IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDOLPH LYLE MOORE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 66652

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of 2nd Post Conviction Relief
Eighth Judicial District Court, Clark County

TIFFANI HURST
Assistant Federal Public Defender
Nevada Bar #11027C
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar #012577
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 9

ARGUMENT 10

A. Adoption of the Proposed Findings 10

B. Effective Assistance of Third Penalty Phase Counsel David Schieck 16

C. Alleged Brady Violations 26

D. Application of Procedural Bars 37

E. No Evidentiary Hearing Was Necessary 60

F. Cumulative Error 63

CONCLUSION 65

CERTIFICATE OF COMPLIANCE 66

CERTIFICATE OF SERVICE 67

TABLE OF AUTHORITIES

Page Number:

Cases

Anderson v. City of Bessemer, N.C.,
470 U.S. 564, 572, 105 S.Ct. 1504, 1510-1511 (1985) 13

Banks v. Dretke,
540 U.S. 668, 675, 124 S.Ct. 1256, 1263 (2004)..... 33, 35

Banks v. Thaler,
583 F.3d 295, 323 (5th Cir. 2009).....35

Bobby v. Van Hook,
130 S.Ct. 13, 16-17 (2009).....48

Bousley v. United States,
523 U.S. 614, 623-24 (1998).....59

Brady v. Maryland,
373 U.S. 83, 83 S.Ct. 1194 (1963)..... 9, 15, 26, 27, 31, 36, 54, 55, 56, 57, 58, 62

Brown v. Sanders,
546 U.S. 212, 126 S.Ct. 884 (2006).....60

Byford v. State,
123 Nev. 67, 70, 156 P.3d 691, 693 (2007) 13

Cooper v. Fitzharris,
551 F.2d 1162, 1166 (9th Cir. 1977).....46

Crump v. Warden,
113 Nev. 293, 303, 934 P.2d 247, 253 (1997).....41

Cullen v. Pinholster,
___ U.S. ___, 131 S.Ct. 1388 (2011).....22

Cuyler v. Sullivan,
446 U.S. 335, 100 S.Ct. 1708 (1980).....25

Davis v. State,
107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) 45
Donovan v. State,
94 Nev. 671, 675, 584 P.2d 708, 711 (1978) 46
Echavarria v. State,
108 Nev. 734, 839 P.2d 589 (1992) 54
Edwards v. Carpenter,
529 U.S. 466, 452-53 (2000).....42
Ennis v. State,
122 Nev. 694, 137 P.3d 1095 (2006) 46
Evans v. State,
117 Nev. 609, 647-48, 28 P.3d 498, 524 (2001).....64
Hall v. State,
91 Nev. 314, 315, 535 P.2d 797, 798 (1975) 51
Harrington v. Richer,
562 U.S 86, 109-110, 131 S.Ct. 770, 790 (2011)..... 20, 47, 62
Hathaway v. State,
119 Nev. 248, 252, 71 P.3d 503, 506 (2003) 40, 42, 55
Hernandez v. State,
118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) 63
Hogan v. Warden,
109 Nev. 952, 960, 860 P.2d 710, 716 (1993) 59
Homick v State,
112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) 45
Hutchison v. Bell,
303 F.3d 720, 742-43 (6th Cir. 2002) 56

Jackson v. Warden, Nevada State Prison,
91 Nev. 430, 432, 537 P.2d 473, 474 (1975) 45
Kirksey v. State,
112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) 45, 47
Lenz v. State,
97 Nev. 65, 66, 624 P.2d 15, 16 (1981) 45
Lisle v. State,
131 Nev. ___, 351 P.3d 725, 729 (2015) 56
Lozada v. State,
110 Nev. 349, 353, 871 P.2d 944, 946 (1994) 40
Mazzan v. Warden,
112 Nev. 838, 842, 921 P.2d 920, 922 (1996) 58
McConnell v. State,
125 Nev. 243, 259, 212 P.3d 307, 318 (2009) 3, 63
McNelton v. State,
115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999) 41
Moore v. State, (1988) (Moore I).....2, 36
Moore v. State, (1991) (Moore II) 2, 36
Moore v. State, (1993) (Moore III).....2
Moore v. State, (1996) (Moore IV)..... 2, 3, 36, 59
Murray v. Carrier,
477 U.S. 478, 488 (1986) 41
Nika v. State,
124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008).....60
Pellegrini v. State,
117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) 42, 58

Pursell v. Horn,
187 F.Supp.2d 260, 374-5 (W.D. Pa. 2002).....64
Riebel v. State,
106 Nev. 258, 263, 790 P.2d 1004, 1008 (1990).....54
Rippo v. State,
113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997).....31
Roe v. Flores-Ortega,
528 U.S. 470, 479, 120 S.Ct. 1029 (2000).....48
Sawyer v. Whitely,
505 U.S. 333, 112 S.Ct. 2514 (1992).....59
State v. Bennett,
119 Nev. 589, 81 P.3d 1 (2003).....55
State v. District Court (Riker),
121 Nev. 225, 112 P.3d 1070 (2005).....42
State v. Greene,
129 Nev. ___, 307 P.3d 322, 325-326 (2013).....13
State v. Haberstroh,
119 Nev. 173, 181, 69 P.3d 676, 681 (2003).....40
State v. Huebler,
128 Nev. ___, 275 P.3d 91 (2012).....55
State v. LaPena,
114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998).....46
State v. Powell,
122 Nev. 751, 756-9, 138 P.3d 453, 456-8 (2006)..... 37, 38
Stewart v. LaGrand,
526 U.S. 115, 120 (1999).....42

Strickland v. Washington,
466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984) 22, 41, 44, 45, 46, 47, 48, 49, 61
U.S. v. Amiel,
95 F.3d 135, 145 (2nd Cir. 1996) 35
Valerio v. Crawford,
306 F.3d 742, 778 (9th Cir. 2002).....14
Williams v. Anderson,
460 F.3d 789 (6th Cir. 2006).....64

Statutes

NRS 6.010.....53
NRS 34.726..... 37, 42
NRS 34.726(1) 55
NRS 34.800..... 15, 37
NRS 34.800(1) 37
NRS 34.800(2) 38
NRS 34.810..... 14, 37
NRS 34.810(1)(b).....3
NRS 34.830.....15
NRS 50.065(2) 54
NRS 50.225.....23
NRS 174.425.....23

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDOLPH LYLE MOORE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 66652

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of 2nd Post Conviction Relief
Eighth Judicial District Court, Clark County

Routing Statement: This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(a)(2) because it is a post-conviction appeal in a death penalty case.

STATEMENT OF THE ISSUES

A. Adoption of the Proposed Findings.

B. Effective Assistance of Third Penalty Phase Counsel David Schieck.

C. Alleged Brady Violations.

D. Application of Procedural Bars.

1. **Ineffective Assistance of First Post-Conviction Counsel as Good Cause.**
2. **Alleged Brady Violations as Good Cause.**
3. **Fundamental Miscarriage of Justice.**

E. No Evidentiary Hearing Was Necessary.

F. Cumulative Error.

STATEMENT OF THE CASE

In 1985, Randolph Moore was convicted of two counts of First Degree Murder with Use of a Deadly Weapon and was sentenced to death for the murders of co-defendant Dale Flanagan's own grandparents, Carl and Colleen Gordon. 15 AA 3622-31; 3638-39. On appeal, the murder convictions were affirmed, but by a three-two split the death sentences were vacated and the case was remanded for a new penalty hearing due to prosecutorial misconduct. Moore v. State, 104 Nev. 113, 754 P.2d 841 (1988) (Moore I). Remittitur issued on June 7, 1988.

A second penalty hearing in 1989 also resulted in death verdicts for Moore but was again reversed on appeal, this time due to unconstitutional admission of satanic worship evidence. 16 AA 3722-27; 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. 17 AA 3996-4003; Moore v. State, 112 Nev. 1409, 930 P.2d 691 (1996) (Moore IV). Remittitur issued on May 22, 1998. 17 AA 4129.

Thereafter, Moore filed his first[1] post-conviction petition on June 2, 1998. 17 AA 4130-40. After extensive briefing and argument, the district court denied all

[1] Although Moore's counsel, David Schieck, filed a previous habeas petition on May 19, 1995, (16 AA 3959-63; 17 AA 4141-54), and one even earlier than that on June 3, 1991, (16 AA 3832-39), both raising guilt phase issues, the Nevada Supreme

guilt phase claims but vacated the death sentences and ordered what would have been a fourth penalty hearing due to McConnell error. 18 AA 4432-40. On appeal, the Nevada Supreme Court in 2008 affirmed the denial of guilt phase issues but reversed and remanded the penalty phase claims for harmless error analysis and if necessary, for resolution of any remaining third penalty phase issues which had previously been rendered moot. 19 AA 4715 – 20 AA 4737. (SC# 46801). Remittitur issued on October 23, 2008.

Upon remand, the district court found any McConnell error to be harmless and denied the remaining penalty phase claims on the merits. 21 AA 5046-60. The Nevada Supreme Court affirmed this final decision in an unpublished Order of Affirmance on August 1, 2012. 21 AA 5147-67 (SC# 55091). Remittitur issued on October 15, 2012.

