IN THE SUPREME COURT OF THE STATE OF NEVADA

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RANDOLPH LYLE MOORE, Petitioner/Appellant, vs. TIMOTHY FILSON, et al., Respondents/Appellees.	Electronically Filed Mar 29 2018 04:46 p.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court No. 66652 District Court Case No. C069269 (Death Penalty Habeas Corpus Case)

PETITION FOR REHEARING

I. INTRODUCTION

Appellant Randolph Moore petitions this Court for rehearing, following this Court's order filed on February 9, 2018, affirming the district court's denial of habeas corpus relief. Moore petitions this Court for rehearing on the grounds that the Court overlooked or misapprehended material questions of fact and law in his case. Nev. R. App. P. 40(c)(2).

II. ARGUMENT

This case has a long history of errors that have not been remedied. Many of these errors have been acknowledged, but deemed harmless. See Flanagan v. State, 112 Nev. 1409, 1416, 930 P.2d 691, 695 (1995) (acknowledging prosecutorial misconduct during the guilt phase); id. at 1418, 930 P.2d at 696 (acknowledging error in religious beliefs evidence to jury); 36AA8848 (acknowledging error under McConnell v. State, 121 Nev. 25, 107 P.3d 1287 (2005)); 36AA8847 (acknowledging that trial counsel's performance was "in some ways deficient"); 20AA4727 (acknowledging error in trial court requiring defense to outside the presence of the jury); 20AA4734 (acknowledging error in aiding and abetting instruction); 20AA4734 (acknowledging error in first-degree murder instruction).

This Court has never considered the cumulative effect of these errors, and refused to for the instant case. See Order at 11. This Court must consider the cumulative effect of errors in assessing a violation of due process of law under the federal constitution, e.g., Chambers v. Mississippi, 410 U.S. 284, 290 n.3, 298, 302-03 (1973); Parle v. Runnels,

505 F.3d 922, 927-28 (9th Cir. 2007), because of the Supremacy Clause, U.S. Cons. art. VI, cl. 2. State law also requires cumulative consideration of errors. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); see Nev. Const. art. I, § 8. It is doubly true under the Eighth Amendment, in death penalty cases, which requires enhanced reliability. See, e.g., Oregon v. Guzek, 546 U.S. 517, 526 (2006); Sawyer v. Smith, 497 U.S. 227, 234 (1990); Caldwell v. Mississippi, 472 U.S. 320, 330 (1985); Zant v. Stephens, 462 U.S. 862, 884-85 (1983). But, perhaps most importantly, the cumulative effect of these errors, must be considered in determining whether new errors are harmless. This affects two other instances of material questions of fact and law that this Court overlooked, and so Moore requests rehearing.

A. This Court overlooked material questions of fact and law in determining that Moore had failed to establish good cause and prejudice on the basis of Brady v. Maryland, 373 U.S. 83 (1963).

Accepting Moore's allegations as true, this Court concluded that the withheld evidence was not material. Order at 4.[1] The Court went on to

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[1] Before taking these allegations as true, this Court noted that the argument under Brady, was "inadequately pleaded." Order at 3. The Court notes that Moore "fails to identify with specificity which facts this court previously considered and which facts are new." Id. Although this portion of the Order is dictum, it is also the basis for the State's Motion to Publish February 9, 2018, Order of Affirmance, at 3 (Feb. 15, 2018). Thus, undersigned counsel respectfully notes his disagreement with the Court's assessment of the adequacy of this pleading.

This Court's analysis of why Moore's claim is "inadequately pleaded" oversimplifies this Court's procedural default jurisprudence. It is true that Moore bears the burden of "pleading and proving specific facts" that demonstrate good cause and prejudice. NRS 34.810(3). However, it is also true that, under State v. Huebler, 128 Nev. 192, 275 P.3d 91 (2012), this burden can be met by proving the elements required to prove a Brady violation. 128 Nev. at 198, 275 P.3d at 95 ("establishing the State withheld 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 . . . ."). Because Moore alleged that the State suppressed favorable evidence and that prejudice resulted, Moore met his pleading requirement under Brady. And, in the Opening Brief, at 58, Moore identified the new evidence on which the Brady theory rested (That "Mr. Peoples fed [Saldana] evidence, told her how to testify, threatened her, and offered her rewards") and distinguished the new facts from the previous allegations relating to Saldana. Id. at 58 n. 14; Reply Br. at 27-28.

conclude, however, that the "allegedly withheld material is not material." Order at 4. This conclusion, in turn, is based on two errors.

