

No. 18-6182

IN THE SUPREME COURT OF THE UNITED STATES

October 30, 2018

RANDOLPH LYLE MOORE, *Petitioner*,

v.

THE STATE OF NEVADA, *Respondent*

*ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

CAPITAL CASE

Whether the Nevada Supreme Court misapplied federal law in holding that an alleged Brady violation did not constitute good cause and prejudice to overcome procedural default in state habeas proceedings?

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STATEMENT OF THE CASE

In 1985, Randolph Moore was convicted of murdering his co-defendant's grandparents and was sentenced to death. On appeal, the murder convictions were affirmed but the two death sentences were vacated and the case was remanded for a new penalty hearing. Moore v. State, 104 Nev. 113, 754 P.2d 841 (1988) (Moore I). A second penalty hearing in 1989 also resulted in death verdicts for Moore which were initially affirmed, but then ultimately reversed again on appeal. Moore v. State, 107 Nev. 243, 810 P.2d 759 (1991) (Moore II); Moore v. State, 109 Nev. 50, 846 P.2d 1053 (1993) (Moore III). A third and final penalty hearing in 1995 again resulted in death verdicts for Moore and this time the death sentences were affirmed

on appeal. Moore v. State, 112 Nev. 1409, 930 P.2d 691 (1996) (Moore IV). Remittitur issued on June 3, 1998.

Thereafter, Moore filed his first state post-conviction habeas petition on June 2, 1998, which was then supplemented by appointed counsel. After extensive briefing and protracted litigation, the district court eventually denied all relief and the Nevada Supreme Court affirmed on August 1, 2012. Moore then proceeded to federal court where he filed a federal habeas petition and the federal public defender was appointed.

Upon obtaining stay and abeyance of federal proceedings, Moore returned to state court and filed a successive state habeas petition on September 19, 2013, to exhaust state remedies. That second state petition was denied as procedurally barred under state habeas default law. In a published Opinion found at Appendix C to the instant certiorari petition, the Nevada Supreme Court affirmed. Moore now seeks certiorari relief.

REASONS FOR DENYING THE PETITION

Randolph Moore was convicted of this double murder more than 30 years ago and has been consistently sentenced to death three times by three different juries in three different penalty hearings, the last of which occurred more than 20 years ago. Moore's allegations of good cause to overcome state procedural bars for his untimely and successive state habeas petition consist of a few new facts in support of a

previously denied Brady claim. *Brady v. Maryland*, 373 U.S. 83 (1963). Because Moore failed to establish good cause to overcome application of the state procedural bars below, the Brady claim was denied not on the merits, but as procedurally defaulted under state law for failing to show actual prejudice.

I.
APPLICATION OF STATE HABEAS PROCEDURAL BARS
CONSTITUTES AN ADEQUATE AND INDEPENDENT STATE GROUND

Application of state procedural bars is an adequate and independent state ground which will bar this Court's review of any potential federal question. Moore seeks certiorari review of the Nevada Supreme Court's affirmance of the denial of his untimely and successive state post-conviction petition which was procedurally barred under state law. The Nevada Supreme Court explained the posture of the case and Moore's burden of proof which Moore's current petition has ignored:

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). 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).

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)

Appendix C, pp. 1-2. Thus, Brady was raised and entertained, not as a substantive constitutional violation, but as good cause to overcome state procedural default and it is this context that Moore fails to acknowledge.

It is well established that the Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds. Michigan v. Long, 463 U.S. 1032, 1040-42, 103 S. Ct. 3469, 3476-77 (1983); Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546 (1991); Lee v. Kemna, 534 U.S. 362, 375, 122 S.Ct. 877 (2002). Such a rule arises out of respect for the independence of state courts as well as a desire to avoid the rendering of advisory opinions. Id. A jurisdictional concern is that this Court not “render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.” Id., citing Herb v. Pitcairn, 324 U.S. 117, 125 (1945). The standard for determining whether a state court decision rests upon adequate and independent state grounds provides as follows:

When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469 (1983).

In the present case, Moore complains that Nevada's prejudice analysis misapplies and exceeds the materiality standard for a Brady claim under federal law. Although good cause and prejudice under state law may "parallel" the second and third Brady components, this does not mean that state procedural default law is coextensive or identical with Brady. See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). Nevada is free to define state law as it chooses and may require for good cause and prejudice more than what a substantive Brady claim requires on the merits:

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***.