Court subsequently held that such was denied as premature and does not constitute a prior petition for procedural bar purposes. Order, SC# 46801 (4/23/08); 19 AA 4719-20. The accuracy of this legal ruling is plainly belied by the fact that this Court affirmed the denial of habeas relief on the merits, not on grounds of mootness or prematurity. Moore v. State, 112 Nev. 1409, 930 P.2d 691 (1996) (Moore IV). Regardless of whether it was "premature," it was filed and entertained on the merits and constitutes "any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction" pursuant to NRS 34.810(1)(b), which makes any subsequent petition successive and subject to procedural bars. Nonetheless, in accord with law of the case on that issue, the State will refer to the June 2nd 1998 petition as a "first" petition, although such is a legal fiction.

Moore then proceeded to federal court where he filed a federal habeas petition on April 18, 2013, and the federal public defender was appointed. 36 AA 8769-73. A motion for stay and abeyance was filed in the federal case on August 30, 2013, which was granted on November 21, 2013. Id. Meanwhile, the federal public defender filed a successive state habeas petition on September 19, 2013. 13 AA 3185 – 15 AA 3573. The State filed its response on January 7, 2014, (36 AA 8738-88), and Moore filed an opposition on March 7, 2014, (36 AA 8789-8838). The matter was argued in court on June 5, 2014, and the judge denied the petition as procedurally barred. 41 AA 10045-64. Moore filed his objections to proposed findings on July 23, 2014, (41 AA 10065-110), and the judge filed her written findings denying the petition on August 27, 2014, (41 AA 10141-165), with Notice of Entry of Order being served on September 2, 2014), (41 AA 10140). A Notice of Appeal was timely filed on October 6, 2014. 41 AA 10166-167.

STATEMENT OF THE FACTS[2]

On November 5, 1984, Randolph Moore participated with several other people in the brutal, planned murder of his friend, Dale Flanagan's ("Flanagan"), elderly grandparents, Carl and Colleen Gordon. 11 AA 2531, 2545. The group began planning the murder at a meeting several weeks in advance. 11 AA 2524-27,

[2] These facts come from the testimony presented at the third penalty hearing.

2607. Flanagan believed he was a beneficiary of his grandparents' will and told Moore and the others that they would "be taken care of." 11 AA 2529, 2587. Flanagan also believed he would receive his grandparents' home and life insurance money after their death. 11 AA 2608. Flanagan further stated that the killing would be easy. The plan involved breaking into the house through the side window, killing the victims, and then making it appear as if it was a burglary. 11 AA 2529, 2609. Moore agreed with Flanagan throughout the discussion. 11 AA 2530.

The group met the night of the murder at Moore's apartment to discuss the plan again before carrying it out. 11 AA 2531. Some drinking occurred, but not a significant amount. 11 AA 2617. Moore and Flanagan were the primary leaders of the discussion. 11 AA 2534. Flanagan stated that he would be in charge of killing Colleen Gordon. 11 AA 2536, 2614. Moore agreed to be responsible for killing Carl Gordon. Id. The remaining members of the group were given the tasks of driving to the home and ransacking the house to make it appear as if it had been burglarized. 11 AA 2615-16. Moore armed himself with a .22 rifle, and Flanagan carried a .22 pistol. Id.

On the way to the Gordons' home, Moore stopped on the side of the road to test-fire the .22 rifle. 11 AA 2617. When they arrived, Flanagan broke into the home through the side window as planned. 11 AA 2543. Flanagan then entered his grandmother's room which was on the first floor of the home. 11 AA 2628. Colleen

Gordon started to sit up in her bed, and Flanagan grabbed her by the jaw and shot her in the head. 11 AA 2544, 2628. Meanwhile, Moore stood ready to kill Carl Gordon with the .22 rifle as he came down the stairs from the second floor. 11 AA 2545, 2628-29. After shooting Mr. Gordon several times in the back and chest, Moore shot him once more in the head in order to "make sure he was dead." 11 AA 2545. Both Mr. and Mrs. Gordon died as a result of their gunshot wounds. 11 AA 2506. Colleen Gordon received three shots to her head. Id. Carl Gordon was shot seven times and managed to crawl several feet before he died. 11 AA 2517.

After the Gordons were dead, the group found Mrs. Gordon's purse and took her wallet. 11 AA 2540. They also ransacked the living room and closet. Then they left the house and disposed of the weapons used in the murder. 11 AA 2549-50. Flanagan had been known for carrying a unique knife which he ended up dropping outside the broken window. 11 AA 2547, 2630. He later purchased a replica knife. 11 AA 2631, 2675-76.

After disposing of the weapons, all of the perpetrators returned to Moore's apartment. 11 AA 2538-39. Moore and Flanagan went through Colleen Gordon's wallet. They found identification cards and a small amount of money. 11 AA 2540-41. They then burned the identifying information found in the purse and purchased beer with Ms. Gordon's money. 11 AA 2541, 2626-27. Moore never demonstrated

any remorse for what he and his coconspirators had done. Moore fled to Mexico and was arrested there in January 1985. 12 AA 2731.

Evidence was also presented to the jury that Moore threatened to kill any member of the group if one of them ever spoke about the murders. 11 AA 2592. Another incident occurred where Moore threatened to kill a friend, Wayne Wittig, whom he believed had been engaging in sexual relations with Moore's wife. 11 AA 2700-03. Moore called Mr. Wittig and asked if he could come to his apartment to talk. 11 AA 2701. When Wittig opened the door, Moore pointed a shotgun at his face. 11 AA 2703. On another occasion, Moore also followed Wittig as he was driving his truck and fired a shot at him. 11 AA 2708.

Moore presented the following mitigation evidence. A prison Chaplain, Janalee Hoffman, testified that Moore had made efforts to help youth stay out of trouble and prison. 12 AA 2755-57. She also testified that Moore had provided emotional and some financial support to her when her husband passed away. One of Moore's letters to Ms. Hoffman was read in court. 12 AA 2765-69. The former testimony of Garry Hoffman concerning Moore's contribution to his prison ministry was also read into the record. 12 AA 2772.

Evidence was also presented that Moore had not received any formal discipline from prison officials since being incarcerated. 12 AA 2779, 2794. However, the evidence also demonstrated that inmates housed in Moore's particular

unit are kept away from the general population and have greater security. 12 AA 2784-87. Thus, it's not unusual that Moore has a small disciplinary record. 12 AA 2788.

Shelly Johnson, a friend of Moore's, testified as a character witness on his behalf. 12 AA 2803. She testified that she believed Moore to be a loving, kind person, and she had kept in contact with him since he was first incarcerated. 12 AA 2804. She expressed her belief that he was not a violent person, and she also testified that Moore was married young to a wife who was unfaithful. 12 AA 2806-07. However, on cross examination Ms. Johnson stated that she did not believe Moore was responsible for killing the Gordon's despite the evidence against him. 12 AA 2810.

Moore's mother, Lynn Moore, testified about Moore's life prior to the murders. She testified that Moore's father had been a violent person, and Moore later grew up without a father figure. 12 AA 2871-72. Ms. Moore also testified that Moore had received several certificates and awards during his time in prison. 12 AA 2874. Ms. Moore then described an incident where Moore allegedly saved a woman from a fire. 12 AA 2878. Finally, Ms. Moore stated that Moore was affected greatly by the death of his grandmother and the breakup of his marriage. 12 AA 2880-82. Moore also gave an unsworn allocution. 13 AA 3029-033. Moore's counsel argued in mitigation that Moore had no significant history of prior criminal history, was

young and intoxicated at the time of the crime, had an unstable childhood, grew up in a less-than-perfect home environment without a true father figure, entered into a foolish marriage causing him to drop out of high school, underwent a change in personality due to his troubles, and finally had no disciplinary action while in prison, 13 AA 3080-84.

SUMMARY OF THE ARGUMENT

Randolph Moore was convicted of this double murder 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 20 years ago. In this appeal, this Court should affirm the denial of Moore's untimely and successive habeas petition which he filed upon return from federal court in order to exhaust state remedies. Nearly all of Moore's current claims have been raised, entertained, and denied in prior habeas proceedings and he simply re-raises them now in greater factual detail. Moore's allegations of good cause consist of an untimely claim of ineffective assistance of first post-conviction counsel, a few new facts in support of a previously denied Brady claim, and a regurgitation of a challenge to the great risk of death aggravator framed this time as a claim of actual innocence of the death penalty. Because Moore failed to establish good cause or otherwise overcome application of the procedural bars below, the district court did not err in denying his successive and untimely petition.

ARGUMENT

A. Adoption of the Proposed Findings

Moore complains that the State's proposed written order denying the petition expanded the scope of the district court's oral ruling. But there is no law requiring a judge to orally articulate every finding which will later appear in a written order, nor is it impermissible to adopt verbatim a parties' proposed order. When the petition was argued in court on June 4, 2014, the judge clarified that there had been no motion to dismiss, 41 AA 10046-047, inquired of Moore's counsel why he was entitled to an evidentiary hearing on a procedurally barred petition, 41 AA 10051-052, corrected Moore's counsel on his characterization of a prior ruling in the case, 41 AA 10053, expressed déjà vu as to the repeated raising of the same issues over fifteen years of habeas proceedings, 41 AA 10054, and reminded the prosecutor of the name of one of Moore's prior counsel, 41 AA 10061. The record demonstrates the judge was well-versed in the briefs and the case history and was actively engaged in the proceedings. At the conclusion, the judge denied Moore's 360-page petition by summarizing that it was successive and that Moore had failed to show good cause and prejudice. 41 AA 10063. The judge asked the State to prepare the order and Moore's counsel was promised an opportunity to view the State's proposed order in advance. Id.

