

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDOLPH MOORE,  
Appellant/Cross-Respondent,  
vs.  
THE STATE OF NEVADA,  
Respondent/Cross-Appellant.

No. 46801

**FILED**

APR 23 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND  
REMANDING

This is an appeal and cross-appeal from a district court order granting in part and denying in part a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

FACTUAL AND PROCEDURAL HISTORY

The district court convicted appellant Randolph Moore, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon and various other felonies. Codefendant Dale Flanagan's grandparents, Carl and Colleen Gordon, were found dead on November 6, 1984, Carl having been shot seven times in the back and chest and Colleen having been shot three times in the head. Six young men were involved in the plot to kill the Gordons. Moore shot Carl, and Flanagan shot Colleen. Flanagan and Moore were tried in September and October 1985 along with two other codefendants, Johnny Ray Lockett and Roy McDowell. The four men were convicted, and Flanagan and Moore

received death sentences. Tom Akers and Michael Walsh were also charged with the murders and pleaded guilty to manslaughter and murder, respectively.

On direct appeal, this court characterized as overwhelming the evidence that Moore, Flanagan, Lockett, and McDowell killed the Gordons so that Flanagan could obtain insurance proceeds and an inheritance. Although this court affirmed Moore's convictions, it reversed his and Flanagan's sentences and remanded the matter for a new penalty hearing due to prosecutorial misconduct.<sup>1</sup> Moore and Flanagan were again sentenced to death, and they appealed. This court affirmed the death sentences.<sup>2</sup> The United States Supreme Court vacated that decision, however, and remanded for reconsideration due to evidence presented at the second penalty hearing regarding Moore's and Flanagan's occult beliefs and activities.<sup>3</sup> Upon remand, this court held that use of such evidence had been unconstitutional and remanded the case to the district court for a third penalty hearing.<sup>4</sup> After the third penalty hearing,

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<sup>1</sup>Moore v. State, 104 Nev. 113, 754 P.2d 841 (1988) (citing Flanagan v. State (Flanagan I), 104 Nev. 105, 754 P.2d 836 (1988)).

<sup>2</sup>Flanagan v. State (Flanagan II), 107 Nev. 243, 810 P.2d 759 (1991).

<sup>3</sup>Moore v. Nevada, 503 U.S. 930 (1992).

<sup>4</sup>Flanagan v. State (Flanagan III), 109 Nev. 50, 846 P.2d 1053 (1993).

Moore and Flanagan once again received death sentences, and this court affirmed the death sentences on appeal.<sup>5</sup>

Moore filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court later appointed counsel, who filed a supplemental petition, and conducted an evidentiary hearing. Subsequently, the district court entered three written orders resolving the petition and supplemental petition. On February 17, 2005, the district court entered an order denying Moore's claims that trial counsel was ineffective during the guilt phase of his trial. The district court entered a second written order on January 23, 2006, striking the burglary and robbery aggravating circumstances pursuant to McConnell v. State.<sup>6</sup> In that order, the district court also vacated Moore's death sentence, ordered a new penalty hearing, and denied as moot Moore's claims of ineffective assistance of counsel respecting his third penalty hearing. On March 21, 2006, the district court entered a third written order, denying Moore's claims that he received ineffective assistance of appellate counsel. This appeal followed.

Moore appeals, arguing that the district court improperly denied his claims relating to the guilt phase of his trial and subsequent appeal and that he is entitled to a new trial. The State cross-appeals,

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<sup>5</sup>Flanagan v. State (Flanagan IV), 112 Nev. 1409, 930 P.2d 691 (1996).

<sup>6</sup>120 Nev. 1043, 102 P.3d 606 (2004).

arguing that the district court erroneously struck two aggravating circumstances pursuant to McConnell and failed to properly reweigh the remaining aggravating and mitigating evidence.

As explained below, we conclude that the district court did not err in denying the claims related to the guilt phase of the trial. We further conclude that the district court properly struck the burglary and robbery aggravating circumstances pursuant to McConnell. However, we remand this matter and direct the district court to enter detailed findings as to whether the jury's consideration of the erroneous aggravating circumstances was harmless beyond a reasonable doubt.