First, this Court overlooked its law on the corroborative evidence requirement under NRS 175.291. This Court rejected Moore's argument that Saldana's testimony was a prerequisite to conviction because "an accomplice is defined as one who is liable for the identical offense charged against the defendant . . . and several of the witnesses who testified against Moore were not liable for first-degree murder . . . ." Order at 4. This overlooks this Court's settled precedent, which also recognizes that an accomplice is one "who is culpably implicated in, or unlawfully cooperates, aids or abets in the commission of the crime charged." Orfield v. State, 105 Nev. 107, 109, 771 P.2d 148, 149 (1989) (citing Potter v. State, 96 Nev. 875, 619 P.2d 1222 (1980)). Here, the witnesses who testified against Moore, with the exception of Saldana, were "culpably implicated in" the crime charged or unlawfully cooperated, aided, or abetted the crime charged.

For example, Rusty Havens testified that he was present during a conversation in which Moore, and others, planned the homicides. See

2AA494. But Havens agreed to be part of this plan, at minimum implicating him in the crime charged. 2AA497; see also Lewis v. State, 100 Nev. 456, 460, 686 P.2d 219, 221-22 (1984) ("It is settled in this state that evidence of participation in a conspiracy may, in itself, be sufficient evidence of aiding and abetting an act in furtherance of the conspiracy to subject the participant to criminal liability as a principal pursuant to NRS 195.020."); NRS 199.490 (proof of overt act not necessary to prove conspiracy).

Thomas Akers testified that he was present for at least two conversations that involved planning the homicides. 4AA761, 780. He drove to the scene and, according to his testimony, was with the group that committed the homicides immediately before and after; while the others committed the homicides, he went to the trailer next to the house to pick up some cassette tapes that would serve as part of their alibi. 4AA793, 799, 817. This is enough evidence to support an aiding and abetting theory, which in turn would make Akers liable as a principal. See NRS 195.020 ("whether present or absent"). And, like Havens, Akers

is at least implicated in the offense. See Orfield, 105 Nev. at 109, 771 P.2d at 149.

John Lucas, though perhaps being closest to a non-accomplice, also was implicated in the offense. He, too, was present for conversations planning the offense. 4AA858. He was at the apartment when the rest of the group left to commit the homicides, and was there to unlock the apartment when they returned. 4AA877. Most importantly, he told officers that he passed out and the rest of the group went "instead of" him, indicating he was supposed to be part of the group who agreed to commit the homicides. 4AA904. Indeed, despite his denials, Lucas was cross-examined closely on whether he was part of the original conspiracy. 4AA894, 896-97. Though he testified otherwise, Lucas told officers that he helped to dispose of the guns. 4AA932 (acknowledging his prior inconsistent statement). As with Havens and Akers, Lucas was at least implicated in this offense.[2]

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[2] In its Answering Brief, the State cited to the testimony of Lisa Licata and Michelle Gray as people who inculpated Moore. See Ans. Br. at 35. However these witnesses testified about Dale Flanagan's knife, which did not implicate Moore at all. See 3AA542, 3AA640. Johnny Ray

Thus, this Court overlooked the role of these witnesses in concluding that NRS 175.291 does not apply on the theory that "several of the witnesses who testified against Moore were not liable for first-degree murder." These witnesses were; but even if they were not, their testimony still required corroboration because they were implicated in these homicides. That Saldana's testimony could still have been presented does not it insulate against the corroboration requirement: after being impeached with the suppressed evidence, no reasonable juror would be able to conclude that the other witnesses' testimony was corroborated because Saldana's impeached testimony has a fundamentally reduced evidentiary value. See Kyles v. Whitley, 514 U.S. 419, 444 (1995) (effective impeachment of one eye witness with information not discussed under Brady can require new trial "even though the attack does not extend directly to others . . . .").

