDIX C

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Per Curiam Opinion, *Moore v. State*,  
Nevada Supreme Court, Case No. 66652  
(May 17, 2018)

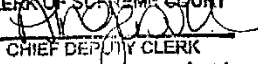
**134 Nev., Advance Opinion 35**  
**IN THE SUPREME COURT OF THE STATE OF NEVADA**

RANDOLPH MOORE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66652

**FILED**

**MAY 17 2018**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

*Affirmed.*

Rene L. Valladares, Federal Public Defender, and Randolph M. Fiedler and Tiffani D. Hurst, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Steven S. Owens, Chief Deputy District Attorney, Clark County, for Respondent.


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BEFORE CHERRY, GIBBONS, PICKERING, HARDESTY,  
PARRAGUIRRE and STIGLICH, JJ.<sup>1</sup>

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<sup>1</sup>The Honorable Michael Douglas, Chief Justice, did not participate in the decision of this matter.

SUPREME COURT  
OF  
NEVADA

(O) 1947A 

18-10012

## OPINION

### PER CURIAM:

The district court denied appellant Randolph Moore's postconviction petition for a writ of habeas corpus as procedurally barred without conducting an evidentiary hearing. We affirm.<sup>2</sup>

Moore was convicted of first-degree murder and sentenced to death for his involvement in killing his friend Dale Flanagan's grandparents. See *Flanagan v. State*, 112 Nev. 1409, 1412, 930 P.2d 691, 693 (1996). Moore filed the postconviction petition at issue in this case on September 19, 2013, more than one year after remittitur issued from his direct appeal. Thus, the petition was untimely filed. See NRS 34.726(1). The petition was also successive because Moore had previously sought postconviction relief. See NRS 34.810(1)(b); NRS 34.810(2). Accordingly, the petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b), (2), (3). Moreover, because the State pleaded laches, Moore was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

To overcome the procedural bars, Moore argues that: (1) the State's withholding of impeachment evidence violated *Brady v. Maryland*, 373 U.S. 83 (1963), (2) his attorneys were ineffective throughout the

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<sup>2</sup>We previously issued our decision in this matter in an unpublished order. Cause appearing, we grant the State's motion to reissue the order as an opinion, see NRAP 36(f), and issue this opinion in place of our prior order.

litigation of his prior postconviction petition, and (3) he is actually innocent of the death penalty.<sup>3</sup>

*Brady v. Maryland*

Moore claims that the State violated *Brady* by failing to disclose evidence that would have impeached a witness who testified at his trial, Angela Saldana.<sup>4</sup> There are three components to a successful *Brady* claim: “the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.” *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). When a *Brady* claim is raised in the context of a procedurally barred postconviction petition, the petitioner has the burden of demonstrating good cause for his failure to present the claim earlier and actual prejudice. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). As a general rule, “[g]ood cause and prejudice parallel the second and third *Brady* components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.” *Id.*

Before discussing this claim in more detail, we note that it is inadequately pleaded. Before trial, the parties knew that Saldana had been working with law enforcement and her uncle, Robert Peoples, in order to obtain information about the murders. Since then, Moore has consistently

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<sup>3</sup>We reject Moore’s request to remand this matter for the district court to make better findings regarding the procedural bars.

<sup>4</sup>Moore also argues that first postconviction counsel was ineffective for failing to uncover the evidence supporting his *Brady* claim. However, he provides no explanation as to how a reasonable postconviction attorney would have uncovered the evidence, and for the reasons explained below, the *Brady* claim fails.

challenged Saldana's role in the case. Although he alleges in his opening brief that he has recently discovered new facts putting the claim in a different light, he fails to identify with specificity which facts this court previously considered and which facts are new. Moore actually asserts that he is under *no obligation* to "distinguish between 'new' facts and facts which were known and previously presented." He is mistaken, as he bears the burden of demonstrating that relief is warranted, which means he must explain why he is raising this claim again, or if it is new, why he did not raise it sooner. See NRS 34.810; NRS 34.810(1)(b). He also bears the burden of demonstrating that the district court erred, which means he must demonstrate that the State withheld material evidence and that he raised the claim within a reasonable time. *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012). Meeting these burdens requires being forthright: a party cannot force the district court to hold an evidentiary hearing by withholding information about a claim. See *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (recognizing that a petitioner is entitled to an evidentiary hearing regarding his claim if it is not belied by the record and, if true, would warrant relief).