In compliance with the court's request, the State drafted proposed findings and served a copy on Moore's counsel on July 9, 2014, via FAX transmission which indicated the State would submit the proposed findings to the judge a week later on July 16, 2014. 41 AA 10141-165. On July 15, 2014, Moore's counsel sent a letter to the State indicating that he had objections to the proposed findings and desired more time before the findings were sent to the judge. 41 AA 10075. The State declined, but promised to forward counsel's letter to the judge along with the proposed findings so that the judge would be aware that he had objections. 41 AA 10079. Moore filed formal written objections on July 23, 2014. 41 AA 10065-073. A month later, the judge calendared the case demonstrating that she had read and was aware of Moore's "extensive" objections. 41 AA 10111-113. The State responded that it was not surprised by the objections and it appeared that Moore's counsel was simply re-arguing the case. Id. The State represented that it had read the defense objections but still believed that the proposed findings were what was needed to prevail on appeal, unless the judge had concerns, and that some of Moore's objections would weaken the findings and make them susceptible to being reversed. Id. On August 27, 2014, the judge signed and filed her findings denying the petition. 41 AA 10141-165.

The text for the State's proposed findings did not materialize out of thin air nor did it contain anything outside the four corners of the briefs already filed and

considered by the judge. *Compare* Findings (41 AA 10141-165) to State's Response to Petition (36 AA 8738-88). The entirety of the proposed findings came directly from the judge's oral ruling as well as the pleadings on file before the district court judge. Id. Moore's counsel was afforded an opportunity to object and did in fact file written objections to the proposed order. In the end, the judge was free to adopt, change, re-draft, or modify the findings it any way she chose. The record reflects that the findings the judge did sign, accurately reflect the judge's intention and were deliberately adopted after the exercise of independent judgment, considerable thought and reflection.

The local rules for the Eighth Judicial District Court require the prevailing party to furnish the written order to the judge. EDCR 7.21. The State drafted its proposed findings consistent with the oral pronouncement of the judge and consistent with the State's responding brief and arguments in such a way as to ensure final disposition of all claims. Certainly, no judge wants proposed findings that are incomplete, weak, or inadequate for the decision reached. To this end, the State's proposed findings included all rulings it believed necessary for final disposition of the habeas petition in accord with the judge's ruling regardless of whether they were specifically mentioned in the oral pronouncement.

The prevailing party is not limited to the transcript of oral pronouncement of a ruling when drafting proposed written findings for the court. To the contrary, the

court need only orally pronounce its decision "with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." Byford v. State, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007); State v. Greene, 129 Nev. ___, 307 P.3d 322, 325-326 (2013). This language from Byford arose in the context of findings submitted to a judge without notice to opposing counsel and without the case having gone back on calendar for a more specific ruling on remand as had been ordered. Id. Such a scenario did not occur in the present case. On appeal, "… even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Anderson v. City of Bessemer, N.C., 470 U.S. 564, 572, 105 S.Ct. 1504, 1510-1511 (1985) (citations omitted). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Id. at 573-574. While the lack of sufficient judicial guidance might be grounds for a more stringent appellate review, it is not grounds for reversal. Id. There is no error where there is no reason to doubt that the findings issued by the court represent the judge's own considered conclusion. Id. Such is the case here.

Moore's 360-page petition contained 47 claims for relief, each with multiple sub-claims. To orally dispose of each specific claim would have consumed an entire afternoon on the bench. Such tedium is not the role of the district court judge.

Ultimately, the judge orally pronounced its ruling on the overriding question in this case which was whether Moore had shown good cause and prejudice to overcome the procedural bars. The only section of Moore's petition below which even addressed good cause was relatively short and simple. 13 AA 3202-210. Unless otherwise specified, by ruling in the State's favor the judge implicitly adopted the State's position and reasons for denying the petition as set forth in the State's response. The record above indicates that despite this adoption, the judge exercised her own independent judgment. If a judge agrees with a party's position in its entirety and desires to rule accordingly, there is no need for particularized oral findings on every single issue as those are already set forth in great detail in the prevailing party's brief.

Moore wants to try and limit the judge to only the successive petition bar of NRS 34.810 because that is the only procedural bar orally mentioned by the judge. Obviously the federal public defender would have preferred such a limitation, because Nevada's successive petition bar is not recognized in federal court and the petition would be entertained on the merits in that forum contrary to state judicial intent. Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002) (finding NRS 34.810 to be inadequate to support a procedural default defense in federal court). The federal public defender's goal is to weaken and undermine the language of the findings by leaving out essential and mandatory language so that they may ultimately

prevail on appeal or in federal court. Application of the one-year time bar is mandatory, and the State correctly included it in the proposed findings as demonstrated by the district court judge's declining to remove it when Moore's objection to it was brought to her attention. The same is true for the laches bar in NRS 34.800.

Despite its title as "Findings of Fact and Conclusions of Law," the State's proposed order did not purport to resolve any factual dispute or decide any witness credibility question for which an evidentiary hearing would have been required. Findings of fact and conclusions of law are required anytime a petition is resolved regardless of whether an evidentiary hearing is held. NRS 34.830. Instead, the judge resolved the petition without an evidentiary hearing by either accepting Moore's factual allegations as true or by finding them belied by the record. For example, some of the claims against first post-conviction counsel were demonstrably false according to the court record which showed the JoNell Thomas did in fact raise many of the claims that the federal public defender alleged she did not raise. 41 AA 10146-151. Also, Moore's allegation that Juror Guerra could not adequately speak and understand English was belied by the voir dire transcript which evidenced the contrary. 41 AA 10150. Moore's allegation regarding the Brady claim had been raised previously by prior counsel and Moore failed to show that any new facts were timely raised or materially different. 41 AA 10152-155. All of these findings are

supported by the record and required no evidentiary hearing to resolve. Accordingly, the State's proposed order did not improperly expand the judge's oral pronouncement to include factual findings, except to say that Moore's facts were either belied by the record or failed to entitle Moore to relief even if accepted as true. 41 AA 10147.

Unless this Court is prepared to say that the judge failed to exercise independent judgment in denying the petition, there is no error in the verbatim adoption of proposed findings drafted by the State consistent with its arguments and position as set forth in its briefs. Even then, any possible remedy would only be one of heightened scrutiny of the findings rather than reversal on appeal. Because there was no evidentiary hearing, there are no factual findings per se concerning witness credibility determinations or resolutions of disputes of fact to which this Court could possibly apply a heightened standard of scrutiny.

B. Effective Assistance of Third Penalty Phase Counsel David Schieck

In this claim, Moore argues that third penalty phase counsel David Schieck failed to investigate and present mitigating evidence. Inexplicably, the entirety of the argument set forth in this section is only a discussion of the merits of Schieck's representation without any reference to procedural bars or good cause to overcome them. The judge below did not reach the merits of any claim of ineffective assistance of counsel against David Schieck, instead holding that such claims are procedurally

barred and were in large part previously raised by first post-conviction counsel JoNell Thomas. 41 AA 10146-147. Moore fails to show how this ruling was in error. Instead, in his Opening Brief, Moore's counsel argues Schieck's ineffectiveness as if this were a timely first post-conviction petition following the penalty hearing, which it is not. This is an appeal from the denial of an untimely and successive habeas petition. The district court judge only considered claims of Schieck's ineffectiveness in the context of prejudice to overcome the procedural bars. Absent a showing of good cause, the prejudice prong is inadequate alone for relief and Moore cannot prevail. Nonetheless, because Moore discusses the merits of Schieck's performance, the State responds in order to show that even if Moore had good cause for an untimely and successive petition, he has still failed to demonstrate that he is prejudiced by the application of procedural bars.

Moore claims that Schieck failed to adequately investigate and present mitigation evidence at the penalty hearing such as his drug addiction, its effect on his brain, his psychological issues, and social and family history. This was raised as Claim 1 of his petition below. 13 AA 3211 – 14 AA 3279. JoNell Thomas previously made these very same arguments in her 2003 supplemental petition in the first post-conviction proceedings. 18 AA 4376-4383. She alleged that Schieck (and co-counsel Wolfbrandt) devoted inadequate resources to the case, hired no mitigation expert, and did very little, if any, mitigation investigation into Moore's

mental health and traumatic and violent childhood. Id. JoNell Thomas alleged that counsel failed to call witnesses who could testify to the effects of abuse and strife on Moore and the alcoholism, mental illness and domestic violence in his family history. Id. On appeal, the Nevada Supreme Court denied the claim as follows:

> Moore contends that counsel failed to adequately investigate and present mitigation evidence concerning his childhood, mental health, and mental state at the time of the murders. However, the evidence he argues should have been presented is insufficiently persuasive to lead us to conclude that even had counsel introduced it at the penalty hearing, the outcome of the proceeding would have been different.

21 AA 5158. Although the federal public defender has compiled a substantial family history, Moore fails to show how his arguments today are any different than those raised by JoNell Thomas in 2003. To the extent the federal public defender has investigated new family history, Moore fails to explain how it is even mitigating or how the outcome of the penalty hearing would have been any different.

