

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

RANDOLPH LYLE MOORE,

Appellant,

vs.

RENEE BAKER, WARDEN, and
ADAM PAUL LAXALT,
ATTORNEY GENERAL FOR
THE STATE OF NEVADA,

Respondents.

No. 66652

VOLUME 5 OF 5

Electronically Filed
Jun 11 2015 12:31 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S SUPPLEMENTAL APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)

Second Judicial District Court, Washoe County

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1 THE COURT: What do you think you're entitled to an evidentiary hearing
2 on?

3 MR. ORAM: Well --

4 THE COURT: Because, I mean, I know we're talking about claim 40 and
5 42, but they include probably 30 claims.

6 MR. ORAM: Yes.

7 THE COURT: Because even -- I counted 18.

8 MR. ORAM: Right.

9 THE COURT: Of those 18, there's several subparts.

10 MR. ORAM: And she incorporates. What you mean is that she'll say --

11 THE COURT: Right. She --

12 MR. ORAM: -- we incorporates --

13 THE COURT: -- she incorporates everything.

14 MR. ORAM: -- all those other things. I would think, Judge, I would only
15 be entitled to an evidentiary hearing on matters regarding the third penalty
16 phase. In other words, if I was to say to Mr. Schieck: Well, Mr. Schieck
17 wasn't the original trial attorney, you know. But if I was to say to Mr. Schieck:
18 Why didn't you do something, or I called a witness who said: Why didn't you
19 do something in the first trial? That would seem, to me, to be completely out
20 of bounds of issue 40 and 42.

21 If I asked Mr. Schieck: Why didn't you call Jane Doe? My
22 investigators found Jane Doe. Jane Doe says that he was beaten as a child;
23 why didn't you interview Jane Doe? For the third penalty phase. Then I think
24 that would be a legitimate issue and I should be allowed to question Mr.
25 Schieck as to that.

1 For example, in 42, one thing -- apparently, Mr. Schieck raised, on
2 the second appeal from the death sentence, three issues that he did not raise in
3 the third one and so, Ms. Thomas claims that --

4 THE COURT: I'm sorry, say that again.

5 MR. ORAM: Okay.

6 THE COURT: In the --

7 MR. ORAM: In the second appeal.

8 THE COURT: Okay.

9 MR. ORAM: Not the second appeal, but the appeal from the second
10 death sentence --

11 THE COURT: Okay.

12 MR. ORAM: -- Mr. Schieck raises three issues.

13 THE COURT: Okay.

14 MR. ORAM: When he's, again, sentenced to death for the third time, Mr.
15 Schieck does not raise any of those issues, and so, the question would be as
16 Ms. Thomas has raised is: Why didn't you raise those same issues and
17 preserve it for the third instance? And those would be the District Court
18 erred in refusing his proposed jury instructions regarding mitigation.

19 District Court erred in instructing on the weighing equation of
20 aggravators and mitigators. The District Court erred in rejecting a motion for
21 severance. Those, apparently, were all filed before the second, or excuse me,
22 after he was sentenced to death the second time, but not the third time. It
23 seems that should have been done.

24 Additionally, there was one issue that the Supreme Court said that
25 should -- on appeal, there was an argument that the jury should have been

1 instructed on burglary, robbery, escape, and attempt. It was raised on appeal
2 and they said: Well, trial counsel -- not trial counsel, but post -- penalty phase
3 counsel didn't object and didn't offer them. So, the Supreme Court said: It's
4 not really right for appeal. It was -- the attorney should have done that so, that
5 would be a question I would ask Mr. Schieck: Why didn't you do it?

6 And so, basically on what Ms. Thomas has raised in issue 40 and
7 42, I would argue that Mr. Moore is entitled to an evidentiary hearing as to
8 ineffective assistance only of Mr. Wolfbrandt, Mr. Schieck, in the third penalty
9 phase, and on appeal from the third sentence of death. With that, I'd submit it.

10 MR. OWENS: And Judge, I would respond: We don't need to ask Mr.
11 Schieck why he did not include those three issues in -- on the appeal from the
12 third penalty hearing because we know that none of them would have had
13 success. None of them would have been meritorious. The Court erred in
14 refusing his proposed instruction on mitigation. That claim is without merit.
15 The Court was properly instructed on mitigation.