Appendix C, p. 2 [emphasis added]. Under state law, actual prejudice requires a showing " 'not merely that the errors created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, in affecting the [trial] with error of constitutional dimensions.' " See NRS 34.726(1); NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). To the extent Nevada's prejudice analysis appears to go beyond the materiality showing of Brady, such is wholly consistent with the application of state procedural bars. To prevail on his claim, Moore was required to show more than just a "reasonable probability" of prejudice under Brady. To overcome state procedural default he was required to show actual and substantial prejudice such that the outcome of the

proceeding in fact would have been different. Viewed in this light, Nevada’s analysis on prejudice is not inconsistent with federal law, but is part of a procedural default analysis which constitutes an adequate and independent state ground.

II.

THE NEVADA SUPREME COURT DID NOT MISAPPLY FEDERAL LAW

Once one accounts for the difference in prejudice to overcome state procedural bars and the materiality prong that is part of a Brady analysis, it is clear that the Nevada Supreme Court correctly applied federal Due Process law to the limited extent it was discussed. In addressing the federal question, the Nevada Supreme Court held that the allegedly withheld evidence was not material under Brady. Appendix C, p. 4. The Court articulated the federal test for materiality by citing to United States Supreme Court authority:

[M]ateriality 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”) . . .

Appendix C, p. 5. Commenting that Saldana’s secondhand testimony was not a “crucial” part of the State’s case is not the articulation of some additional test for materiality. Rather, it is part of the Court’s observation that numerous other witnesses testified they saw Moore plan, commit, and confess to the murders, which is why impeaching Saldana would not have undermined this testimony. 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). This Court has stated that where other evidence strongly supports the conviction, a Brady violation is not material. Strickler v. Greene, 527 U.S. 263, 292-93, 119 S.Ct. 1936 (1999) (evidence impeaching important witness not material when the record provided strong support for the conviction apart from the witness's testimony); United States v. Agurs, 427 U.S. 97, 112-13, 96 S. Ct. 2392, 2402 (1976) (“If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.”). Consideration of the other witness’s testimony on the same point is necessary to determine the likely effect of new impeachment evidence against Saldana. Nevada’s articulation and application of federal law pursuant to Brady and its progeny is accurate.

III. **FACTUAL ALLEGATIONS OF A BRADY VIOLATION ARE** **UNFOUNDED AND WITHOUT MERIT**

Throughout the habeas petition below, Moore’s counsel deceptively failed to allege exactly which facts are “new” and previously unavailable to the defense and which facts were known and previously presented. This intentional pleading practice was the reason the decision below was published and the Nevada Supreme Court noted that the Brady claim was “inadequately pleaded” because it failed “to

identify with specificity which facts this court previously considered and which facts are new.” Appendix C, p. 3. The Court reminded Moore’s counsel that the burden of overcoming procedural bars “requires being forthright: a party cannot force the district court to hold an evidentiary hearing by withholding information about a claim.” Id. Unfortunately, the inadequately pleaded facts continue in the present certiorari petition. Despite Moore’s representations of withheld information, the vast majority of Moore’s factual theory regarding Saldana’s testimony has long been known and was in fact presented to the jury and raised in prior post-conviction claims.

Basically, Moore alleges the State knowingly presented false testimony by procuring witness Angela Saldana as a police agent using promises and inducements which were not disclosed to the defense in violation of Brady. This claim is not new. Moore has long maintained that Saldana’s testimony was false and that her testimony was induced, but has no such evidence even after litigating and investigating this claim for the past 30 years.

At a pre-trial evidentiary hearing in 1985, Angela Saldana acknowledged that her aunt and uncle encouraged her to get information about the murder for the police. She also admitted that she contacted police officer Ray Berni about a week or two after the murder, and then Beecher Avants from the District Attorney’s Office and then the prosecutor on the case, Dan Seaton. She had sex with co-defendant

Flanagan and promised to marry him as well as co-defendant Tom Akers all in an attempt to get more information which she could pass along to law enforcement. Saldana told Officer Berni, her former boyfriend, that she was going to “play along” and find out what more she could learn, although she was not asked to do so by Officer Berni.