As for the new expert opinions of Dr. Jonathan Lipman (Neuro-Pharmacologist) (24 AA 5810-40), and Dr. Jonathan Mack (Neuro-Psychologist) (28 AA 6921-67), their worth and validity nearly 30 years after the murders is suspect. Both doctors acknowledge the difficulty and limitations of their reports due to the passage of so much time. Id. Dr. Lipman did not even interview Moore and merely provides an opinion based on what he could read in the record. Id. Dr. Mack's unimpressive conclusion is that Moore may have residual ADHD, post-traumatic stress disorder, and depression. 28 AA 6954. These are hardly noteworthy

or significant revelations. In fact, the jury heard testimony of the vast majority of facts upon which their opinions are based, and no attempt is made to explain why the presentation of these expert opinions would have changed the outcome of the penalty hearing.

Shelly Johnson, a friend of Moore's, testified as a character witness on his behalf. 12 AA 2803. She testified that she believed Moore to be a loving, kind person, and she had kept in contact with him since he was first incarcerated. 12 AA 2804. She expressed her belief that he was not a violent person, and she also testified that Moore was married young to a wife who was unfaithful. 12 AA 2806-07. However, on cross examination Ms. Johnson stated that she did not believe Moore was responsible for killing the Gordon's despite the evidence against him. 12 AA 2810. Moore's mother, Lynn Moore, testified about Moore's life prior to the murders. She testified that Moore's father had been a violent person, and Moore later grew up without a father figure. 12 AA 2871-72. Ms. Moore also testified that Moore had received several certificates and awards during his time in prison. 12 AA 2874. Ms. Moore then described an incident where Moore allegedly saved a woman from a fire. 12 AA 2878. Finally, she testified that Moore was affected greatly by the death of his grandmother and the breakup of his marriage. 12 AA 2880-82. Schieck argued in mitigation that Moore had no significant history of prior criminal history, was young and intoxicated at the time of the crime, had an unstable

childhood, grew up in a less-than-perfect home environment without a true father figure, entered into a foolish marriage causing him to drop out of high school, underwent a change in personality due to his troubles, and finally had no disciplinary action while in prison, 13 AA 3080-84.

There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Harrington v. Richter, 131 U.S. 770, 131 S.Ct. 770, 788-89 (2011). Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. Id. In a capital case, there are any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly have been useful. Id. But counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. Id. Even if an expert theoretically could support a client's defense theory, a competent attorney may strategically exclude it, consistent with effective assistance, if such expert may be fruitless or harmful to the defense. Id. at 789-90.

Given Moore's high level of intelligence as revealed by Dr. Mack's testing (Full Scale IQ of 128 placing him in the superior range at the 97th percentile rank), 28 AA 6938-39, competent counsel may have found this to be not just unhelpful but

actually detrimental to Moore's case in mitigation. Co-defendant Flanagan, who had a much worse childhood and lower IQ than Moore, 13 AA 3083, utilized psychologist Dr. Marvin Etcoff in mitigation yet it made no difference to the jury in terms of imposing the death penalty. 12 AA 2901 – 13 AA 2998. Moore fails to explain how his belated psychological expert opinions would have resulted in a sentence of less than death with this particular jury. David Schieck's declaration is not evidence of a failure to investigate; rather, Schieck repeatedly indicates that, "I do not recall" and "I do not remember" and "I have no independent memory," whether certain investigative steps were taken. 25 AA 5978-80. Such is not surprising after 20 years' time. Certainly, there were many investigative actions that Schieck does remember taking and which he outlines in his declaration. Id. This is also confirmed by the penalty phase testimony which reflects an objectively reasonable strategy throughout the penalty hearing. Finally, Moore inappropriately relies upon Schieck's declaration in comparing his performance from 20 years ago to how he would investigate and defend a capital case today: "I have a great deal more training and experience today than I had at the time . . . if I were assigned to represent Mr. Moore today. . . ." 25 AA 5980. It is the prevailing standards of performance at the time that govern claims of ineffective assistance of counsel and the distorting effects of hindsight are to be avoided.

In Cullen v. Pinholster, the United States Supreme Court discussed the Strickland standard for effective assistance of counsel in the context of a capital penalty hearing. Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388 (2011). In Pinholster's penalty hearing, trial counsel called only one witness, Pinholster's mother, who gave an account of his troubled childhood and adolescent years, his siblings, and described Pinholster as "a perfect gentleman at home." Id. at 1396. Although trial counsel had consulted a psychiatrist, no expert was called in penalty hearing. Id. In post-conviction, Pinholster argued that counsel should have investigated and presented additional evidence about family members, his schooling and mental health history and epileptic disorder. Id. Although Pinholster supported his claim with school, medical, and legal records, as well as declarations from family members, and a psychiatrist who diagnosed petitioner with bipolar mood disorder and seizure disorders that were not presented at trial, his post-conviction petition was denied because the new evidence largely duplicated the mitigation evidence at trial, and some of the new evidence would likely have undercut the mitigating value of the testimony by petitioner's mother. Id. at 1409-1410. The Court reasoned that a one-witness "family sympathy" defense was reasonable under the circumstances, and the failure to present a psychiatric defense with evidence of brain damage and additional family investigation was a "two-edged sword" with questionable mitigating value. Id. The same is true in Moore's case. All that the federal public

defender has done in this claim is to propose an alternative strategy and theory of defense which in hindsight he speculates might have resulted in a non-death sentence.

Moore next complains that Schieck failed to investigate and impeach State's witnesses, John Lucas, Tom Akers, and Wayne Wittig. But there is nothing new presented here that was not known to Schieck or that would have changed the outcome of the penalty hearing. John Lucas told the jury about his two prior sex offenses with the grant of probation and counsel was prohibited from exploring it further. 11 AA 2559, 2577. Counsel was very much aware Lucas avoided prison time for his sex offense. Id. The jury also heard that Lucas had received $2,000 from Secret Witness. 11 AA 2554, 2567. Counsel also impeached Lucas with his prior inconsistent testimony, with intoxication, with uncharged criminal conduct, and favorable treatment in prison. 11 AA 2552-69. The allegation that the State offered to move Lucas to Florida, all expenses paid, is belied by a defense affidavit from Lucas himself signed in 2000. 23 AA 5602. Lucas says his own mother bought him a round trip ticket to Florida so he could spend time with his children, but when he was unable to schedule his return flight the State allegedly had to fly him back to Las Vegas so he could testify at trial. Id. Even accepted as true, all that these facts show is that the State secured the attendance of an out-of-state witness as required by statute. NRS 50.225; NRS 174.425.

Akers was impeached at the third penalty hearing with his agreement to testify against the others in exchange for a reduced plea to Voluntary Manslaughter for which he received just five years in prison. 11 AA 2638-42; 2648-50. The State even agreed "not to stand in the way" of the restoration of his civil rights.[3] 11 AA 2651-52. He was also impeached with admitted lies he told to police in his voluntary statement. 11 AA 2643-46. He was impeached regarding his close relationship with Angela Saldana, their sexual intimacy, and his proposal for marriage. 11 AA 2646-47; 2660-61. He testified to his sporadic employment history since the time of the crime and current unemployment at the time of his testimony. 11 AA 2636; 2657-59. If family friend, Beecher Avants, helped Akers find an attorney at a discounted rate (24 AA 5808), and Robert Peoples helped Akers secure an undesirable job that lasted only a few weeks (24 AA 5809), such additional impeachment would have been de minimis and cumulative to the other much stronger impeachment evidence which the jury heard.

Counsel impeached Wittig with his prior inconsistent testimony, questioned whether he was telling the truth, accused him of provoking Moore by sleeping with Moore's wife, and queried him on his violent temper and his being involved in a prior shooting incident in an alley. 11 AA 2712 – 12 AA 2729. No other witnesses

[3] This supposed benefit never materialized. 24 AA 5808.

were present besides Wittig and Moore for the allegations Wittig made against Moore. So, although Wittig's family now believe that he may have embellished many prior stories in his life, none were percipient witnesses to know the truth or falsity of his testimony in this case. None of this constitutes new impeachment evidence against these witnesses whose testimony primarily bore on Moore's guilt and was not prejudicial at the third penalty hearing because it would not have resulted in a non-death sentence.

David Schieck represented Moore in the second penalty hearing in 1989 and continued through the third penalty hearing and subsequent appeal which concluded in 1998. During this time, and in between the second and third penalty hearings, David Schieck apparently represented Moore's mother in a few civil cases. See 26 AA 6404, 6445, 6450. Schieck's declaration indicates that the representation did not create a conflict of interest or he would not have represented her. 25 AA 5978. Moore offers no further evidence or factual allegation of an alleged conflict of interest. Merely establishing dual representation alone, does not establish a conflict of interest or divided loyalties, of which Moore has no evidence. See Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980); NRPC Rule 1.7.