Moore provided some clarity at oral argument in this court. Considering those assertions along with those raised in his opening brief, what forms the basis of his *Brady* claim is apparently the notion that rather than being a willing participant in the investigation into Moore's codefendant as previously believed, Saldana was forced to participate against her will and was fed information by Peoples, who had access to police reports. Assuming, without deciding, that Moore raised this claim within a reasonable time, we nevertheless conclude that he fails to demonstrate that relief is warranted.

Accepting Moore's assertions as true, evidence that Peoples coached and coerced Saldana's testimony constitutes favorable evidence, see *United States v. Scheer*, 168 F.3d 445, 449 (11th Cir. 1999) (holding that by "withholding information regarding the prosecutor's threatening remarks to a key prosecution witness, the government failed to divulge material impeachment evidence that was, in essence, exculpatory by virtue of its ability to cast substantial doubt on the credibility of the witness"); see also *Hunter v. State*, 29 So. 3d 256, 269 (Fla. 2008) (evidence that the State threatened a witness with a life sentence if she failed to testify against the defendant satisfied the first two prongs of *Brady*), in the State's possession.<sup>5</sup> However, we conclude that the allegedly withheld evidence is not material. Moore asserts that the evidence was material because the State needed Saldana's testimony to corroborate the other witnesses' testimony pursuant to NRS 175.291 (requiring corroboration for accomplice testimony). But an accomplice is defined as one who is liable for the identical offense charged against the defendant, NRS 175.291(2), and several of the witnesses who testified against Moore were not liable for first-degree murder; further, impeaching Saldana would not have eliminated her testimony, and therefore, it still could have been used to corroborate the other witnesses.

Regardless, materiality for the purposes of *Brady* focuses on whether the withheld evidence might create a reasonable doubt in the mind

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<sup>5</sup>We note that Moore summarily concludes that the State possessed this evidence because "an investigator with the Clark County District Attorney's office was very involved with Mr. Peoples in coercing Ms. Saldana," but he admits that the investigator was not involved at all stages of the alleged coercion campaign and that the investigator and the other actors involved were acting outside of their official capacities. Nevertheless, because the district court did not hold an evidentiary hearing on this claim, we will assume that the evidence was in the State's possession.



of the jury, *Wearry v. Cain*, \_\_\_ U.S. \_\_\_, \_\_\_, 136 S. Ct. 1002, 1006 (2016) (“Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury.” (internal quotation marks omitted)); *Huebler*, 128 Nev. at 202, 275 P.3d at 98 (“Normally, evidence is material if it creates a reasonable doubt.” (internal quotation marks omitted)), not whether it implicates a state statute requiring corroboration. Applying that test, Moore’s claim still fails. Saldana’s secondhand testimony was not a crucial part of the State’s case. In contrast, numerous witnesses testified that they observed Moore plan, commit, and confess to the murders, including witnesses who participated in the killings. See generally *Turner v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 1885, 1894 (2017) (concluding that withheld evidence was not material when it would have required the jury to believe that two witnesses falsely confessed even though their testimony was “highly similar” to that of other witnesses). Impeaching Saldana would not have undermined this testimony. In light of this, Moore seems to acknowledge that he played a role in the crime and that the jury would have so concluded even if the allegedly withheld evidence was presented to impeach Saldana, but he argues that it might have led to a different penalty determination because it might have caused the jury to doubt the *level* of his involvement or the *motive* behind the murders. Moore fails to demonstrate that the withheld evidence would have affected the outcome of the penalty hearing as it does not affirmatively undermine the evidence presented to the jury as to Moore’s involvement, the motive for the murders, or the aggravating circumstances.

