

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 RANDOLPH LYLE MOORE,

Case No. 66652

3 Appellant,

4 vs.

5 RENEE BAKER, Warden, Ely State
6 Prison, and CATHERINE CORTEZ
7 MASTO, Nevada Attorney General,

8 Respondents.

Electronically Filed
Oct 28 2014 04:12 p.m.
AMENDED DOCKETING
STATEMENT OF ORIGINAL
APPEALS Criminal
Clerk of Supreme Court

9 **GENERAL INFORMATION**

- 10 1. Judicial District Eighth County Clark
11 Judge Hon. Michelle Leavitt District Ct. Case No. C069269
- 12 2. If the defendant was given a sentence,
13 (a) what is the sentence? Death
14 (b) has the sentence been stayed pending appeal? No; No death warrant
15 has been issued.
16 (c) was defendant admitted to bail pending appeal? No

- 17 3. Was counsel in the district court appointed X or retained ?

- 18 4. Attorney filing this docketing statement:

19 Attorney Tiffani D. Hurst, Gary Taylor, Randolph Fiedler

20 Telephone (702) 388-6577

21 Firm Federal Public Defender, District of Nevada

22 Address 411 East Bonneville Avenue, Suite 250

23 Las Vegas, Nevada 89101

24 Client(s) Randolph Lyle Moore

- 25 5. Is appellate counsel appointed X or retained ?

26 If this is a joint statement by multiple appellants, add the names and
27 addresses of other counsel on an additional sheet accompanied by a
28 certification that they concur in the filing of this statement.

- 29 6. Attorney(s) representing respondent(s):

30 Attorney Steven B. Wolfson, Steven S. Owens

31 Telephone (702) 671-2750 Email: Steven.Owens@ccdandv.com

32 Firm Clark County District Attorney

33 Address 200 Lewis Avenue

34 Las Vegas, Nevada 89155

35 Client(s) State of Nevada; Renee Baker, Warden, Ely State Prison

Attorney Catherine Cortez Masto, Adam Woodrum
Telephone (702) 486-3904
Firm Office of the Nevada Attorney General
Address 555 E. Washington Ave, Suite 3900
Las Vegas, Nevada 89101

Client(s) Renee Baker, Warden, Ely State Prison

7. Nature of disposition below:

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Grant of pretrial habeas |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Grant of motion to suppress evidence |
| <input type="checkbox"/> Judgment upon guilty plea | <input checked="" type="checkbox"/> Post-conviction habeas (NRS ch. 34) |
| <input type="checkbox"/> Grant of pretrial motion to dismiss | grant <input checked="" type="checkbox"/> denial |
| <input type="checkbox"/> Parole/Probation revocation | <input type="checkbox"/> Other disposition (specify) |
| <input type="checkbox"/> Motion for new trial | |
| <input type="checkbox"/> grant <input type="checkbox"/> denial | |
| <input type="checkbox"/> Motion to withdraw guilty plea | |
| <input type="checkbox"/> grant <input type="checkbox"/> denial | |

8. Does this appeal raise issues concerning any of the following:

- | | |
|--|---|
| <input checked="" type="checkbox"/> death sentence | <input type="checkbox"/> juvenile offender |
| <input type="checkbox"/> life sentence | <input type="checkbox"/> pretrial proceedings |

9. Expedited appeals: The court may decide to expedite the appellate process in this matter. Are you in favor of proceeding in such a manner?

Yes ☐ No ☒

10. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeal after post-conviction proceedings):

Moore v. State, 104 Nev. 113, 754 P.2d 841 (1988) (opinion affirming in part and reversing in part, and remanding for a new penalty hearing based upon cumulative effect of prosecutor's extensive misconduct).

Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988) (opinion affirming in part and reversing in part, and remanding for a new penalty hearing based upon cumulative effect of prosecutor's extensive misconduct).

Flanagan & Moore v. State, 107 Nev. 243, 810 P.2d 759 (1991) (opinion affirming death sentences).

Moore v. Nevada, 503 U.S. 930, 112 S. Ct. 1463 (1992) (granting petition for certiorari and vacating judgment and remanding to Nevada Supreme Court for further consideration in light of Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093 (1992)).

1 Flanagan v. Nevada, 503 U.S. 931, 112 S.Ct. 1464 (1992) (granting petition for
2 certiorari, vacating judgment and remanding to Nevada Supreme Court for
3 further consideration in light of Dawson v. Delaware, 503 U.S. 159, 112 S. Ct.
4 1093 (1992).