16 The Court erred in instructing jury on the weighing process? No;
17 they were correctly instructed on the weighing process. In fact, we have a
18 new case this year that further confirms that the instruction we've been using
19 is correct on the weighing process.

20 Court erred in rejecting a motion for severance so, they've tried
21 that. Way back in '85 they've been trying to sever the case. That's been
22 previously denied in the case so, there's no reason to believe any of those
23 claims would have had success had they been raised in the third appeal brief,
24 therefore, it doesn't matter why he didn't raise it; they can't show prejudice
25 under *Strickland*.

1 As for this issue about failing to request instructions on the elements of
2 burglary, robbery, escape, and attempt, I'm not sure I understand exactly what
3 instruction they wanted to have. But in that same line where the Court said:
4 Hey, the Court and the Court below you that you didn't object on that basis so
5 it can only be reviewed for plain error in the Supreme Court, and the very next
6 sentence they said: But there's no merit to this argument anyway. And --

7 THE COURT: What page are you on in the opinion?

8 MR. OWENS: That's in the opinion; yes. This --

9 THE COURT: Will you just show me what -- just tell me what page? Oh,
10 I thought you were reading from the opinion.

11 MR. OWENS: No; I'm --

12 THE COURT: From your notes?

13 MR. OWENS: -- reading from my notes, but --

14 THE COURT: Okay. I'm sorry.

15 MR. OWENS: -- I can -- this is in *112 Nevada 1409*, and it's on page --
16 well it's headnote 12.

17 MR. ORAM: Your Honor, that's the 96 opinion.

18 THE COURT: I have the 2 -- I'm looking at the 2008 opinion.

19 MR. OWENS: Yeah; it's in the '96 opinion where this was raised and
20 they said: Well, you know, you didn't object below, however, the argument's
21 without merit anyway on these burglary, robbery, escape and attempt -- special
22 requests for instructions on those elements. We see no merit to -- actually it
23 was an argument raised by Flanagan. We see no merit to Flanagan's argument
24 anyway, but it's the same exact issue.

25 I believe that's the reference that Mr. Oram and JoNell, in her brief

1 was citing to when they said that the Court couldn't review it because it hadn't
 2 been preserved below. Well, they acknowledge it wasn't preserved but they
 3 also address the merits and say it was without merit. And so, again, I see no
 4 reason to hold an evidentiary hearing. I don't see any claim here that if -- I
 5 mean, there may be unanswered questions, questions -- what we had for Mr.
 6 Schieck about why he did or did not do certain things. But unless they can
 7 also satisfy the prejudice prong under *Strickland* and show that had Mr. Schieck
 8 --

9 THE COURT: Right.

10 MR. OWENS: -- done it differently that the result and the outcome would
 11 have been different, than they're not entitled to that evidentiary hearing. And
 12 we've had three juries -- 36 jurors unanimously -- from the community say that
 13 Randolph Moore deserves to die. I don't think there's -- especially in a case like
 14 this that there can be any showing that the result would have been different.

15 THE COURT: Okay. As to claim 40, the first issue was trial counsel
 16 failed to hire a mitigation expert and did no mitigation investigation. This issue
 17 fails because their counsel has failed to identify what mitigation investigation or
 18 evidence counsel failed to conduct or present. He has a burden to demonstrate
 19 specific evidence that would have probably led to a different result.

20 The next one is, failure to move, to sever Petitioner's case from his
 21 Co-defendants as Mr. Oram has pointed out. That issue has been raised
 22 several times and rejected and there's -- there's no -- there's no additional legal
 23 authority or any proposition that he was entitled to severance during the third
 24 penalty phase, and has not identified that this motion would have had any
 25 chance of success.