#### DISCUSSION

Initially, we address a procedural default matter raised by the State. Shortly before the commencement of his third penalty hearing, Moore filed a petition for a writ of habeas corpus, which the district court denied. Subsequently, the district court held a hearing respecting its denial of the petition. At that hearing, the parties discussed a mandamus petition that Moore had filed with this court challenging the district court's denial of his habeas petition. In denying the mandamus petition, this court stated that a denial of a habeas petition was an independently appealable determination and not an appropriate matter for extraordinary relief. After some discussion of the jurisdictional posture of Moore's habeas petition, the district court concluded that its denial of the petition would be appealable only upon the entry of a final judgment in the criminal action. In this case, the district court concluded, the third penalty hearing remained pending and unresolved. Consequently, the

district court concluded that Moore's notice of appeal did not divest it of jurisdiction to proceed with the third penalty hearing. After the third penalty hearing, this court considered the appeal from the district court's denial of habeas relief, along with Moore's appeal from his third penalty hearing.<sup>7</sup>

The State argues that to the extent the instant petition raised guilt phase issues, it is procedurally barred and successive in light of the 1995 habeas petition. We disagree. In denying the 1995 habeas petition, the district court essentially considered it premature in light of the then pending third penalty hearing and concluded that the filing of a notice of appeal did not divest its jurisdiction to proceed with the third penalty hearing. Because the 1995 petition was denied as premature, we conclude that guilt phase matters raised in the instant habeas petition are not procedurally barred.

Before we address the propriety of the district court's resolution of the claims raised in Moore's post-conviction habeas petition, we first address the claims the State raises in its cross-appeal.

#### State's cross-appeal

The State argues on cross-appeal that the district court improperly applied McConnell retroactively to strike two aggravating circumstances. After the State filed its brief in this case, we resolved the

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<sup>7</sup>Flanagan IV, 112 Nev. at 1419-20, 930 P.2d at 698.

retroactivity issue in Bejarano v. State,<sup>8</sup> and held that McConnell applies retroactively to cases that are final. Based on Bejarano, we conclude that the State's argument lacks merit.

The State next argues that the district court erred in vacating the death sentence. We agree. A death sentence based in part on an invalid aggravator may be upheld by reweighing the aggravating and mitigating evidence or conducting a harmless-error review.<sup>9</sup> If it is clear beyond a reasonable doubt that the jury would have found the defendant death eligible and imposed a sentence of death despite the erroneous aggravating circumstances, then the error was harmless. On the other hand, if it cannot be determined beyond a reasonable doubt that the jury would have found the defendant death eligible and imposed death absent the erroneous aggravating circumstances, then the defendant is entitled to a new penalty hearing.<sup>10</sup>

Although the district court properly struck the burglary and robbery aggravating circumstances pursuant to McConnell, we are unable to discern from the district court's order whether its reweighing analysis was sufficient. Without a detailed explanation of its ruling, we are unable

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<sup>8</sup>122 Nev. 1066, 146 P.3d 265 (2006).

<sup>9</sup>Clemons v. Mississippi, 494 U.S. 738, 741 (1990); State v. Haberstroh, 119 Nev. 173, 183, 69 P.3d 676, 682-83 (2003).

<sup>10</sup>Browning v. State, 120 Nev. 347, 363-64, 91 P.3d 39, 51 (2004); Leslie v. Warden, 118 Nev. 773, 783, 59 P.3d 440, 447 (2002).

to review the propriety of the district court's conclusion that the jury's consideration of the erroneous aggravating circumstances was not harmless beyond a reasonable doubt in this case.<sup>11</sup> Therefore, we remand this matter with instructions to the district court to enter detailed findings as to whether the jury's consideration of the burglary and robbery aggravating circumstances was harmless beyond a reasonable doubt.

Moore's appeal

Claims of ineffective assistance of trial counsel

Moore contends that the district court improperly denied numerous claims of ineffective assistance of trial counsel related to the guilt phase of his trial. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.<sup>12</sup> A defendant must demonstrate prejudice by showing a reasonable probability that but for counsel's errors, the result of the trial

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<sup>11</sup>See Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (stating that "[a]n appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion").