5 Flanagan & Moore v. State, 109 Nev. 50, 846 P.2d 1053 (1993) (on remand
6 from the United States Supreme Court reversing and remanding cases for new
7 penalty hearing).

8 Flanagan & Moore v. State, 112 Nev. 1409, 930 P.2d 691 (1996) (opinion
9 affirming denial of habeas corpus relief on judgments of conviction and
10 affirming sentences of death on remand).

11 Luckett v. State, No. 17094, June 25, 1987 (unpublished order affirming
12 judgment of conviction and sentence).

13 McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987) (opinion affirming
14 judgment of conviction and sentence).

15 Luckett v. State, No. 26019, December 24, 1997 (unpublished order affirming
16 amended judgment of conviction).

17 Luckett v. State, No. 28591, April 16, 1999 (unpublished order affirming
18 denial of post-conviction habeas corpus relief).

19 Luckett v. State, No. 36945, December 12, 2001 (unpublished order affirming
20 denial of post-conviction habeas corpus relief).

21 McDowell v. State, No. 38750, July 11, 2002 (unpublished order affirming
22 denial of post-conviction habeas corpus relief).

23 Moore v. State, No. 46801, April 23, 2008 (unpublished order affirming denial
24 of post-conviction habeas corpus and district court's order striking burglary
25 and robbery aggravating circumstances pursuant to McConnell v. State, 120
26 Nev. 1043, 102 P.3d 606 (2004), and remanding the case to the district court
27 to enter detailed findings as to whether the jury's consideration of the
28 erroneous aggravating circumstances was harmless beyond a reasonable
doubt).

Flanagan v. State, No. 40232, February 22, 2008 (unpublished order affirming
denial of post-conviction habeas corpus relief).

McDowell v. State, No. 54544, March 10, 2010 (unpublished order affirming
denial of post-conviction habeas corpus relief).

Moore v. State, No. 55091, August 1, 2012 (unpublished order affirming denial
of post-conviction habeas corpus relief and confirming jury's consideration of
invalid aggravating circumstances was harmless).

Flanagan v. State, No. 63703 (appeal from denial of post-conviction habeas
corpus relief currently pending in the Nevada Supreme Court).

///

11. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):

McDowell v. Whitley, et al., 88-cv-00616-HDM (pro se petition for writ of habeas corpus filed in November 1988 and dismissed in September/October 1989).

Luckett v. McDaniel, 213 F.3d 642 (9th Cir. 2000) (unpublished decision affirming denial of federal habeas corpus petition, CV-97-00719-HDM, D. Nev.).

Flanagan v. Baker, et al., 2:09-cv-00085-KJD-GWF, United States District Court, D. Nev. (federal habeas corpus proceedings currently stayed pending exhaustion in state court).

Moore v. Baker, et al., 2:13-cv-0655-JCM-CWH, United States District Court, D. Nev. (federal habeas corpus proceedings currently stayed pending exhaustion in state court).

Luckett v. Director, Nevada Department of Prisons, et al., cv-n-89-0753-HDM (Certificate of Probable Cause denied).

Mr. Moore believes his co-defendants may have instituted further proceedings in federal court but that information is unavailable to him at this time.

12. Nature of action. Briefly describe the nature of the action and the result below:

Petitioner/Appellant's appeal from order dismissing post-conviction petition for writ of habeas corpus, Eighth Judicial District Court, Clark County

13. Issues on appeal. State concisely the principal issues(s) in this appeal:

1. Did the district court err by applying the law of the case doctrine despite a substantial change in the law as decided by the United States Supreme Court and the United States Court of Appeals?

2. Did the district court err in refusing to consider newly proffered evidence supporting Mr. Moore's Brady claim?

3. Did the district court err in holding that Mr. Moore failed to establish good cause for any delay in bringing his claims?

4. Did the district court's refusal to address the merits of Mr. Moore's claims result in a fundamental miscarriage of justice?