1 The third issue, failing to challenge the Constitution -- the
2 constitutionality of Nevada's death penalty scheme including, failing to assert
3 the following arguments, and this is a subpart. Nevada's death penalty scheme
4 is unconstitutional because it does not narrow the class a person's eligible for
5 the death penalty which was claim 30. This has been specifically rejected by
6 the Nevada Supreme Court in *Caldwell v State*. The aggravating circumstances
7 used to impose death sentence sufficiently narrow the termination of death
8 eligibility and the Petitioner cites to no legal authority for these claims and is
9 unclear how this would have been a just -- a justiciable issue at the third
10 penalty hearing.

11 The next subpart, Nevada's death penalty is unconstitutional
12 because it employs lethal injection. This was claim 31. Petitioner cites to no
13 legal authority for these claims and is unclear how this would have been a
14 justiciable issue at the third penalty hearing, and the U. S. Supreme Court has
15 recently rejected this argument in *Baze, [B-A-Z-E] v Rees, [R-E-E-S], 128*
16 *Supreme Court 1520 2008*.

17 And the next subpart C, the death penalty is excessive under the
18 facts of Petitioner's case. Claim 32, Petitioner has failed to cite to any legal
19 authority for these claims, and again, it's unclear how this would have been a
20 justiciable issue at the third penalty hearing or would have made any difference.

21 D, the next subpart. The death penalty is cruel and usual, claim
22 33. There's no legal authority for these claims, and again, unclear how this
23 would have been justiciable issue at the third penalty hearing.

24 The next subpart, the death penalty violates international law.
25 Claim 34, there's no legal authority for these claims. It's unclear how this

1 would have been justiciable. Petitioner fails to demonstrate what particular,
 2 customary, international legal principles prohibit the death penalty in the United
 3 States, and he fails to establish the use of the death penalty is some sort of
 4 peremptory norm of international law. Courts that have considered the
 5 question of whether international law bars capital punishment in the United
 6 States have uniformly concluded that it does not. Mere citation to *Paquete*, [P-
 7 A-Q-U-E-T-E] and *Habana*, [H-A-B-A-N-A], and the notion that U. S. follows
 8 customary international law, is insufficient.

9 The next subpart, Petitioner claims any current or future
 10 international law norms which is claim 35. This argument does not present and
 11 could not -- a cognizable basis for relief. The next subpart, the Nevada
 12 Supreme Court conducted inadequate appellate review during Petitioner's direct
 13 appeal and failed to adequately address Petitioner's appeal of his third penalty
 14 hearing conviction, claim 36.

15 Again, this is not a cognizable issue in a State Court post
 16 conviction proceeding. I can obviously not rule on whether the Nevada
 17 Supreme Court conducted an adequate appellate review, and it does not
 18 address the effectiveness of Petitioner's counsel in relation to the third penalty
 19 hearing.

20 The next subpart, Petitioner was deprived of an opportunity for
 21 clemency, claim 37. This is a political question, does not implicate the
 22 effectiveness of Petitioner counsel.

23 Number 4 failed to file a motion in limine to prohibit prosecutorial
 24 misconduct. The Petitioner did not cite to any legal authority for this argument
 25 and the District Court would obviously not be inclined to assume the State was

going to engage in prosecutorial misconduct. I guess the way I interpreted this is that the attorney failed to file a motion to tell the prosecutor to follow the rules, and I think this is the same as a prosecutor filing a motion telling defense counsel not to be ineffective. So that claims fails as well.

Number 5 failed to file a motion in limine to prevent admission of or object to the testimony of John Lucas [phonetic] because it impermissibly suggested that Petitioner had threatened Mr. Lucas [phonetic]. The Petitioner fails to demonstrate how this would have been an issue at the third penalty hearing and how it would have been successful.

Number 6 failed to object to the seating of obviously biased jurors and Bambi Lynn, and it's N-I-E-T-S-C-H, [Nietsch]. And the next one I'll spell, Ishkanian, I-S-H-K-A-N-I-A-N. And this is in claim 7. I am unclear as to what Petitioner's counsel is citing to here. It's impossible to determine the factual record of juror N-I-E-T-S-C-H-S. I guess it's Nietsch's statements and purported bias, and I could not see a mention of Ishkanian juror in the Petitioner's brief.