By his own admission, Moore was a shooter and was the one who shot and killed the grandfather while Flanagan shot and killed his own grandmother. 11 AA 2545-46, 2628-29; 12 AA 2744. That is why Moore got the death penalty. While a

sentence less than death was available for the non-shooters who had participated in the murders, the jury reserved death sentences for the only two shooters in the group: Flanagan and Moore. In fact, three different juries have now heard the evidence and each time have found Moore's actions warrant the death penalty. None of the defense's current claims of ineffective assistance of counsel against David Schieck would have changed the outcome of the penalty hearing. In fact, Moore fails to show how his arguments today are substantially any different than those previously raised by JoNell Thomas in 2003. 18 AA 4376-83. Even if Moore had good cause for raising or re-raising these claims against David Schieck in a successive petition, the district court judge correctly concluded that none resulted in prejudice sufficient to overcome the procedural bars.

C. Alleged Brady Violations

Next, Moore claims that the State coerced and coached witness Angela Saldana and violated Brady by failing to disclose witness benefits and intimidation. The district court judge denied this claim as procedurally barred without a showing of good cause. She further found that any newly alleged facts were merely cumulative to what has been raised before and not material enough to have affected the outcome of the case. 41 AA 10152-155. As with the claim above, Moore's argument in this section of his brief focuses exclusively on the merits of his claim without regard to procedural bars and the lack of good cause which was the basis for

the judge's denial. Absent a showing of good cause, the prejudice prong is inadequate alone for relief and Moore cannot prevail. Nonetheless, because Moore discusses the merits of his claim, the State responds in order to show that even if Moore had good cause to re-raise this Brady claim in an untimely and successive petition, he has still failed to demonstrate that he is prejudiced by the application of procedural bars.

Even if this current petition had been timely filed once the new facts were discovered or became available, they still fail to demonstrate good cause for re-raising claims of government misconduct in withholding impeachment evidence and procuring allegedly false testimony from Angela Saldana. Her testimony was already impeached and discredited at trial and anything new the defense has supposedly discovered fails to materially alter the state of evidence in the case.

Notably, these claims regarding Angela Saldana are not new. Moore has long maintained that prosecutors bribed witnesses and that Angela worked as a police agent, but he is no closer to establishing these allegations than he was 30 years ago when he first raised them. 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. Respondent's Appendix (hereinafter "RA") at 29. 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. RA 45-9. She had sex with 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. Id. 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. RA 48.

At the conclusion of the evidentiary hearing 30 years ago, Flanagan's attorney, Randy Pike, 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.

1 AA 69-70. 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.

1 AA 74. 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. 5 AA 1046-47, 1108. 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. 5 AA 1056-57. When asked by Flanagan's attorney whether it was Officer Berni or Beecher Avants who had instructed her to "play along" to get additional information, she responded it was neither. 5 AA 1082. 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. 5 AA 1082, 1095. 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. 5 AA 1086. Later, when asked whether Officer Berni had suggested in any way that she become an agent of law enforcement and go elicit information from Flanagan, she responded no, that it was her idea alone. 5 AA 1102-03, 1106, 1115-16, 1118-19. Her motive in voluntarily reporting to the police was her desire for experience to become a criminal investigator. Id.

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". 8 AA 1842. Flanagan's counsel extensively argued that Saldana could not be trusted and that her memory suspiciously improved over time. 8 AA 1873-75. He characterized her as a "user" of people who enjoyed the limelight and who would be paid for her "performance."

8 AA 1876-77. 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?

8 AA 1891 (argument by counsel for Moore).

By the time of the third penalty hearing, Saldana's testimony was further impeached with an intervening criminal charge. 11 AA 2691-92. Saldana acknowledged on cross-examination by Flanagan's attorney 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. Id. 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. Id. This line of questioning by Flanagan's attorney 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. 11 AA 2697. Then, in the 2003 habeas proceedings, JoNell Thomas again made the same allegations and obtained declarations from John Lucas, Robert Peoples, Deborah Samples, and Angela Saldana in support of her claims which were all denied. 18 AA 4247-55,

4360-62. These prosecutorial misconduct and Brady claims were all denied in the post-conviction appeal:

> Moore further argued that the prosecutor engaged in a course of misconduct throughout the trial, including: failing to disclose exculpatory, impeachment, and mitigation evidence; threatening witnesses with prosecution if they declined to testify; providing witnesses with cash payments, immunity from prosecution, and other benefits in exchange for their testimony; improperly investigating potential jurors; improperly eliciting incriminating statements and physical evidence form Flanagan and others to prosecute Moore; and improperly relying on the statements of Angela Saldana. Moore, however, failed to adequately substantiate these claims or show any resulting prejudice from counsel's alleged deficiency in addressing these matters.

20 AA 4726. Such claims have been repeatedly raised and denied throughout the 30 year history of this case.

Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). To prove a Brady violation, a petitioner must show 1) the evidence is favorable to the accused, either because it is exculpatory or impeaching, 2) the State withheld the evidence, either intentionally or inadvertently, and 3) that the evidence was material. Id. However, "a Brady violation does not result if the defendant, exercising reasonable diligence, could have obtained the information." Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997).

Throughout his petition below and his Opening Brief on appeal, Moore's counsel fails to allege exactly which facts are "new" and previously unavailable to the defense and which facts were known and previously presented. That burden of sorting through the facts is left to the court and the prosecution. Because Moore has the burden, not the State, his petition could have been denied on that basis alone. Nonetheless, 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.

None of Moore's allegations constitute material exculpatory evidence withheld from the defense. Accepting Moore's allegations as true, 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 Moore has included in his appendix. 22 AA 5236-39, 5248, 5250, 5256-68. 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. Id. 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. Id. 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 Las Vegas 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 apparently based on police reports he had. 16 AA 3841; 27 AA 6607. More importantly, Angela herself does not confirm their perceptions and indicates only that Peoples "encouraged" her to assist the police. 24 AA 5875. Even if true, this does not mean that Angela felt coerced or that she testified falsely. "Coaching" of a witness does not violate Due Process unless it results in untruthful testimony. See Banks v. Dretke, 540 U.S. 668, 675, 124 S.Ct. 1256, 1263 (2004).

Notably, had Angela refused to testify, the prosecutor certainly could have obtained a material witness warrant and compelled her testimony. Pressuring or

even compelling 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. 5 AA 1048-49. 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 30 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. This is not a case where the evidence of coaching and intimidation consists of a pretrial transcript

withheld from the defense as in Banks v. Dretke, *supra*, but is only the memories of witnesses recalling events from 20 to 30 years ago. 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. See Statement of Facts above. 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 and by Angela herself.

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. "Suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." Banks v. Thaler, 583 F.3d 295, 323 (5th Cir. 2009), quoting U.S. v. Amiel, 95 F.3d 135, 145 (2nd Cir. 1996). 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 is an old, previously raised claim. 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. Therefore, even if Moore had good cause for re-raising this claim again in a successive petition, he has failed to demonstrate prejudice and the district court correctly denied it as procedurally barred.

D. Application of Procedural Bars

Moore objects to application of the laches bar found in NRS 34.800. Notably, this is but one of three time or procedural bars upon which Moore's petition was denied. 41 AA 10143-144. To prevail on appeal, Moore must demonstrate that the judge below erred in her application of all three bars. A misapplication of statutory laches alone will not entitle Moore to relief as this Court must still affirm on the basis of the other two independent and adequate bars in NRS 34.726 and NRS 34.810. Nonetheless, a petition may be dismissed if delay in the filing of the petition prejudices the prosecution in responding to the petition or in its ability to conduct a retrial, "unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred" or "unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred." NRS 34.800(1). The district court below found that Moore failed to overcome this burden. 41 AA 10143.

In the Powell case relied upon by Moore, the State did not dispute that the original petition with all its claims was timely filed, but only sought to apply the statutory laches bar of NRS 34.800 to a new claim raised for the first time in a supplemental petition. State v. Powell, 122 Nev. 751, 756-9, 138 P.3d 453, 456-8 (2006). The delay at issue was not the extensive court proceedings beyond Powell's

control, but the two year delay in filing the supplemental petition which raised a new claim that was available to Powell and could have been included in his timely original petition. Id. But the Court held that statutory laches and other procedural bars apply only to original petitions and not to supplemental pleadings which a district court may permit to be filed much later even if they raise entirely new claims. Id. No such situation is presented in Moore's case. The State is not alleging that Moore filed an untimely supplemental petition to which statutory laches would apply and so Powell is inapposite.

Just because much of the 30 years since the original trial of this case may be due to necessary court proceedings and appellate review of district court error, does not mean that statutory laches does not apply. Although a presumption of prejudice arises upon the passage of five or more years, any delay at all that prejudices the State would permit the district court to dismiss the petition under this statute. NRS 34.800(2). The entire time Moore spent pursuing federal habeas relief qualifies as delay in pursuing his claims in state court and does not constitute good cause. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Additionally, throughout the findings the district court held that many of the claims were based upon grounds of which Moore either had actual knowledge or could have had knowledge through the exercise of reasonable diligence before circumstances prejudicial to the State arose:

> Moore, by his own admissions, had knowledge about the claims raised at least since February of 2011 when his co-defendant Flanagan raised these same claims. At a minimum, the factual basis for the claims had been available to him since that time. Once the new facts were known, Moore failed to pursue them for two and a half years.

41 AA 10144-145.

> These claims of ineffective assistance of prior post-conviction counsel, were not timely raised when they became reasonably available to Moore and therefore do not constitute good cause for delay in filing.