But even setting the corroboration requirement aside, the suppression of evidence was prejudicial and this Court overlooked

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Luckett also offered testimony against Moore, but like the others implicated in the offense, Luckett had strong incentives to testify against Moore, as indicated by the State's closing argument casting aspersions on Luckett's testimony. See 6AA1326, 8AA1795.

material questions of fact. Saldana's testimony was not, as this Court held, "secondhand," and, contrary to this Court's holding, it was a "crucial part of the State's case." Order at 5. The State referred to Saldana numerous times during closing argument. 8AA1768-69, 1774, 1784, 1786. And Saldana's untainted testimony was an important part of the State's theory: after discussing how all the other witnesses—Havens, Akers, Lucas, and Luckett—who inculpated Moore were part of the planning, the State emphasized they had one witness who was not: Angela Saldana. 8AA1773-74 ("There was one person who wasn't present who took the stand and told you. That was Angela Saldana . . . . So we have four people who were there and heard the words spoken. Actually a fifth, Dale Flanagan, as told through the sixth, Angela Saldana."). See State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003) (prosecutor's emphasis on invalid aggravating factor "likely" induced jury's reliance on factor).

Saldana's lack of involvement in the offense was important for the State's theory because, as the State acknowledged during closing arguments, all the other inculpatory witnesses had credibility problems.

See 8AA1775 ("And you might not have liked things that you heard about some of the people and you thought, 'Boy anybody who is that kind of a person probably wouldn't tell the truth . . . .'"). Havens conspired with the other defendants and was not charged. See 2AA497. Akers participated in these homicides and, after pleading guilty to voluntary manslaughter, received a sentence of five years' probation. 4AA850. Lucas gave inconsistent statements about his participation, received $1,000 for his testimony, and was not charged. See 4AA938. Luckett, as noted above, was trying to avoid his own criminal conviction. See n.2 above.

These witnesses had severe credibility issues, presenting a grave problem for the State. Saldana solved this problem by being the supposedly uninvolved witness. So, when this Court holds that "[i]impeaching Saldana would not have undermined [the other inculpatory] testimony" this Court overlooks the fact that that testimony was already severely undermined. See Order at 5. This was a fundamentally constitutional error and this Court should grant rehearing.

B. This Court overlooked material questions of fact and law in determining that Moore had failed to establish good cause and prejudice on the basis that his post-conviction counsel was ineffective.

This Court found both that post-conviction counsel was not deficient and that Moore failed to demonstrate prejudice. Order at 7-8. Both findings are predicated on questions of fact and law that this Court overlooked or misapprehended.

As to the performance of post-conviction counsel, this Court held "although Moore has apparently uncovered many witnesses over the last several decades, he fails to demonstrate that post-conviction counsel acted unreasonably by failing to do the same." Order at 7. This conclusion is puzzling. If it refers to the witnesses uncovered by Moore to show the deficiency of post-conviction counsel, the sentence is inaccurate in referring to witnesses uncovered "over the last several decades," because these witnesses were "uncovered" by Moore between this Court's issuance of remittitur on October 15, 2012 and when Moore filed the instant petition on September 19, 2013. If it refers to witnesses uncovered by Moore over all of the last several decades, then those witnesses were necessarily *already* "uncovered" at the time that post-conviction counsel

represented Moore. Whichever time frame the decision refers to, the conclusion does not follow. For, if these witnesses were "uncovered" within the 11-month period between the issuance of remittitur and the filing of the instant petition, effective post-conviction counsel could also have "uncovered" these witnesses during the roughly fourteen years that post-conviction counsel represented Moore.[3] Alternatively, if these witnesses were "uncovered" over the last several decades, post-conviction counsel would have had no reason to fail to present them during post-conviction proceedings.