Seventh issue, failed to obtain prison records necessary to impeach John Lucas [phonetic] with his conviction for a gross misdemeanor. The Petitioner fails to establish how this would have been relevant or even admissible impeachment material.

Number 8 failed to request adequate instruction on the elements of burglary, robbery, escape, and attempt. And again, I think that we have addressed that. Petitioner failed to explain how this would have been a -- an issue at the third penalty hearing or on appeal. And again, although this issue was waived, the Nevada Supreme Court opined and Petitioner's direct appeal that this failure resulted in no meaningful prejudice.

1 Number 9 failed to object to the extensive prosecutorial misconduct
2 during the State's closing and rebuttal closing.

3 Claim 15, again, this does not make sense because trial and
4 appellate counsel for the third penalty phase cannot be deemed ineffective for
5 failing to object to prosecutorial misconduct during the guilt phase.

6 Number 10 failed to object to the District Court's extensive
7 questions to potential jurors about their religious affiliations and practices.

8 Claim 5, this claim is denied as well. The scope of voir dire is
9 within the trial court's discretion and inquiry into religious beliefs may be
10 appropriate in a death penalty case. In the trial court, in the present case,
11 reasonably permitted the written juror's questionnaire to explore whether a
12 juror's religious views would compromise his or her ability to apply, impartially,
13 the law regarding the death penalty.

14 Number 11 failed to object to removal of a juror for cause based on
15 the juror's statement that his anti-death penalty viewpoint would substantially
16 impair his ability to fulfill his duty as a juror. This is under claim 6.

17 The Petitioner failed to cite any law demonstrating why removal of a juror
18 entitles to him relief. This challenge relates to jury selection for Petitioner's
19 first trial. Thus, it would have no bearing on the effectiveness of Petitioner's
20 counsel at the third penalty hearing and appeal.

21 Number 12 failed to assert challenges for cause to biased potential
22 jurors relying, instead upon peremptory challenges, thus limiting Petitioner's
23 ability to preserve those challenges for other potential jurors.

24 This was claim 7. Petitioner is only speculating that he would have
25 received a more favorable jury had his counsel not expended peremptory

1 challenges on these jurors. Additionally, he never identifies which jurors those
2 peremptory challenges should have been reserved for.

3 Number 13 failed to object to general misconduct consistent of
4 potential juror with knowledge of Petitioner's prior vacated death sentence
5 informing other potential jurors that Petitioner's penalty hearing was a retrial.

6 Claim 8, the Petitioner's failed to demonstrate whether the other
7 potential jurors actually made it onto the jury panel.

8 Number 14 failed to object to the District Court's screening other
9 potential jurors as to whether they could equally consider the three potential
10 sentences that could be imposed.

11 Claim 9, this claim challenges conduct during the first trial which is
12 not a basis for demonstrating ineffective assistance at the third penalty hearing
13 and subsequent appeal of the third penalty hearing. And Petitioner cites to no
14 law indicating this would be a basis for relief.

15 Number 15 failed to object to Clark County Eighth Judicial District
16 Court's administration of jury selection -- [Sneeze heard].

17 MR. ORAM: Bless you.

18 THE COURT: -- as racially discriminatory which caused Petitioner to be
19 convicted by an all white jury.

20 Claim 11, Petitioner's failed to show how this issue would have
21 been successful at the third penalty hearing. Petitioner fails to establish a
22 prima facie case that he was denied a jury fairly representative of the
23 community. It also doesn't make much sense because the Petitioner is white;
24 is that correct? The Petitioner was white?

25 MR. ORAM: Yes.

1 THE COURT: But the claim was that he was convicted by an all-white
2 jury.

3 Number 16, in regards to the jury instructions on the death penalty,
4 counsel failed to -- in subpart A, object to an instruction that a verdict may not
5 be influenced by sympathy, prejudice, or public opinion, and 26A, Petitioner
6 cites to no legal authority for this argument. '

7 B, object to the jury instruction on aggravating and mitigating
8 circumstances which fail to convey the message that each juror is permitted,
9 individually, to consider and give effect to mitigating evidence when deciding to
10 vote for a sentence of death, leaving the jurors to believe the -- that --

11 MR. ORAM: Unanimity?

12 THE COURT: -- there you go, was required for mitigating factor to be
13 found and we have already discussed this and that that instruction has been
14 upheld. C, object to the jury instruction on aggravated circumstances which
15 fail to emphasize that such factors must be found unanimously.