At the conclusion of the evidentiary hearing 30 years ago, defense counsel made the very same “police agent” argument that is being advanced in the current petition:

One thing, your Honor. By this time she [Angela Saldana] would be a police agent and I think what she was doing was pumping him trying to get information for Officer Berni that she could turn over to him or the district attorney’s office. I think anything beyond the point that she first contacted Officer Berni and was turned over at which point she became a police agent and it was acting as an arm of the state should be excluded in consideration against Mr. Flanagan.

The district court judge who had heard Saldana’s testimony disagreed:

Concerning the theory of agency, I find the testimony does not substantiate that. Miss Saldana indicated she was acting on her own volition. The officer told her to put the knife back and stay out of harm’s way, in essence. The officer didn’t direct her and she, for whatever reason, decided to follow the matter up.

At trial, Angela Saldana admitted she expected to be paid \$2,000.00 from the Secret Witness Program for her work and assistance on the case. She again testified that she contacted Beecher Avants of the district attorney’s office at the suggestion of her aunt and uncle because Beecher was a friend of the family. When asked whether

it was Officer Berni or Beecher Avants who had instructed her to “play along” to get additional information, she responded it was neither. Rather, she testified it was her uncle who had asked her to do that and she confirmed that her uncle was affiliated with law enforcement as an attorney. She also confirmed that if she learned any more information, she would go right to tell Metro or Officer Berni or Beecher Avants or even Dan Seaton in the district attorney’s office. Later, when asked whether Officer Berni had suggested in any way that she become an agent of law enforcement, she responded no, that it was her idea alone. Her motive in voluntarily reporting to the police was her desire for experience to become a criminal investigator.

In closing argument, defense counsel vehemently attacked Saldana’s character and credibility both as a stripper as a police informant for money. She was called a “performer” and a “phony” and that “she is as willing to dance for money in this courtroom as she is on the stage at Bogie’s”. Flanagan’s counsel extensively argued that Saldana could not be trusted and that her memory suspiciously improved over time. Id. at 1585-87. He characterized her as a “user” of people who enjoyed the limelight and who would be paid for her “performance.” The value and credibility of Saldana’s testimony was summed up for the jury as follows:

I think she has been characterized appropriately, stripper, loose woman, sex with Tom Akers while she was living with Dale, wanted to be a private investigator and so she thought this would be a marvelous opportunity to become an agent on her own. Of course, the fact that

she had spoken to her boyfriend who was a police officer, spoke to Beecher Avants and spoke to Detective Levos, how much credence can we probably give to the testimony of that kind of person?

By the time of the third penalty hearing, Saldana's testimony was further impeached with an intervening criminal charge. Saldana acknowledged on cross-examination that she had been arrested on a drug trafficking charge in 1989 for which she was in custody at the time of the second penalty hearing. After her testimony at the second penalty hearing the drug trafficking charge was reduced to a misdemeanor trespass and she received just a \$200 fine. This line of questioning suggested that the prosecutor had rewarded Saldana with the charge reduction in exchange for her testimony. But Saldana clarified that the plea negotiation was separate and not in exchange for her testimony on this case.

None of Moore's allegations constitute material exculpatory evidence withheld from the defense. Angela Saldana's "uncle," Robert Peoples, was apparently a high-profile character in Las Vegas at the time whose history was documented in old newspaper articles obtained by Moore. According to the newspaper, Peoples was a convicted murderer who subsequently worked as an investigator in the public defender's office and then as an informant in the Bramlet murder case in cooperation with then homicide detective, Beecher Avants. Robert Peoples ended up marrying Wendy Hanley (now Mazaros), the 21-year old wife of Tom Hanley, the man he betrayed and helped convict of the Bramlet murder. Both

Wendy Mazaros and Amy Hanley-Peoples have strong motive against Robert Peoples and Beecher Avants as the men who betrayed and helped convict their husband and father, Tom Hanley, of murder. Regardless of whether such facts are “new” to the federal public defender, Moore has failed to show that local counsel at the time was not aware of this public and high-profile background in what amounted to a relatively small legal community in the 1980’s.