5. Did the district court err in failing to grant relief on the substantive claims in Mr. Moore's petition for writ of habeas corpus filed September 19, 2013:

A. Mr. Moore suffered ineffective assistance of counsel during the

1 penalty trial in this case which resulted in the death penalty
2 (Claim One);

3 B. Mr. Moore suffered ineffective assistance of counsel during the
4 trial in this case and was found guilty of first-degree-murder
5 (Claim Two);

6 C. Mr. Moore's constitutional rights to due process, a fair trial, equal
7 protection, and confrontation were violated by the denial of his
8 motion to sever his trial from the trials of his co-defendants
9 (Claim Three);

10 D. Mr. Moore's constitutional rights to due process, equal
11 protection, confrontation and an impartial jury were violated with
12 the admission of co-conspirator statements (Claim Four);

13 E. Mr. Moore's constitutional rights to due process, equal
14 protection, and confrontation were violated by the admission of
15 statements by former co-defendant Luckett, as well as former
16 testimony by Sheldon Green, Richard Good and Michael Geary
17 (Claim Five);

18 F. Mr. Moore's constitutional rights to due process, a fair trial, and
19 the effective assistance of counsel were violated by the
20 prosecutors' presentation of false and impeachable testimony, as
21 well as the prosecutors' failure to disclose exculpatory
22 information (Claim Six);

23 G. The prosecutors' payment of money and other inducements to key
24 witnesses violated Mr. Moore's constitutional rights to due
25 process, equal protection, and the right to effective assistance of
26 counsel (Claim Seven);

27 H. The admission of unsubstantiated testimony regarding witness
28 intimidation violated Mr. Moore's constitutional rights to due
process, equal protection, and impartial jury and a reliable
sentence (Claim Eight);

I. The prosecutors' pervasive and outrageous misconduct, and
overreaching, rendered Mr. Moore's trial and sentencing hearing
fundamentally unfair and violated his rights to freedom of speech,
rights to associate, separation of church and state, due process,
equal protection and a reliable sentence (Claim Nine);

J. The prosecutor's comment on Mr. Moore's silence violated his
constitutional right of freedom from self-incrimination (Claim
Ten);

K. Mr. Moore's constitutional rights to due process, equal protection
and a reliable sentence were violated by the admission of
evidence relating to his co-defendants' sentences (Claim Eleven);

L. The prosecutors' outrageous misconduct and overreaching
distorted the fact-finding process, rendered the trial and

1 sentencing proceeding fundamentally unfair and violated Mr.
2 Moore's constitutional rights to freedom of speech, right to
3 associate, separation of church and state, due process, equal
4 protection, effective assistance of counsel, confrontation,
5 compulsory process and to be free of cruel and unusual
6 punishment (Claim Twelve);

7
8 M. The admission of evidence that Mr. Moore was in a gang and
9 involved in a coven that was a form of devil worship violated Mr.
10 Moore's constitutional rights of freedom of association, free
11 exercise of religion, an impartial jury, equal protection and due
12 process (Claim Thirteen);

13
14 N. Mr. Moore's rights to due process were violated because Nevada
15 courts lacked jurisdiction to require him to undergo a third
16 penalty proceeding (Claim Fourteen);

17
18 O. Mr. Moore's constitutional rights to due process, equal
19 protection, a fair and impartial jury and a reliable sentence were
20 violated by the inability of one of his jurors to understand English
21 (Claim Fifteen);

22
23 P. The trial judge's repeated questions regarding the jurors' religious
24 preferences and practices during Mr. Moore's third penalty trial
25 violated the constitutional rights to freedom of religion, due
26 process, equal protection, effective assistance of counsel, an
27 impartial jury and a reliable sentence (Claim Sixteen);

28
Q. The erroneous instructions to jurors and the qualification of jurors
based on whether they could "equally consider" the death penalty
and other available sentences violated Mr. Moore's constitutional
rights to due process, equal protection, effective assistance of
counsel, an impartial jury and a reliable sentence (Claim
Seventeen);

R. The trial judge's failure to sufficiently inquire into potential juror
misconduct during the third penalty trial violated Mr. Moore's
constitutional rights to due process, equal protection, effective
assistance of counsel, an impartial jury and a reliable sentence
(Claim Eighteen);

S. Mr. Moore's constitutional rights to due process, equal
protection, effective assistance of counsel, an impartial jury and
a reliable sentence were violated by the trial judge's failure to
remove a biased juror and the improper removal of an unbiased
juror—allowing a biased juror to be seated (Claim Nineteen);

T. Mr. Moore's constitutional rights to due process, equal
protection, effective assistance of counsel, an impartial jury and
a reliable sentence were violated when a prospective juror was
improperly removed based upon his views concerning the death
penalty, even though those views did not substantially impair the
juror's ability to follow the law (Claim Twenty);