16 Claim 26C, as the petition concedes, the jury was instructed that it
17 should find the aggravating factors unanimously, even assuming this claim is
18 not belied by the record, the failure to adequately instruct the jury on unanimity
19 may be harmless where the jury is informed that aggravating circumstances
20 must be unanimously found beyond a reasonable doubt, and no constraints are
21 placed on the jury's ability to find mitigating circumstances, *Nika v State, 198*
22 *P 3rd 839*, a Nevada case, 2008.

23 D requests clarification to the jury that they were never mandated
24 to impose the death penalty. Claim 26D, the instruction given has already been
25 found sufficient to inform the jury that they are never required to impose the

1 death penalty in *Bennett v State*, *Riley v State*. Subpart E, object to a jury
2 instruction describing the potential for -- I'm sorry, commutation of a death
3 sentence which overstated the potential for receiving a commutation of
4 sentence, claim 26A.

5 The U. S. Supreme Court has rejected this argument and that is in
6 *California v Ramos*, 463 U. S. 992, a 1983 case. Object to the instruction on
7 commission of a felony as an aggravated circumstance which suggests a
8 felony's purely incidental to a murder constituting aggravating circumstances,
9 claim 26F. Petitioner fails to cite any authority supporting this purported
10 distinction between incidental and aggravating felonies, and I'm not quite sure
11 if this was -- could have been interpreted as an attempt to raise the *McConnell*
12 issue that was eventually raised. So, I don't know.

13 MR. ORAM: And Judge, and that's --

14 THE COURT: If you don't think it was --

15 MR. ORAM: And it was -- this Court decided the *McConnell* matters --

16 THE COURT: Right.

17 MR. ORAM: -- previously. Okay.

18 THE COURT: But this was before *McConnell*.

19 MR. ORAM: Right.

20 THE COURT: This brief was before *McConnell*.

21 MR. ORAM: Right.

22 THE COURT: So there was kind of -- reading it very broadly --

23 MR. ORAM: Okay.

24 THE COURT: -- that maybe it was an attempt. Okay. G, object to jury
25 instruction that inadequately described the weighing of aggravating and

1 mitigating factors. Claim 27, these arguments have already been addressed
 2 and rejected by the Nevada Supreme Court. *Bennett v State, Riley v State*.
 3 Number 17 failed to challenge the State's failure to include in the charging
 4 information a designation of aggravating circumstances.

5 Claim 28, Petitioner failed to establish how counsel, at the third
 6 penalty hearing, could have raised this issue. And number 18, failed to object
 7 to admission of Co-defendant, Lockett's [phonetic] prior testimony due to
 8 unavailability based on Lockett's [phonetic] anticipated invocation of his 5th
 9 Amendment privilege.

10 Claim 29, this has no bearing on the effectiveness of counsel at the
 11 third penalty hearing and subsequent appeal. As to claim 42, this claim repeats
 12 the above incorporation by reference approach adopted in claim 40. Thus,
 13 claim 42 fails for the same reason.

14 The only additional argument is that counsel for Petitioner's appeal
 15 of his third penalty hearing was ineffective for -- and we've already discussed
 16 this, but I'll state it for the record, for failing to reassert unsuccessful appellate
 17 arguments from Petitioner's prior appeal, for what I believe are obvious
 18 reasons, appellate counsel is not ineffective for electing not to assert these
 19 same unsuccessful arguments a second time.

20 Petitioner's claim that the probable outcome of his appeal would
 21 have been different as belied by the record in the Nevada Supreme Court
 22 decisions and Petitioner's prior appeals, and for all those reasons, the petition
 23 as to Plaintiff's 40. Okay. All right, when I was reading my notes, it should
 24 have been justiciable. I said: justifiable, I think. So, I'm sorry.