For all of these reasons, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

*Ineffective assistance of postconviction counsel*

Moore contends that he demonstrated good cause and prejudice to excuse the procedural bars because postconviction counsel was ineffective. Because a petitioner sentenced to death is entitled to the appointment of counsel for his first postconviction proceeding, see NRS 34.820(1), he is entitled to the effective assistance of that counsel, and a meritorious claim that postconviction counsel was ineffective can provide cause to excuse the procedural bars, *Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 253 (1997).<sup>6</sup>

*Mitigating evidence regarding Moore's upbringing*

Moore argues that postconviction counsel should have found evidence to support the claim that trial counsel was ineffective for failing to present mitigating evidence regarding Moore's background. Moore fails to demonstrate deficient performance. See *Crump*, 113 Nev. at 304 & n.6, 934 P.2d at 254 & n.6 (applying the deficiency-and-prejudice test of *Strickland v. Washington*, 466 U.S. 668 (1984), to postconviction counsel). Although he provides a colorful narrative of his life, including quotes from witnesses and citations to the record, he routinely fails to identify who the witnesses are or how they came to know something about him. Having reviewed the included declarations, it seems these derelictions were intentional. Many of the alleged witnesses appear to have had little to no involvement in Moore's life, and he provides no explanation as to why a reasonable postconviction attorney conducting a reasonable investigation would have

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<sup>6</sup>We note that the district court incorrectly concluded that some of Moore's ineffective-assistance-of-postconviction-counsel claims were not raised within a reasonable time, as these claims were not available until the first postconviction proceedings concluded.

sought them out. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (“[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up.”). Thus, although Moore has apparently uncovered many witnesses over the last several decades, he fails to demonstrate that postconviction counsel acted unreasonably by failing to do the same. *See In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012) (“[T]he mere fact that new counsel has discovered some background information concerning a defendant’s family, educational or medical history that was not presented to the jury at trial in mitigation of penalty is insufficient, standing alone, to demonstrate prior counsel’s actions fell below the standard of professional competence.”).

Moore also fails to demonstrate prejudice. Trial counsel presented similar evidence about the same mitigating themes. Although no one testified about Moore’s mother’s contribution to his problematic childhood, and his drug use was only casually referenced, the jury heard about his difficult upbringing, the lack of a father figure, the traumatic deaths of his loved ones, and his compromised thinking around the time of the murders. Additional evidence might have provided more details about Moore’s life, but it would not have altered the picture of Moore that trial counsel presented in any meaningful way. *See Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (denying relief where the sentencing jury was aware of the defendant’s background and “[a]dditional evidence on these points would have offered an insignificant benefit, if any at all”).

*Mitigating evidence in the form of expert testimony*

Moore argues that postconviction counsel should have presented mitigating testimony from experts. Moore fails to demonstrate deficient performance and prejudice. Although he correctly points out that

postconviction counsel faulted trial counsel for not presenting such testimony, Moore fails to demonstrate that the challenge to trial counsel's performance would have succeeded as he points to nothing in the record which establishes that trial counsel should have suspected that his mental health was at issue at the time. *See generally Riley v. State*, 110 Nev. 638, 650-51, 878 P.2d 272, 280 (1994) (explaining that trial counsel was not ineffective for failing to have the defendant psychologically evaluated despite indications that the defendant had previously been hospitalized and had abused drugs); *see also Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) ("[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). Further, expert testimony regarding the "humanizing" evidence would merely have added an expert's gloss to the testimony the jury already heard. *See Belmontes*, 558 U.S. at 24. While it may have reinforced the mitigating theme that Moore committed the murders while in a period of emotional tumult, this theme was "neither complex nor technical. It required only that the jury make logical connections of the kind a layperson is well equipped to make." *Id.* We therefore conclude that the district court did not err by denying this claim without an evidentiary hearing.

*Additional expert testimony*

Moore argues that postconviction counsel should have argued that trial counsel was ineffective for failing to hire a criminalist, whose testimony would have cast doubt upon "the authenticity of the testimony regarding the guns, and whether the guns could be connected to the bullets or casings found[] at the crime scene." Moore also argues that

postconviction counsel should have argued that trial counsel was ineffective for failing to hire an expert in substance abuse, whose testimony would have undermined “the mens rea requirement for first-degree murder.” Moore fails to demonstrate deficient performance or prejudice; he does not, for example, explain how testimony regarding guns and ammunition was used at trial, what conclusions an expert could have provided that would have changed the result, nor how expert testimony would have shown he did not meet the mens rea requirement for murder. These bare assertions are insufficient to warrant relief and therefore Moore fails to demonstrate that the district court erred by denying this claim without an evidentiary hearing.