41 AA 10145.

> Additionally, these claims [concerning Angela Saldana] were first raised in 1985 and have been repeatedly re-raised for the past 28 years. Moore has failed to show how these claims are substantially any different than those raised by JoNell Thomas in 2003.

41 AA 10149.

> Moore fails to account for the entire length of the delay occurring after any new facts in support of a Brady violation became reasonably available to him, in particular the time during Flanagan's litigation of these same claims and Moore's pursuit of federal habeas relief.

41 AA 10153.

Accordingly, the district court judge did not fault Moore for delays attributable to appellate review and error correction, but instead for Moore's own delay in raising claims in state court when the grounds for the claims were previously available to Moore or could have been known previously through the exercise of reasonable diligence. Therefore, the district court did not abuse its discretion in applying the statutory laches bar.

In this next section of his brief, Moore finally gets around to challenging the district court's rejection of his good cause arguments to overcome the time and procedural bars. This is really the central issue in the case. While Moore's argument on these issues now span 53 pages of his Opening Brief (pp. 63-116), Moore devoted relatively few pages of his petition below to the demonstration of good cause. Although his petition was 360 pages in length and raised 47 substantive claims, the mostly bare allegations of good cause were found in only a few introductory pages of his petition. 13 AA 3203-10. Understandably then, many of Moore's arguments on good cause in his Opening Brief are greatly expanded from how he alleged them in the district court proceedings. Nonetheless, he has failed to show the district court in rejecting his claims of good cause.

A petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003), *citing* Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). This language contemplates that the delay in filing a petition must be caused by a circumstance not within the actual control of the defense team. "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal

basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.' " Id., quoting Murray v. Carrier, 477 U.S. 478, 488 (1986).

1. Ineffective Assistance of First Post-Conviction Counsel as Good Cause

Next, Moore complains that the district court erred in finding that ineffective assistance of first post-conviction counsel, JoNell Thomas, did not constitute good cause for the delay in filing the untimely and successive habeas petition.[4] The district court held that Moore had not timely raised his claims against first post-conviction counsel and further held that Moore failed to show deficient performance and prejudice under Strickland. 41 AA 10145. This ruling was not in error.

All claims of ineffective assistance of counsel at trial or on appeal could have been raised in the first post-conviction proceedings, so they are all procedurally barred. However, the State agrees that as a death row petitioner, Moore had a right to effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-conviction counsel in a successive petition. See McNelton v. State, 115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). However,

[4] To the extent Moore alleges Chris Oram's ineffectiveness for failing to raise new claims upon remand (see Opening Brief, p. 70, fn 17), Oram was only appointed to handle those claims specifically remanded by this Court and was not at liberty to raise new claims. See 19 AA 4716.

he must still raise these matters in a reasonable time to avoid application of procedural default rules. See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim of ineffective assistance of post-conviction counsel must itself be timely raised:

> A claim of ineffective assistance of counsel may also excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment. However, in order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted. In other words, a petitioner must demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion.

State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005); see also Edwards v. Carpenter, 529 U.S. 466, 452-53 (2000) (concluding that claim of ineffective assistance of counsel cannot serve as cause for another procedurally defaulted claim); Stewart v. LaGrand, 526 U.S. 115, 120 (1999) (concluding that ineffective assistance of counsel claim failed as good cause because ineffective assistance claim was itself procedurally defaulted).

Moore's first post-conviction counsel was JoNell Thomas who was appointed in 1999. JoNell Thomas filed an exhaustive 209-page supplemental petition which

raised in excess of 46 claims and sub-claims of ineffective assistance of prior counsel. 17 AA 4190 – 18 AA 4400. Eventually, all claims regarding prior counsel's performance at the guilt phase of the trial in 1985 with Murray Posin were denied in written findings by the district court filed on February 17, 2005. RA 61-7. Those findings were affirmed on appeal on April 23, 2008 (SC# 46801). 19 AA 4716. Upon remand, JoNell Thomas withdrew on February 26, 2009. RA 79-83. Chris Oram was then appointed as post-conviction counsel for the purpose of arguing JoNell Thomas's remaining claims 40 and 42 pertaining to ineffective assistance of counsel at the third penalty hearing and subsequent appeal by David Schieck. Id. The denial of those claims was then affirmed on appeal on August 1, 2012. 21 AA 5148.

Then, more than a year later, Moore attempted to allege that JoNell Thomas's and Chris Oram's ineffectiveness constituted good cause for returning to state court on September 19, 2013, in a successive petition. However, claims of ineffective assistance of first post-conviction counsel as good cause are not timely raised. JoNell Thomas ceased her representation of Moore on February 26, 2009, more than four and a half years prior to the instant petition. Because the right to counsel only extends to first post-conviction proceedings and not any subsequent appeals, Chris Oram's representation of Moore for purposes of establishing good cause concluded with the Findings of Fact filed on January 15, 2010, which is more than three and a

half years prior to the instant petition. 21 AA 5047. The performance of any counsel after that date cannot constitute good cause as a matter of law. Moore had no entitlement to mandatory counsel in either the subsequent discretionary appeal to the Nevada Supreme Court or in the federal habeas proceedings.

Pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). In Colley, the defendant argued that he appropriately refrained from filing a state habeas petition during the four years he pursued a federal writ of habeas corpus. The Nevada Supreme Court disagreed:

> Should we allow Colley's post-conviction relief proceeding to go forward, we would encourage offenders to file groundless petitions for federal habeas corpus relief, secure in the knowledge that a petition for post-conviction relief remained indefinitely available to them. This situation would prejudice both the accused and the State since the interest of both the petitioner and the government are best served if post-conviction claims are raised while the evidence is still fresh.

Id. Moore therefore failed to offer any good cause explanation that accounts for the entire length of the delay, in particular the three and a half years since his claims against first post-conviction counsel became reasonably available to him.

Even if Moore's claims against first post-conviction counsel were timely raised (which they are not), he utterly failed to establish deficient performance and prejudice under Strickland. A defendant making an ineffectiveness claim must show both that counsel's performance was deficient, which means that "counsel's

representation fell below an objective standard of reasonableness," and that the deficient performance prejudiced the defendant, which means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975). The Court may consider both prongs in any order and need not consider them both when a defendant's showing on either prong is insufficient. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), *citing* Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective

assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), *citing* Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, *supra* at 689, 2065. What appears by hindsight to be a wrong or poorly advised decision of tactics or strategy is not sufficient to meet the defendant's heavy burden of proving ineffective counsel. "Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998), quoting from Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984). An attorney cannot be deemed ineffective for failing to make futile motions or objections. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

In support of his claim against prior post-conviction counsel JoNell Thomas for inadequate investigation, Moore primarily relies upon an affidavit of counsel wherein she compared her performance from 10 to 15 years ago to how she would handle a capital habeas case today. 25 AA 5990-94. Her opinion of her own performance, although interesting, was not particularly relevant or helpful as it was entirely dependent upon hindsight:

> . . . . *presented with the same circumstances today*, I would conduct a more thorough factual and mitigation investigation. *I have a great deal more experience today than I had* when I was appointed to represent Mr. Moore. . . . The investigation and records collection regarding

> Randolph Moore's childhood and social history is another area which *I would handle differently today*. . . . *Today we routinely rely on experts*. . . . *Our current clients* are often evaluated by a mental health professional. . . . *If I were appointed to represent Mr. Moore today*, all of these issues would be addressed in my investigation. . . .

Id. [emphasis added]. None of this bears on the issue of whether Ms. Thomas's performance fell below an objective standard of reasonableness in existence at the time. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996), *citing* Strickland, 466 U.S. at 689. If anything, Ms. Thomas's affidavit tends to confirm that her performance was on par with the standard for attorney representation in existence at the time. At best, her affidavit establishes nothing more than that her performance may have been deficient under today's standards, but not at the time. Furthermore, Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 790 (2011). So, Ms. Thomas's subjective opinion of her own performance is not controlling. Rather, it is counsel's objective performance which is at issue and which the district court found not deficient.

The problem with Moore's reliance upon the ABA Guidelines is that indigent defendants are not constitutionally entitled to "high quality legal representation" which is the stated objective of the ABA Guidelines. Strickland, on the other hand, only requires a constitutionally reasonable standard of attorney performance. With respect to performance standards, the United States Supreme Court has held:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Bobby v. Van Hook, 130 S.Ct. 13, 16-17 (2009) (internal quotations removed); see also Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984) ("American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition). While private groups such as the ABA "are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Bobby v. Van Hook, 130 S.Ct. at 16-17 *citing* Roe v. Flores-Ortega, 528 U.S. 470, 479, 120 S.Ct. 1029 (2000). Notably, the Supreme Court has declined to express a view on whether the 2003 ABA Guidelines accurately reflect prevailing norms. Bobby v. Van Hook, *supra*, fn 1.

Nevada likewise recognizes that attorney performance standards are "intended to serve as a guide for attorney performance" but that "steps actually taken should be tailored to the requirements of a particular case." Nevada Indigent Defense Standards of Performance, Standard 1(b), (c) (ADKT No. 411). Such standards "are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction." Id. at Standard 1(d). Most notably, Nevada's attorney performance standards do not "overrule, expand or extend" the standard for attorney performance as defined by Strickland and its progeny. Id.