25 MR. OWENS: Okay.

1 THE COURT: So, Kerry, when -- every time I said -- I think I did say
2 justifiable. Let me look because I think it was a typo. Did I say it every time?

3 MR. OWENS: I don't remember.

4 THE COURT: Do you remember?

5 MR. ORAM: I don't recall.

6 THE COURT: I think I might have.

7 MR. ORAM: But I promise I won't say anything on appeal about it,
8 Judge.

9 THE COURT: Okay. It's -- because I'm looking at one and it looks to be
10 a typo. I don't know if I corrected myself but I meant to say: justifiable.

11 MR. ORAM: Okay.

12 THE COURT: Okay.

13 MR. ORAM: Yes, Your Honor.

14 THE COURT: So, do the parties have any objection to Kerry making that
15 correction?

16 MR. ORAM: No.

17 MR. OWENS: No objection.

18 THE COURT: So that --

19 MR. ORAM: No; no objection at all.

20 THE COURT: -- it's really clear.

21 MR. ORAM: No; I understand; it's very clear.

22 THE COURT: And, I mean, I don't -- I can't -- I don't want to read the
23 whole thing again.

24 MR. ORAM: No.

25 THE COURT: And I can't remember if I corrected myself.

1 MR. ORAM: Your Honor.

2 THE COURT: Okay.

3 MR. ORAM: One question. The State obviously will prepare the order in
4 this particular case and I imagine it sort of being piece meal.

5 THE COURT: Oh, April liked the notes because it makes her minutes
6 easier.

7 MR. ORAM: With regard to the order, State will just make sure it's
8 served on me so that the 30 day --

9 THE COURT: Okay. I was going to ask Mr. Owens because, you know
10 how this has gone back and forth, and when I decided the *McConnell* issue, I
11 decided that 40 and 42 were moot and then it came back to decide, you know,
12 what they told me to decide after the *McConnell* issue and then we still had to
13 decide 40 and 42. Do you not think we now have to have a complete order
14 that disposes of all the claims?

15 MR. OWENS: Just the *McConnell* harmless error decision.

16 THE COURT: Okay.

17 MR. OWENS: And your decision here today.

18 THE COURT: Okay. So we have not done that one?

19 MR. OWENS: I think we discussed it, JoNell and I, on the record at the
20 time and we suggested, because previously there had been three separate
21 findings and we said it shouldn't be piece meal. Resolve everything and we'll
22 do one final order so we just need to resolve what it was remanded for and
23 that was *McConnell* harmless error --

24 THE COURT: Right.

25 MR. OWENS: -- claims 40 and 42 that we did here today and one final

1 set of findings. And by all means, I will send that over to Mr. Oram before I
2 submit it to the Court.

3 THE COURT: Okay.

4 MR. ORAM: That sounds great.

5 THE COURT: And I'll keep my notes.

6 MR. ORAM: Okay.

7 THE COURT: And I'll obviously review it, and if you just want the C -- if
8 you want the DVD -- is that okay or do you actually want a transcript?

9 MR. OWENS: We probably should have a transcript.

10 THE COURT: Okay. Then I'll have Kerry prepare the transcript and the
11 State will prepare the order and I think it's now completely done.

12 MR. ORAM: [Indiscernible].

13 THE COURT: And are you going to continue?

14 MR. ORAM: I'll continue on and just through the appeals, Judge.

15 THE COURT: All right.

16 MR. ORAM: Thank you very much, Your Honor.

17 THE COURT: Thank you.

18 MR. OWENS: Thank you.

19 THE COURT: Thank you very much because this was an interesting
20 case.

21 MR. ORAM: It is an interesting case.

22 THE COURT: Thank you.

23 MR. OWENS: It's only done for now. These things are --

24 THE COURT: I know I said --

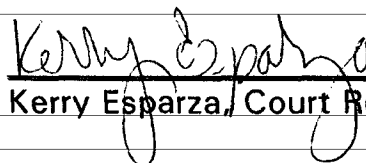
25 MR. OWENS: They always come back, one way or another.

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THE COURT: It is only done for now. So, don't get your hopes up.

[Proceeding concluded at 11:16 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.


Kerry Esparza, Court Recorder/Transcriber