*Other ineffective-assistance claims*

Moore also argues that postconviction counsel should have argued that: (1) the prosecutors engaged in repeated misconduct, (2) a penalty-phase juror was not proficient in English, and (3) the trial court failed to change venue. These claims were waived by the time of the first postconviction proceeding because they could have been raised on direct appeal and Moore failed to demonstrate good cause and prejudice for the failure to do so. See NRS 34.810(1)(b).<sup>7</sup> Therefore, he fails to demonstrate that the district court erred by denying this claim without conducting an evidentiary hearing.

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<sup>7</sup>Moore asserts that the district court’s failure to appoint an investigator and conduct an evidentiary hearing during the first postconviction proceeding constitutes good cause and prejudice. Any failure on the part of the district court should have been raised on the appeal from the denial of that petition.

*Actual innocence*

Moore contends that the district court erred by denying his petition because he is actually innocent of the death penalty, which may excuse the failure to show good cause. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). In the death penalty context, actual innocence means that no rational juror would have found Moore eligible for the death penalty. *See Lisle v. State*, 131 Nev. 356, 362, 351 P.3d 725, 730 (2015).

Moore first asserts that he is actually innocent because 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 invalid on its face and unconstitutional as applied to him. This court has rejected these arguments, *see Flanagan v. State*, 112 Nev. 1409, 1421, 930 P.2d 691, 699 (1996), and Moore provides no cause to reconsider the decisions, *see Lisle*, 131 Nev. at 362, 351 P.3d at 730 (concluding that a petitioner was not entitled to relief on his actual-innocence challenge where he “points to no new evidence supporting his claim of actual innocence with respect to the aggravating circumstance[,] [n]or do his arguments present any issue of first impression as to the legal validity of the aggravating circumstance” (citation omitted)). Moreover, there remains another aggravating circumstance, and therefore, Moore is still eligible for death such that he is not actually innocent of the death penalty. *See id.* at 364, 351 P.3d at 733-34.

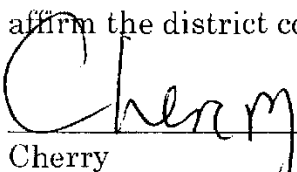
Moore also contends that he is actually innocent because this court did not appropriately conduct a reweighing analysis when resolving a prior appeal. This argument constitutes legal innocence rather than factual innocence and does not relate to death eligibility. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (“Actual innocence means factual

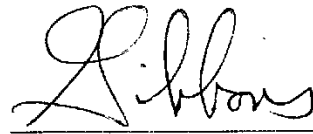
innocence, not mere legal insufficiency.” (internal quotation marks omitted)). Therefore, we conclude that the district court did not err by denying this claim.

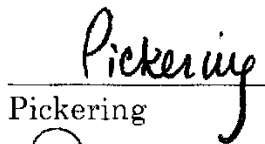
*Procedurally-barred claims*

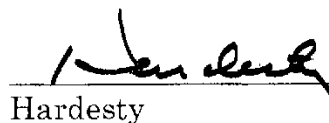
Moore argues that, under a cumulative-error theory, this court must consider other claims which were previously raised and rejected by this court. We disagree. Many of the claims are bereft of legal analysis or citations to controlling authority. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”). Further, Moore fails to identify the prior proceeding where the claim was raised, the nature of the error this court found, why this court concluded that the error was harmless, and how any error in this proceeding cumulates with the prior error. See *Reno*, 283 P.3d at 1223.<sup>8</sup>

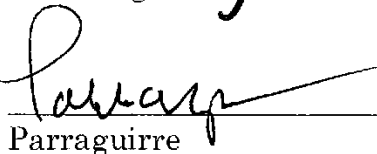
As Moore fails to demonstrate that the district court erred, we affirm the district court’s judgment.

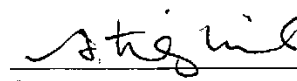
\_\_\_\_\_, J.  
Cherry

\_\_\_\_\_, J.  
Gibbons

\_\_\_\_\_, J.  
Pickering

\_\_\_\_\_, J.  
Hardesty

\_\_\_\_\_, J.  
Parraguirre

\_\_\_\_\_, J.  
Stiglich

<sup>8</sup>Moore’s claim that lethal injection violates the Eighth Amendment is premature. See *McConnell v. State*, 125 Nev. 243, 249, 212 P.3d 307, 311 (2009).