The involvement of Angela Saldana’s aunt and uncle in the Bramlet murder in 1977 has little to no connection with the current case. It was Angela Saldana, not Robert Peoples, who was a witness and testified in Moore’s murder trial. Accordingly, it is her motivation and relationship with law enforcement that is at issue, not that of Robert Peoples. Whether Angela’s uncle had other motives in getting Angela to assist law enforcement is simply not relevant nor exculpatory. The declarations from Wendy and Amy simply indicate that Robert Peoples pressured Angela Saldana to testify and told her what to say based on apparent police reports he had. Even if true, this does not mean that Angela felt coerced or that she testified falsely. Notably, had Angela refused to testify, the prosecutor certainly could have obtained a material witness warrant and compelled her testimony. Pressuring someone to testify is not the same thing as pressuring them to testify falsely, and Moore has no evidence of the latter. It was well-known that she got paid \$2,000 for her work as an informant. It was well-known that she and her family had close ties

not just to law enforcement, but directly with the district attorney's office through family friend and district attorney investigator Beecher Avants.

Nor is it unusual or improper for a witness to "rehearse" testimony prior to taking the stand by reviewing their former statements. This is often done directly with the State's prosecutor or investigator to help refresh their memory. Angela testified at least four times against Moore over many years and had amassed a number of statements and prior testimony which she undoubtedly reviewed before taking the stand each time. That Angela may also have reviewed such materials with Robert Peoples is no surprise considering his background as a criminal investigator.

Any minor new facts Moore has alleged in the current petition were available 27 years ago as common knowledge in the legal community, publicly available in newspapers, or available through known witnesses. That Moore subsequently was able to "discover" these allegedly new facts on his own from public sources and belated witness interviews belies any claim that they were withheld by the State, even assuming that Wendy Mazaros made herself difficult to locate. Moore fails to allege what impediment external to the defense prevented him from interviewing witnesses and acquiring these details sooner.

Angela Saldana was not the only one to incriminate Moore. Her testimony was corroborated through several other witnesses including Rusty Havens, Lisa Licata, Michelle Gray, Tom Akers, and John Lucas. Because of the unique

procedural history of this case, Angela Saldana has testified at least four times against Moore at trial and penalty hearings over more than a decade's time. Her testimony has been consistent throughout as to what she saw and heard. Wendy and Amy's suspicions to the contrary are belied by the record.

Considering the lack of credibility and extensive impeachment of Saldana's testimony at trial, the newly alleged facts are merely cumulative and not material enough to have affected the outcome of the case. Any further impeachment of Saldana's motives and connection to law enforcement would not have altered what the Nevada Supreme Court has repeatedly found to be "overwhelming" evidence of Moore's culpability. Moore v. State, 104 Nev. 105, 754 P.2d 836 (1988) (Moore I) ("The record contains *overwhelming* evidence that nineteen year old Flanagan and his co-defendants planned to kill the Gordons in an effort to obtain insurance proceeds and an inheritance"); Moore v. State, 107 Nev. 243, 810 P.2d 759 (1991) (Moore II) ("The evidence of aggravating circumstances was *overwhelming* and clearly outweighed the mitigating circumstances found by the jury"); Moore v. State, 112 Nev. 1409, 930 P.2d 691 (1996) (Moore IV) ("We characterized the evidence against Flanagan and Moore as '*overwhelming*' in our first opinion in this case. There is no reason to change that characterization now").

Accordingly, Moore's claim that the State has withheld evidence of Angela Saldana's inducements under Brady fails to establish good cause to overcome the

procedural bars in this case. Any newly discovered factual allegations were not withheld by the State and fail to establish any inducement at trial. Furthermore, any additional facts are not material in effecting the outcome of the case considering the cumulative effect of the impeachment of Angela Saldana's testimony at trial and the duplicative nature of her testimony as overwhelmingly established by many other witnesses.

CONCLUSION

The Nevada Supreme Court found that Moore's successive and untimely state post-conviction habeas petition was procedurally barred and Moore had failed to establish good cause and prejudice to overcome the procedural default. In seeking certiorari, Moore confuses Nevada's standard of good cause and prejudice to overcome procedural default, with this Court's articulation of materiality under Brady. The Nevada Supreme Court's analysis of the issue is entirely consistent with and correctly applies federal Due Process law. Factually, even if the claim were not procedurally defaulted under state law, Moore has failed to allege new facts, not previously considered, which are sufficient to establish a Brady violation.

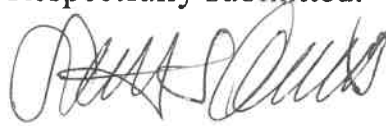
WHEREFORE, the State respectfully requests that certiorari be denied.

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Respectfully submitted.

A handwritten signature in dark ink, appearing to read "Steven S. Owens", written in a cursive style.

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