Just as JoNell Thomas made the very same arguments against penalty counsel, David Schieck, as the federal public defender now makes in their successive and untimely petition, (see Section B above), JoNell Thomas also previously made most, if not all, of the claims against trial counsel Murray Posin for his performance in the 1985 guilt phase of trial. In particular, JoNell Thomas argued that Murray Posin failed to file unspecified pretrial motions, failed to adequately interview two State witnesses, Rusty Havens and John Lucas, failed to secure notes from police officers taken during interviews, should have moved for discovery of the personnel file of police officer Ray Berni, should have demanded full disclosure of State witness Angela Saldana's alleged role as a police agent, failed to prevent the admission of irrelevant, prejudicial, and hearsay testimony, should have responded to the State's

opposition to his motion for appointment of a psychiatric expert, should have objected to alleged restrictions the district court placed on his defense, improperly participated in joint defense strategies with codefendants' counsel, unreasonably relied upon the work product of codefendants' counsel, should have moved for a change of venue, should have sought sequestration of the jury, failed to conduct meaningful voir dire, should have filed a motion for appointment of a psychiatrist ex parte and under seal, elicited inflammatory evidence during cross-examination of witnesses, and failed to develop a coherent theory of defense. 18 AA 4355-76.

On appeal, the Nevada Supreme Court denied these claim as follows:

> We have carefully considered Moore's arguments and submissions in support of these claims and conclude that, even if counsel's performance was deficient for any of the reasons listed above, Moore failed to demonstrate that the result of his trial would have been different. To the extent these claims implicated evidentiary matters, we conclude that Moore also failed to show prejudice in light of the overwhelming evidence of guilt.

20 AA 4723-32. Additionally, the Court went on to discuss in detail seven additional claims regarding Murray Posin's inadequate communication with Moore and incompetence due to partial hearing loss, failure to prevent the admission of Satanic and occult evidence against Moore, failure to object to several instances of prosecutorial misconduct, failure to challenge the trial court's handling of objections outside the jury's presence, failure to secure a complete record of all bench conferences and hearings in chambers, failure to object to certain jury instructions

and to request others, failure to file a motion for new trial. Id. As to all of these claims, the Court found that Moore had failed to show prejudice such that the outcome of the trial would have been different. Id.

To say that ineffective assistance of trial counsel was extensively litigated in this case previously is an understatement. To the extent Moore re-raised these same claims, they are barred by law of the case. If any of his claims against Murray Posin are new, Moore fails to allege which parts are new or why they should not be still barred by law of the case. The doctrine of the law of the case provides that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). The Nevada Supreme Court has held that this doctrine "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d 797, 535 P.2d at 799. Most importantly, Moore has utterly failed to conduct any analysis as to how the outcome of his trial would have been any different and so he once again has failed to show prejudice.

In her 2003 supplement, JoNell Thomas raised numerous claims of prosecutorial misconduct and bribery of State's witnesses. Specifically, she claimed that the testimony of John Lucas, Rusty Havens, and Angela Saldana was "purchased" for $2,000 each and that additional agreements for non-prosecution and

leniency were conditioned on their testimony. 18 AA 4244-55. She claimed that witness intimidation, coerced and false testimony, and government overreaching were the cornerstones of Moore's prosecution and that Angela Saldana was employed as a police agent. Id. She further claimed that the State withheld all of this exculpatory impeachment evidence from the defense. Id. Claims of this nature were first raised in 1985 and have been repeatedly re-raised throughout the lengthy post-conviction and appeal procedures of Moore's case for the past 30 years as argued in Section C above.

Moore fails to offer any analysis of how JoNell Thomas was deficient in the prosecutorial misconduct claims that she did raise. In her recent declaration, JoNell Thomas states that she "obtained the pleadings filed by Dale Flanagan's attorney and sought to include the information they discovered in my pleadings." 25 AA 5990-94. She further states that she attempted to locate Angela Saldana, but was unsuccessful. Id. This comports with Wendy Mazaros's declaration where she states that she "intentionally made [herself] difficult, if not impossible, to locate." 22 AA 5402; see also 22 AA 5404. Given that similar claims of prosecutorial misconduct have been raised throughout the proceedings as well as those of Dale Flanagan, Moore fails to show that JoNell Thomas was deficient in failing to look for additional facts in order to re-raise these previously denied claims.

Moore next alleges that ineffective assistance of post-conviction counsel is good cause for raising a new claim that Juror Carlos Guerra who served on the 1995 third penalty hearing jury had only limited understanding of the English language in violation of Moore's constitutional rights. Although JoNell Thomas raised many claims regarding voir dire at the 1995 penalty hearing, 18 AA 4223-40, it does not appear that she raised this specific claim. However, Moore's representation that Carlos Guerra could not understand English is belied by the voir dire transcript which indicates that the judge and three attorneys had no trouble communicating with him in English. 2 SA 319-329. He gave answers appropriate to the questions asked of him. Id. The inability to ***write*** in English or to spell words correctly is not grounds for disqualification of a juror. The qualifications for jury service simply require "sufficient knowledge of the English language." NRS 6.010. The federal public defender fails to show that Juror Guerra could have been successfully challenged for cause. JoNell Thomas could have only raised such an issue as an ineffective assistance of trial counsel claim. Understandably, trial counsel would not have raised such an issue clearly belied by the record.

Although Carlos Guerra is deceased, none of the declarations from his wife or other jurors rebuts the voir dire transcript which demonstrates sufficient understanding of English to serve as a juror. Furthermore, reliance upon juror affidavits in an attempt to show that Carlos Guerra did not understand the testimony

or instructions in English is not permitted under the law. NRS 50.065(2) (prohibiting consideration of affidavits or testimony of jurors concerning their mental processes or state of mind of themselves or other jurors in reaching the verdict); see also Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992); Riebel v. State, 106 Nev. 258, 263, 790 P.2d 1004, 1008 (1990). JoNell Thomas was not deficient in failing to raise this claim which had not been preserved at trial and which had no chance of success on post-conviction.

Finally, Moore alleges that ineffective assistance of post-conviction counsel is good cause for re-raising claims of an impartial tribunal and change of venue. However, JoNell Thomas raised these precise issues on pages 198 to 204 and 13 to 18, respectively, of her 2003 supplemental petition. 17 AA 4203-08; 18 AA 4388-94. To the extent the change of venue claim contains additional supporting factual allegations, such are inadequate to have changed the outcome. Accordingly, there is no good cause for entertaining these claims again.

2. Alleged Brady Violations as Good Cause

The district court rejected the Brady claims as good cause for the untimely and successive petition because they were raised previously and Moore failed to account for the entire length of delay occurring after any new facts in support of a Brady claim became reasonably available to him. 41 AA 10152-155. The district

court further found that Moore had failed to show that any new facts were withheld or material which was discussed in Section C above. Id.

When a Brady claim is raised in an untimely post-conviction petition for a writ of habeas corpus, the petitioner has the burden of pleading and proving specific facts that demonstrate both components of the good-cause showing required by NRS 34.726(1), namely "[t]hat the delay is not the fault of the petitioner" and that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. State v. Huebler, 128 Nev. ___, 275 P.3d 91 (2012). Those components parallel the second and third prongs of a Brady violation: establishing that the State withheld the evidence demonstrates that the delay was caused by an impediment external to the defense, and establishing that the evidence was material generally demonstrates that the petitioner would be unduly prejudiced if the petition is dismissed as untimely. Id., *citing* State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003).

An allegation that the government may have been responsible for part of the initial delay in bringing a claim does not explain or excuse Moore's continued delay once the basis for the claim became known to him. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); see also State v. Huebler, 128 Nev. ___, 275 P.3d 91, 96 at fn 3 (2012) ("We note that a Brady claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense."). In other words, Moore "has the burden of demonstrating the elements of

the Brady claim *as well as its timeliness*." Lisle v. State, 131 Nev. ___, 351 P.3d 725, 729 (2015) [emphasis added]. Even legitimate Brady claims are procedurally barred when the basis for the claim was known and it was either not brought in an earlier proceeding or within an applicable time bar. Hutchison v. Bell, 303 F.3d 720, 742-43 (6th Cir. 2002) (Brady claim barred where no good cause for delay of 11 months between discovery of claim and assertion of claim in state court). Because Moore has failed to provide any explanation that accounts for the entire length of his delay, there is no good cause and the petition was properly dismissed.

Notably, Moore's allegedly "new" Brady arguments in the instant petition were familiar to the district court judge because they were the very same arguments raised by co-defendant Dale Flanagan a year earlier in a successive petition.[5] See 36 AA 8775-85. In fact, although it appears that Moore re-interviewed several witnesses just prior to filing the instant petition, his allegations in large part were based upon declarations obtained and used by Dale Flanagan years earlier. See e.g., 22 AA 5393 (Amy Peoples); 22 AA 5397 (Wendy Mazaros); 23 AA 5596 (Rusty Havens); 23 AA 5600 (John Lucas); 23 AA 5614 (Robert Peoples); 23 AA 5618 (Debora Samples); 23 AA 5621 (Angela Saldana); 24 AA 5743 (Wayne Wittig). Accordingly, to the extent there were any new factual allegations raised, those facts

[5] Co-defendant Flanagan's appeal is pending before this Court in SC# 63703 and raises substantially similar issues.

have been known and available to Moore for several years and he fails to explain the entire length of delay in returning to state court. When Flanagan made these same arguments a year earlier, they were untimely raised then, even more so a year later when raised by Moore. Simply re-interviewing the same witnesses does not provide a later date for when the factual claims reasonably became available to Moore. Because the district court denied all of these same claims when raised by Flanagan previously (36 AA 8775-85), the result rightfully was the same a year later when they were raised by Moore.