<sup>12</sup>Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

would have been different.<sup>13</sup> Both prongs of the test need not be considered if an insufficient showing is made on either one.<sup>14</sup>

In particular, Moore argues that the district court erred in denying the following claims of ineffective assistance of counsel: counsel failed to file unspecified pretrial motions; counsel failed to adequately interview two State witnesses, Rusty Havens and John Lucas; counsel failed to secure notes from police officers taken during interviews; counsel should have moved for discovery of the personnel file of police officer Ray Berni; counsel should have demanded full disclosure of State witness Angela Saldana's alleged role as a police agent; counsel failed to prevent the admission of irrelevant, prejudicial, and hearsay testimony; counsel should have responded to the State's opposition to his motion for appointment of a psychiatric expert; counsel should have objected to alleged restrictions the district court placed on his defense; counsel improperly participated in joint defense strategies with codefendants' counsel; counsel unreasonably relied upon the work product of codefendants' counsel; counsel should have moved for a change of venue; counsel should have sought sequestration of the jury; counsel failed to conduct meaningful voir dire; counsel should have filed a motion for the appointment of a psychiatrist ex parte and under seal; counsel elicited

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<sup>13</sup>Strickland, 466 U.S. at 694; Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

<sup>14</sup>Strickland, 466 U.S. at 697.



inflammatory evidence during cross-examination of witnesses; and counsel failed to develop a coherent theory of defense.

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. Therefore, we conclude that the district court did not err in denying these claims.<sup>15</sup>

In addition to the claims listed above, Moore argues that the district court erred in rejecting seven additional claims of ineffective assistance of counsel, which we address below in more detail.

First, Moore argues that the district court erroneously denied his claim that counsel inadequately communicated with him and was incompetent due to his partial hearing loss. However, Moore failed to explain how additional communication would have changed the outcome of his trial. And although the trial transcript shows that counsel experienced hearing difficulties throughout the trial, counsel asked for clarification in those instances. We conclude that Moore failed to

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<sup>15</sup>To the extent Moore contends that appellate counsel were ineffective for not raising any of these matters on direct appeal, we conclude that he failed to demonstrate that they had a reasonable probability of success. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

demonstrate that counsel was ineffective on these grounds and that the district court did not err in denying these claims.<sup>16</sup>

Second, Moore contends that the district court erred in denying his claim that counsel should have prevented the admission of a codefendant's testimony regarding Moore's connection to Satanic and occult practices, or should have at least requested a limiting instruction. This evidence was admitted over counsel's objection. And in Moore's appeal after his third penalty hearing, we concluded that this evidence was properly admitted as to the guilt phase, although the prosecutor's comments on this evidence during closing argument were improper.<sup>17</sup> Therefore, Moore cannot demonstrate prejudice resulting from counsel's failure to take additional steps to preclude admission of this evidence or to request a limiting instruction. Moreover, other evidence presented at trial showed that Moore and his codefendants committed the murders for financial gain, not because of Satanic or occult influences. Therefore, we conclude that the district court did not err in denying this claim.

Third, Moore argues that the district court improperly denied his claim that counsel was ineffective for not objecting to several instances

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<sup>16</sup>To the extent Moore contends that his appellate counsel were ineffective for not raising this matter on direct appeal, we conclude that he failed to demonstrate that it had a reasonable probability of success. See id.

<sup>17</sup>Flanagan v. State (Flanagan IV), 112 Nev. 1409, 1419, 930 P.2d 691, 698 (1988).

of prosecutorial misconduct. In particular, Moore asserted that the prosecutor, in the jury's presence, improperly referred to pretrial rulings respecting the admissibility of coconspirator testimony. Moore contended that the prosecutor's comments suggested to the jury that a conspiracy had been proven. Even if counsel should have objected to the challenged comments, Moore failed to show prejudice in light of the overwhelming evidence of Moore's extensive participation in planning and committing the murders.

Moore also contended that the prosecutor improperly referred to Moore and his codefendants as "devil worshippers" and argued that the men "shared witchcraft." Although the prosecutor's argument may have been improper, Moore failed to demonstrate any resulting prejudice considering the overwhelming evidence of guilt.

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 from 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.