- 1 U. Mr. Moore's constitutional rights to due process, equal
2 protection, and a reliable sentence were violated because the
3 aggravating factors were not charged in the Information, there
4 was no finding of probable cause, and he received insufficient
5 notice of the State's charges of aggravating factors (Claim
6 Twenty-One);
- 7 V. Mr. Moore's constitutional rights to due process, equal
8 protection, and a reliable sentence were violated by the invalid
9 aggravating circumstance that the killing was committed by
10 someone who "knowingly created a great risk of death to more
11 than one person by means of a weapon, device or course of action
12 that would normally be hazardous to the lives of more than one
13 person (Claim Twenty-Two);
- 14 W. The Nevada Supreme Court's "re-weighting" and "re-sentencing"
15 of Mr. Moore after invalidating two aggravating circumstances,
16 and performing a constitutionally inadequate harmless error
17 analysis, violated his constitutional rights to a jury trial, due
18 process, equal protection and a reliable sentence (Claim Twenty-
19 Three);
- 20 X. The jury instructions in Mr. Moore's trial and penalty proceedings
21 violated his constitutional rights to due process, equal protection,
22 an impartial jury and a reliable sentence (Claim Twenty-Four);
- 23 Y. The jury's instructions on the possibility of commutation or
24 sentence modification violated Mr. Moore's constitutional rights
25 to due process, equal protection, effective assistance of counsel
26 and a reliable sentence (Claim Twenty-Five);
- 27 Z. The anti-sympathy jury instructions violated Mr. Moore's
28 constitutional rights to due process, equal protection, effective
assistance of counsel and a reliable sentence (Claim Twenty-Six);
- AA. The failure of the trial judge in the third penalty trial to give
constitutionally appropriate and required jury instructions, and
counsel's failures to object and request such instructions, violated
Mr. Moore's constitutional rights to due process, equal
protection, effective assistance of counsel and a reliable sentence
(Claims Twenty-Seven, Twenty-Nine, Thirty, Thirty-One, Thirty-
Two, Thirty-Three, and Thirty-Four);
- BB. Nevada's weighing equation violated Mr. Moore's constitutional
rights to due process, equal protection, effective assistance of
counsel and a reliable sentence (Claim Twenty-Eight);
- CC. Mr. Moore's constitutional rights to due process, equal
protection, effective assistance of counsel, an impartial jury and
a reliable sentence were violated because his counsel on direct
appeal was ineffective (Claim Thirty-Five);
- DD. Execution by lethal injection violates Mr. Moore's constitutional

rights to due process, equal protection, a reliable sentence, effective assistance of counsel and the prohibition against cruel and unusual punishments (Claim Thirty-Six);

EE. Mr. Moore's constitutional rights to due process, equal protection, a reliable sentence, and international law are violated because his trial, sentencing, and review on direct appeal were all conducted by judges whose tenure was not dependent on good behavior but was dependant on popular election, and who failed to conduct a fair and adequate appellate review (Claim Thirty-Seven);

FF. The admission of gruesome, prejudicial and inflammatory photographs in Mr. Moore's trial and penalty proceedings violated due process (Claim Thirty-Eight);

GG. Mr. Moore's rights to due process, equal protection, a fair tribunal, and a reliable sentence were violated by an impartial tribunal (Claim Thirty-Nine);

HH. The trial judge's failure to change venue of the trial violated Mr. Moore's constitutional rights to due process, confrontation, effective assistance of counsel, a reliable sentence, a fair trial, freedom from self incrimination, equal protection, an impartial jury and freedom from cruel and unusual punishments (Claim Forty);

II. Mr. Moore's constitutional rights to due process, confrontation, effective assistance of counsel, a public trial, a reliable sentence, freedom from self-incrimination, equal protection, an impartial jury, and freedom from cruel and unusual punishments were violated by the unrecorded bench conferences in his proceedings and his absence during critical stages in the proceedings (Claim Forty-One);

JJ. Mr. Moore's conviction by an all white jury from which African Americans were systematically excluded and unrepresented violated his rights to due process, equal protection, an impartial jury drawn from a fair cross section of the community, effective assistance of counsel, and a reliable sentence (Claim Forty-Two);

KK. The death penalty is cruel and unusual punishment in all circumstances and Mr. Moore's death sentence violates his constitutional rights to due process, equal protection, effective assistance of counsel and a reliable sentence (Claim Forty-Three);