Moreover, this Court's conclusion appears to be based on a false premise. This Court noted that the "alleged witnesses appear to have had little to no involvement in Moore's life." Order at 7.[4] Based on this, the

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[3] This would be a factual issue to be proved at an evidentiary hearing. See Opening Br. at 116.

[4] The Court also indicated that the briefing included "intentional" "derelictions" in failing to identify the identity of quoted witnesses and in failing to explain how these witnesses came to know about Moore. Order at 6-7. This appears to be part of the basis for the State's request to publish this order. See Mot. to Publish at 3 (citing to Order of Affirmance, p. 3-7). Undersigned counsel, again, would note disagreement with this Court's assessment. NRAP 28(e)(1) requires "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied

Court noted that Moore provided "no explanation as to why a reasonable post-conviction attorney conducting a reasonable investigation would have sought them out." Id. But here, post-conviction counsel did no more than a perfunctory investigation. See 25AA5992 ("I assumed that there were no issues relating to his childhood. However, I do not believe I asked him in detail about his childhood, but instead focused mainly on guilt phase relief and relief based upon purely legal issues presented by the third penalty phase."). This alone established deficient performance.

This Court's analysis also asks the wrong question. The question is not whether reasonable post-conviction counsel would have sought out these specific witnesses. See Wiggins v. Smith, 539 U.S. 510, 522-23 (2003). Rather, the question is, at the time counsel decided to not investigate, was counsel's decision supported by sufficient investigation? Id. at 523. If the decision to end the investigation is unsupported, then counsel was deficient. Id. Here, post-conviction counsel acknowledged

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on is to be found." This Court's order acknowledges that these "citations to the record" accompanied these quotations. Thus, the briefing is not in violation of any duties, as implied by the word "dereliction."

there were indications in the record of drug and alcohol abuse, but that she did not investigate them. 25AA5992. Counsel spoke to three or four witnesses, but did not conduct an investigation. 25AA5991. Counsel did not ask about issues relating to his childhood at all, instead assuming there were none. 25AA5992. This was deficient because counsel had an obligation to conduct enough investigation to conclude that further investigation would be fruitless. See Wiggins, 539 U.S. at 523-29. Here, counsel lacked enough information to so conclude.

This Court also held that Moore failed to demonstrate prejudice because, "Trial counsel presented similar evidence about the same mitigating themes." Order at 7. This overstates the strength of trial counsel's presentation. Six witnesses testified on behalf of Moore. Two were associated with prison ministries. See 12AA2754, 65-66 (Janalee Hoffman, jeweler who was married to Chaplain Gary Hoffman, and knew Moore through correspondence after he was incarcerated); 12AA2770-72 (Gary Hoffman, jeweler and chaplain who met Moore through prison ministry). These witnesses offered no testimony about Moore's upbringing. Two other witnesses testified about Moore's lack of a

disciplinary record after conviction. 12AA2777-79 (Sherman Hatcher, Warden of Southern Desert Correction Center); 12AA2791, 94 (Bud Hlavaty, supervising guard over unit where Moore was housed). These witnesses offered no testimony about Moore's upbringing.

This Court's conclusion that similar evidence about similar themes, then, came solely from two witnesses, the only two witnesses to testify on Moore's behalf who knew him before he went to prison: Shelly Johnson, a friend, and Lindy Moore, his mother. 12AA2802; 12AA2868.

The overlap between the now-available mitigation evidence and what was actually presented is minimal. For example, both Johnson and Lindy Moore testified about Moore's marriage to Sherri Shea. Johnson testified as follows:

> Q: Do you know whether or not this marriage was a happy one?
>
> A: No. It wasn't.
>
> Q: Did you personally observe that?
>
> A: Well, with him and Sherri, I mean they didn't fight in front of me then, but you could feel the tension.
>
> Q: They didn't seem to get along?

A: Not a whole lot, no.