We conclude that Moore failed to establish that counsel was ineffective respecting any of the aforementioned allegations of prosecutorial misconduct. Therefore, we conclude that the district court did not err in denying this claim.<sup>18</sup>

Fourth, Moore contended that the district court erroneously denied his claim that counsel was ineffective for not challenging the district court's direction that defense objections and motions be made to the court reporter and outside his and the jury's presence. In an effort to streamline anticipated frequent objections related to severance matters, Judge Donald M. Mosley instructed all defense counsel to either wait until there was a break in the trial to raise an objection or ask the district court for leave to approach the court reporter and inform her of the nature of the objection counsel desired to be recorded. Although we conclude that Moore failed to demonstrate prejudice resulting from counsel's failure to object to this procedure, we express our disapproval of the district court's procedure in this regard. Parties are required to assert contemporaneous objections to preserve alleged errors for appellate review.<sup>19</sup> Judge Mosley's unusual procedure frustrated the defense's ability to comply with this fundamental

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<sup>18</sup>To the extent Moore contends that his appellate counsel were ineffective for not raising these matters on direct appeal, we conclude that he failed to demonstrate that they had a reasonable probability of success. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>19</sup>Sullivan v. State, 115 Nev. 383, 387 n.3, 990 P.2d 1258, 1260 n.3 (1999).

rule of appellate review. Additionally, it precluded the defense from securing any cautionary instructions to the jury should such instructions become necessary during the course of the trial. Therefore, we caution the district court to refrain from employing such practices that may impede a party's ability to comply with elemental rules of trial and appellate practice.

Fifth, Moore asserted that the district court erred in denying his claim that counsel was ineffective for not securing a complete record of bench conferences and chamber hearings and for failing to ensure his presence at all proceedings, specifically several pretrial chamber conferences. Moore further complained that because several bench conferences and chambers hearings were held out of public hearing and view, he was denied a public trial. A capital defendant does not have an absolute right to have trial proceedings recorded<sup>20</sup> or an unlimited right to be present at every trial proceeding.<sup>21</sup> Here, Moore failed to adequately explain how he was prejudiced by the omission of any recording from a bench conference or chamber hearing or his absence from any pretrial hearing. Further, Moore failed to adequately explain how conducting several bench conferences and chambers hearings out of the public view

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<sup>20</sup>Archanian v. State, 122 Nev. \_\_\_, \_\_\_, 145 P.3d 1008, 1018-19 (2006) (quoting Daniel v. State, 119 Nev. 498, 507, 78 P.3d 890, 897 (2003)).

<sup>21</sup>Gallegos v. State, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001).

denied him his right to a public trial. Therefore, we conclude that the district court did not err in denying these claims.<sup>22</sup>

Sixth, Moore argues that the district court erred in denying his claim that counsel was ineffective for failing to object to several jury instructions and for not requesting others. Respecting his contention that counsel should have objected to the instructions on reasonable doubt,<sup>23</sup> implied malice,<sup>24</sup> and “equal and exact justice,”<sup>25</sup> these instructions comported with statutory and case law.

Moore also contended that counsel should have objected to a jury instruction advising the jurors that if they concluded beyond a reasonable that Moore was guilty, they should “so find, even though [the jurors] may believe one or more other persons are also guilty.” Moore asserted that this language instructed the jurors to find him guilty if it also found a codefendant guilty. However, he failed to adequately explain why the challenged instruction was improper or cite to any relevant authority supporting his contention.

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<sup>22</sup>To the extent Moore contends that his appellate counsel were ineffective for not raising these matters on direct appeal, we conclude that he failed to demonstrate that they had a reasonable probability of success. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>23</sup>See NRS 175.211.

<sup>24</sup>See Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 482-83 (2000).

<sup>25</sup>See Leonard v. State, 117 Nev. 53, 78, 17 P.3d 397, 413 (2001).

Moore further argued that counsel was ineffective for failing to object to the aiding and abetting instructions on the ground that they failed to clearly inform the jury of the specific intent necessary to hold him liable as an aider and abettor in Colleen Gordon's murder based on the reasoning this court later developed in Sharma v. State.<sup>26</sup> However, even assuming counsel should have objected to the challenged instructions, Moore cannot demonstrate prejudice here. The State presented overwhelming evidence that Moore and five other men planned and executed the murders expressly so that Flanagan would receive life insurance and inheritance proceeds. Murdering both Carl and Colleen was necessary to effectuate this objective. Moore, Flanagan, and the others planned the murders at least one month prior to the killings, discussing in detail who would shoot Carl and Colleen and in what manner, how the men would gain entry into the Gordon residence, and the types of weapons to be used. The men also agreed that the murders would be made to look like a burglary or robbery gone wrong. The evidence overwhelmingly supports a finding that Moore had the intent necessary to be held liable for Colleen's murder under an aiding or abetting theory of liability. Consequently, we conclude that Moore did not demonstrate a reasonable probability that the result of his trial would have been