Moore's counsel admits that he became aware of the new facts in support of re-raising the Brady claims in February of 2011 when Flanagan filed his federal petition. 41 AA 10050. That is two and a half years prior to Moore filing the instant petition in state court. That is the period of delay for which Moore has no good cause explanation. During that time, Moore sought a remand of his appeal in order to raise in district court the new factual allegations which he set forth in great detail in his motion, complete with an attached proposed successive habeas petition and witness declarations. RA 86-122. The appeal was basically concluded by the point with the Order of Affirmance having already issued on August 1, 2012. 21 AA 5147. The State opposed remand. 38 AA 9292-94. This Court denied remand to the district court to consider new exculpatory evidence and held that "[a]ny challenge to the judgment of conviction must be made in a post-conviction petition for a writ of

habeas corpus filed in the district court in the first instance." 21 AA 5183. Despite this directive, Moore inexplicably delayed further by litigating his new Brady claims in federal court before finally returning to state court a year later on September 19, 2013. This was two and a half years after Moore's counsel admits he became aware of the new facts. Pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Moore failed to allege any good cause explanation which would account for the entire length of the delay occurring after any new facts in support of a Brady violation became reasonably available to Moore, in particular the time during Flanagan's litigation of these same claims and Moore's pursuit of federal habeas relief.

3. Fundamental Miscarriage of Justice

As to claims of a fundamental miscarriage of justice, the district court denied them because they have been raised and denied previously in this case and only constitute an argument of legal error, not factual innocence. 41 AA 10156. Nevada recognizes actual innocence as a "gateway" where applicable procedural bars may be excused when "the prejudice from a failure to consider [a] claim amounts to a 'fundamental miscarriage of justice.'" Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), quoting Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Where the Petitioner has argued that the procedural default should be

ignored because he is actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible. Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993), *citing* Sawyer v. Whitely, 505 U.S. 333, 112 S.Ct. 2514 (1992).

Notably, Moore has repeatedly challenged the great risk of death aggravating circumstance unsuccessfully in prior proceedings. 17 AA 4057-60; 18 AA 4306-08; 18 AA 4328-30; Moore v. State, 112 Nev. 1409, 930 P.2d 691 (1996) (Moore IV). The United States Supreme Court has noted that actual innocence means factual innocence and not mere legal insufficiency. See Bousley v. United States, 523 U.S. 614, 623-24 (1998). Moore's argument against the interpretation and application of an aggravating circumstance to his case advances no new facts but only a legal argument which is contrary to Nevada precedent and against the law of the case. Such is inadequate to establish an actual innocence claim.

To the extent Moore complains of this Court's re-weighing analysis after striking two of his aggravating circumstances in the last appeal (SC# 55091), this is a purely legal argument and fails to advance any new facts to show his factual innocence. Furthermore, the district court could not sit in judgment or appellate review of the Nevada Supreme Court on the constitutionality of its re-weighing analysis. Any argument against re-weighing should have been raised (and in fact

was raised) in the last appeal and the issue is now controlled by law of the case. Besides, even the United States Supreme Court engages in re-weighing or harmless error analysis to uphold a death sentence after striking a felony aggravator in the same way as the Nevada Supreme Court did in Moore's appeal. Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006).

Moore next alleges the district court provided an inadequate forum and no evidentiary hearing so that he could establish the above good cause explanations. But Moore misunderstands the purpose for an evidentiary hearing which is to resolve factual disputes, not for discovery or development of facts which Moore was obliged to allege with specificity in his petition. The denial of an evidentiary hearing was proper and unnecessary for disposal of the instant petition as further argued in the next section below.

E. No Evidentiary Hearing Was Necessary

An evidentiary hearing is not a discovery tool, but is only necessary if Moore asserted specific factual allegations that were not belied nor repelled by the record and that if true, would entitle him to relief. Nika v. State, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008). Moore did not meet this standard and so he received no evidentiary hearing. 41 AA 10147. Moore overstates the value and exaggerates the import of his factual allegations and erroneously concludes that the district court

resolved factual disputes without conducting the necessary evidentiary hearing. But that is not what happened below.

Moore's allegations that JoNell Thomas failed to investigate did not require an evidentiary hearing. The claim was denied because it was not timely raised and Moore failed to factually allege any good cause explanation for the entire length of delay. 41 AA 10119. Absent good cause, it was not even necessary for the district court to address JoNell Thomas's alleged deficient performance and prejudice under Strickland and did so only as an alternative basis for denying the claim. Id. Within the Strickland analysis, the district court concluded that the federal public defender failed to show how his arguments in the instant petition were any different than those raised by JoNell Thomas in 2003 or how any new family history is so mitigating that the outcome of the penalty hearing would have been different. 41 AA 10120. The district court does not appear to have directly ruled upon the deficient performance prong of JoNell's investigation relying instead upon Moore's failure to demonstrate prejudice.

Besides, JoNell Thomas's affidavit only acknowledges that she did not conduct a "complete" mitigation investigation because she strategically elected to focus her habeas petition on the guilt phase of trial which was Moore's main concern at the time. 25 AA 5990. She does not maintain that she conducted no investigation at all as Moore implies. No matter, a Strickland analysis is not concerned with

counsel's actual thinking and counsel need not confirm every aspect of the strategic basis for his or her actions. Harrington v. Richer, 562 U.S 86, 109-110, 131 S.Ct. 770, 790 (2011). "After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome." Id. That is all that is reflected in JoNell Thomas's affidavit. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S., at 688, 104 S. Ct. 2052.

Likewise, no evidentiary hearing was required to resolve any kind of factual dispute as to juror Carlos Guerra's understanding of the English language. The claim was not substantively resolved on the merits, but was denied as an untimely claim against first post-conviction counsel JoNell Thomas. 41 AA 10124. Carlos Guerra died in 2010, (27 AA 6594), and absent good cause for the delay in challenging Ms. Thomas's omission of this issue, it was not necessary to even address the claim in terms of prejudice.

Similarly, Moore's Brady claim was denied not on the merits, but because it had been raised and denied previously in the case and Moore failed to timely raise any new factual allegations when they became reasonably available to him. 41 AA 10126-29. Any newly alleged facts were merely cumulative and not material enough

to have affected the outcome of the case. Id. Moore failed to allege good cause for the entire length of delay in re-raising the claim. The disposition of this issue was not in any way dependent upon resolution of a factual dispute. Moore utterly ignores that his petition below was not denied on the merits, but was denied because it was untimely and procedurally barred without good cause. No evidentiary hearing was necessary for such disposition.

F. Cumulative Error

The "cumulative error" section of Moore's Opening Brief (pp. 121-187), is devoted to claims "which were fully raised in previous proceedings, but erroneously rejected by this Court as procedurally barred or meritless." O.B. p.121. Moore is not substantively re-raising any of these claims nor attempting to allege good cause and prejudice for their re-consideration, but instead makes a bizarre argument that they must be included in a cumulative harmless error analysis.

The State does not dispute that the cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually. Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). However, this cumulative-error standard applies to harmless error review on direct appeal from a Judgment of Conviction and has no application in the context of a post-conviction habeas petition. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). This Court has recognized that "some" courts have taken an

approach similar to cumulative error in addressing ineffective-assistance claims, holding that multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of the *Strickland* test when the individual deficiencies otherwise would not meet the prejudice prong. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009); but see Williams v. Anderson, 460 F.3d 789 (6th Cir. 2006) ("the law of this Circuit is that cumulative error claims are not cognizable on habeas . . ."). But there is no authority for the application of a cumulative error approach in the context of an untimely and successive habeas petition which is denied as procedurally barred. To the contrary, to be added to a cumulative error mix, "the error complained of must not be procedurally barred. . . ." Pursell v. Horn, 187 F.Supp.2d 260, 374-5 (W.D. Pa. 2002).

This was not a timely first petition which resolved claims of ineffective assistance of counsel on the merits which might be cumulated with other claims of error as in the Evans case. Evans v. State, 117 Nev. 609, 647-48, 28 P.3d 498, 524 (2001). It was an untimely and procedurally barred petition for which no good cause explanation was given for the entire length of the delay. There is simply no way to cumulate claims of good cause and the district court below did not rely upon any kind of harmless error claim to dispose of the petition. Moore's cumulative error argument is nonsensical, not supported by law, and inapplicable to the analysis for

good cause and prejudice to overcome procedural bars in an untimely and successive habeas petition.

CONCLUSION

WHERFORE, the State respectfully requests that this Court affirm the denial of habeas relief.

Dated this 1st day of September, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the page or type-volume limitations of NRAP 32(a)(7)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 16,016 words and does not exceed 80 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of September, 2015.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 1, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

TIFFANI HURST
RANDOLPH M. FIEDLER
Assistants Federal Public Defenders

STEVEN S. OWENS
Chief Deputy District Attorney

/s/ E.Davis
Employee, Clark County
District Attorney's Office

SSO//ed