LL. Mr. Moore's death sentence violates his constitutional rights to due process, equal protection, an impartial jury, effective assistance of counsel and a reliable sentence because Nevada effectively has no mechanism to provide for clemency in capital cases (Claim Forty-Four);

- 1 MM. The Nevada capital punishment system operates in an arbitrary
2 and capricious manner and Mr. Moore's death sentence violates
3 his constitutional rights to due process, equal protection, effective
4 assistance of counsel and a reliable sentence (Claim Forty-Five);
- 5 NN. Mr. Moore's constitutional rights to due process, equal
6 protection, a reliable sentence, and to be free from cruel and
7 unusual punishments were violated because, as a direct result of
8 the state's misconduct, he has undergone multiple trials and
9 appeals, ending in the reversal of his sentences, leaving him on
10 death row for almost thirty years (Claim Forty-Six);
- 11 OO. The cumulative error in Mr. Moore's trial and sentencing
12 proceedings violated his constitutional rights to due process,
13 equal protection, effective assistance of counsel, a fair tribunal,
14 an impartial jury, and a reliable sentence (Claim Forty-Seven).
- 15 14. Constitutional issues. If the State is not a party and if this appeal challenges
16 the constitutionality of a statute or municipal ordinance, have you notified the
17 clerk of this court and the attorney general in accordance with NRAP 44 and
18 NRS 30.130?
- 19 N/A X Yes _____ No _____
20 If not, explain
- 21 15. Issues of first-impression or of public interest. Does this appeal present a
22 substantial legal issue of first-impression in this jurisdiction or one affecting
23 an important public interest?
- 24 First-impression: Yes _____ No X
25 Public interest: Yes X No _____
- 26 16. Length of trial. If this action proceeded to trial or evidentiary hearing in the
27 district court, how many days did the trial or evidentiary hearing last?
- 28 The original trial occurred between September 26, 1985 and October 17, 1985,
and included fifteen (15) days; a second penalty hearing was held between July
10-14, 1989, and lasted five (5) days; a third penalty hearing was held between
June 13-23, 1995, and lasted nine (9) days. Mr. Moore was never granted an
evidentiary hearing in his habeas proceedings.
17. Oral argument. Would you object to submission of this appeal for disposition
without oral argument?
- Yes X No _____

TIMELINESS OF NOTICE OF APPEAL

18. Date district court announced decision, sentence or order appealed from
August 27, 2014
19. Date of entry of written judgment or order appeal from September 2, 2014

1 (a) If no written judgment or order was filed in the district court, explain the
2 basis for seeking appellate review:

3 N/A

4 20. If this appeal is from an order granting or denying a petition for a writ of
5 habeas corpus, indicate the date written notice of entry of judgment or order
6 was served September 2, 2014

7 (a) Was service by delivery _____ or by mail X (specify).

8 21. If the time for filing the notice of appeal was tolled by a post-judgment motion,

9 (a) Specify the type of motion, and the date of filing of the motion: N/A

10 Arrest judgment _____ Date filed _____
11 New trial _____ Date filed _____
12 (newly discovered evidence)
13 New trial _____ Date filed _____
14 (other grounds)

15 (b) Date of entry of written order resolving motion _____

16 22. Date notice of appeal filed October 6, 2014

17 23. Specify statute or rule governing the time limit for filing the notice of appeal,
18 e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015(2), or other
19 NRS 34.575(1)

20 SUBSTANTIVE APPEALABILITY

21 24. Specify statute, rule or other authority which grants this court jurisdiction to
22 review the judgment or order appealed from:

23 NRS 177.015(1)(b) _____ NRS 34.560 _____
24 NRS 177.015(1)(c) _____ NRS 34.575(1) X
25 NRS 177.015(2) _____ NRS 34.575(2) _____
26 NRS 177.015(3) _____ Other(specify) _____
27 NRS 177.055 _____

28 VERIFICATION

I certify that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief.

25 Randolph Lyle Moore
26 Name of Appellant

Tiffani D. Hurst
Name of counsel of record

27 October 28, 2014
28 Date

TIFFANI D. HURST
Signature of counsel of record

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of October 2014. Electronic Service of the foregoing Amended Docketing Statement shall be made in accordance with the Master Service List as follows:

Adam Woodrum
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AWoodrum@ag.nv.gov

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JEREMY KIP
An employee of the Federal Public Defender's Office