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<sup>26</sup>118 Nev. 648, 655, 56 P.3d 868, 872 (2002); see Mitchell v. State, 122 Nev. \_\_\_, 149 P.3d 33, 38 (2006) (holding that Sharma clarified existing law).

different had counsel objected to the aiding and abetting instructions.<sup>27</sup> Therefore, we conclude that the district court did not err in denying this claim.

Moore also claimed that counsel was ineffective for not requesting instructions on the admissibility of prior inconsistent statements as substantive evidence, the limited use of prior bad act and character evidence, and the admissibility of hearsay. However, he did not adequately explain why these instructions were necessary or demonstrate a reasonable probability that the outcome of his trial would have been different but for counsel's failure to request the instructions.

For the foregoing reasons, we conclude that the district court did not err in denying Moore's claim that counsel was ineffective respecting any matter related to jury instructions.<sup>28</sup>

Seventh, Moore contends that the district court improperly denied his claim that counsel was ineffective for not filing a motion for a new trial. However, Moore failed to identify what grounds should have

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<sup>27</sup>To the extent Moore argues that the district court's instructions respecting aiding and abetting do not comport with Sharma, we conclude that this claim is procedurally barred absent a showing of good cause and actual prejudice, which Moore has failed to demonstrate. See NRS 34.810(1)(b), (3).

<sup>28</sup>To the extent Moore contends that his appellate counsel were ineffective for not raising these matters on direct appeal, we conclude that he failed to demonstrate that they had a reasonable probability of success. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).



been raised in a motion for a new trial.<sup>29</sup> Nor has he shown that if a motion for a new trial had been filed, it had any probability of success. Therefore, we conclude that the district court properly denied this claim.

Claims of ineffective assistance of appellate counsel

Moore contends that the district court improperly denied his claims that appellate counsel were ineffective. A successful claim of ineffective assistance of appellate counsel requires a showing that counsel's performance was deficient and that an omitted issue had a reasonable probability of success on appeal.<sup>30</sup>

Moore first contends that the district court erred in denying his claim that appellate counsel were not qualified to represent him in a capital case. In particular, he complained that counsel did not communicate with him and raised only a few issues on direct appeal. Moore also noted that one of his counsel was actually suspended from the practice of law in Nevada shortly after this court resolved Moore's direct appeal. However, Moore failed to adequately explain how any of these circumstances demonstrated that counsel were unqualified to represent him. Consequently, we conclude that the district court did not err in denying this claim.

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<sup>29</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>30</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Second, Moore complains that the district court improperly denied his claim that appellate counsel failed to “federalize” several issues on direct appeal. Moore failed to show that had counsel invoked the United States Constitution when raising his claims that they would have had any greater likelihood of success on direct appeal. Therefore, we conclude that the district court did not err in denying this claim.

#### Miscellaneous claims

Moore argued that the district court erred in denying his claim that this court failed to provide him with a constitutionally adequate appellate review of his trial by summarily resolving on direct appeal matters related to the guilt phase of the trial. However, Moore failed to show that our consideration of his case was erroneous or flawed. Therefore, we conclude that the district court did not err in denying this claim.

Moore contended that he was entitled to relief due to the cumulative impact of trial and appellate counsel’s errors. Although Moore’s trial was not free from error, he failed to show that any of the errors considered cumulatively denied him a fair trial. Therefore, we conclude that the district court did not err in denying this claim.

#### Direct appeal claims

Moore raised a number of claims that were appropriate for direct appeal, including that the district failed to inquire into counsel’s qualifications to try a capital case and conduct a hearing respecting Moore’s motion to dismiss counsel. Moore further alleged that the district court erred in denying his motion to sever his trial from that of his

codefendants.<sup>31</sup> We conclude, however, that Moore showed neither good cause for failing to raise these issues earlier nor actual prejudice.<sup>32</sup> Therefore, we conclude that the district court did not err in denying these claims.