12AA2804-05. Lindy Moore also testified about Moore's marriage. With regard to Moore's emotional and physical condition, she testified, "Before he got married, he was fine. During the time he got married, at the very beginning he was ecstatic and then he started forgetting things, being forgetful, I don't know, not quite the most happy person." 12AA2880. This was the extent of the testimony about Moore's marriage. This testimony also fails to even approximate the information available about Moore's marriage. Compare 12AA2804-05 (Shelly Johnson) and 12AA2880 (Lindy Moore) with Opening Br. at 35, 36-37.

The extent of testimony about Moore's "difficult upbringing," Order at 7, consisted of Lindy Moore's lone testimony that Moore changed schools often. 12AA2870-71.

The extent of testimony about Moore's lack of a father figure encompasses just over two pages of transcript:

Q: How was Randy's father toward him?

A: Well, when they little [sic], he was a great dad; but we [sic] was a little older - - I don't

know if it was pressure at work or what. He started yelling and saying things to him.

Q: Did he ever become violent toward Randy?

A: I only saw one instance, and that's when I left him.

Q: How old was Randy when this incident of violence occurred and you left his father?

A: I believe around six or seven.

. . .

Q: Did Randy's father have visitation with him while this divorce battle was ongoing?

A: One time and the second he came to pick the kids up, they were in tears and refused to go.

Q: Did you inquire of them as to why they didn't want to visit with their father?

A: Yes.

Q: And did they answer?

A: They were terrified of him. He had been abusive to both verbally and physically.

. . .

Q: Was there anyone else that ever assumed the role of father figure to Randy?

A: Not really. There have been some good friends in his life that have been adult men, but not really.

Q: So at least in the home there was, for most of his life, no father figure?

A: No, no.

Q: Or if there was a father figure, he was either indifferent or abusive?

A: That's right.

12AA2871-73. Importantly, the abuse referenced here indicates only one instance that Lindy Moore testified about. Id.

The extent of evidence about "the traumatic deaths of his loved ones" covered not even a full page of testimony. 12AA2881 ("Within a six-month period—the break up of his marriage, his horse that he brought along as a little baby died; the horse died in his lap, basically. He lost his dog and his cat"); id. (also testifying that Moore's grandmother died).

The extent of testimony about his "compromised thinking around the time of the murders," Order at 7, ostensibly, wasthat Moore "started

forgetting things, being forgetful, I don't know, not quite the most happy person." 12AA2880 (Lindy Moore).

In contrast, Shelly Johnson and Lindy Moore provided extensive testimony that Moore was a good, normal child. Johnson testified that she and Moore were good friends and that she valued his opinion. 12AA2804. Lindy Moore testified that Moore liked school, and especially enjoyed Russian language class and band class; that Moore participated in 4-H and volunteered with the school library. 12AA2873-74. She testified that Moore received many awards, and was good with horses. 12AA2874-77. Moore also received a check for $50 for saving a woman from a burning building when he was twelve or thirteen. 12AA2878.

So, to summarize: six witnesses testified on behalf of Moore during the penalty phase. Four of these witnesses said nothing about Moore's background. The remaining two witnesses mostly testified about Moore's good character, with minimal testimony about Moore's background and upbringing.

This Court's conclusion, then, that "[a]dditional evidence might have provided more details about Moore's life, but it would not have

altered the picture of Moore that trial counsel presented in any meaningful way" is wholly unsupported. The additional evidence provided here does not merely provide more details, but in fact replaces the picture of Moore that trial counsel presented with an accurate and fundamentally different, profoundly more mitigating, picture See Opening Br. at 35-37. Thus, this Court's conclusion that Moore failed to show prejudice is inconsistent with the evidence in the record and this Court should grant rehearing.

III. CONCLUSION

Based on forgoing, this Court should grant rehearing, find that Moore is entitled to relief, or at least an evidentiary hearing, and remand this case.

DATED this 29th day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing 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:

   It has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2013 in 14 font Century.

2. I further certify that this petition for rehearing complies with the type-volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points or more, and contains 3,865 words.

   DATED this 29th day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 29th day of March 2018, electronic service of the foregoing PETITION FOR REHEARING shall be made in accordance with the Master Service List as follows:

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