Moore also argued that he was prejudiced by the district court's instruction to the jury on premeditation and deliberation, commonly known as the Kazalyn instruction.<sup>33</sup> This instruction was later determined in Byford v. State to inadequately explain the distinction between first- and second-degree murder.<sup>34</sup> Moore contends that Polk v. Sandoval,<sup>35</sup> a recent decision by the United States Court of Appeals for the Ninth Circuit, mandates reversal of his first-degree murder conviction. In sum, Polk concluded that in reviewing the Kazalyn instruction in Byford and concluding that the decision was not retroactive in Garner v. State,<sup>36</sup> this court ignored clearly established federal law holding that an

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<sup>31</sup>To the extent Moore suggests that we should revisit this matter, we decline to do so.

<sup>32</sup>See NRS 34.810(1)(b)(2); State v. Williams, 120 Nev. 473, 477, 93 P.3d 1258, 1260-61 (2004).

<sup>33</sup>Kazalyn v. State, 108 Nev. 67, 75-76, 825 P.2d 578, 583-84 (1992).

<sup>34</sup>116 Nev. 215, 234-35, 994 P.2d 700, 713-14 (2000).

<sup>35</sup>503 F.3d 903 (9th Cir. 2007).

<sup>36</sup>116 Nev. 770, 6 P.3d 1013 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

instruction omitting an element of a crime and relieving the prosecution of its burden of proof violates the federal Constitution.<sup>37</sup> The Polk court concluded that given the “State’s exceptionally weak evidence of deliberation,” it could not conclude that the instructional error was harmless in that case.<sup>38</sup> We conclude, however, that the evidence adduced at Moore’s trial overwhelmingly established that he and his cohorts methodically planned the murders for pecuniary gain. Considering Polk, we nonetheless conclude that any error in the challenged instruction was harmless beyond a reasonable doubt.<sup>39</sup>

#### CONCLUSION

Based upon the foregoing discussion, we affirm the district court’s order denying Moore post-conviction relief as to claims related to the guilt phase of his trial. We further affirm the district court’s order striking the robbery and burglary aggravating circumstances pursuant to McConnell. However, we remand this matter and direct the district court to enter detailed findings as to whether the jury’s consideration of the

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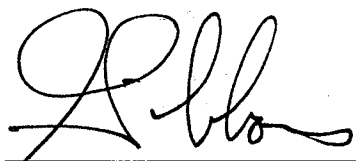
<sup>37</sup>Polk, 503 F.3d at 911.


<sup>38</sup>Id. at 913.

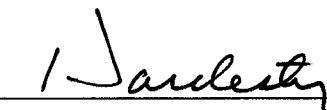
<sup>39</sup>To the extent Moore contends that counsel was ineffective for not objecting to this instruction, we conclude that he failed to demonstrate the result of trial would have been different. See Strickland v. Washington, 466 U.S. 668, 694 (1984).

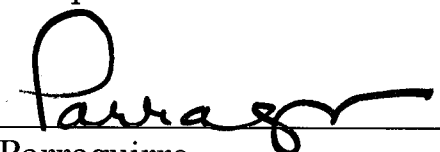
erroneous aggravating circumstances was harmless beyond a reasonable doubt.<sup>40</sup> Accordingly, we

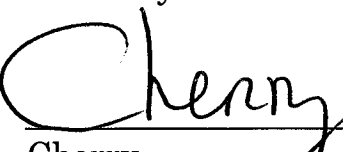
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.<sup>41</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, Sr.J.  
Rose<sup>42</sup>

<sup>40</sup>After entering detailed findings regarding harmless error review, if the district court concludes that a new penalty hearing is not warranted, the district court must then resolve the claims that Moore raised in his post-conviction habeas petition relating to his third penalty hearing.

<sup>41</sup>This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

<sup>42</sup>The Honorable Robert E. Rose, Senior Justice, was appointed by the court to sit in place of the Honorable Michael Douglas, Justice, who  
*continued on next page . . .*

cc: Hon. Michelle Leavitt, District Judge  
Hon. Donald M. Mosley, District Judge  
JoNell Thomas  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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*... continued*

voluntarily recused himself from participation in the decision of this matter. Nev. Const. art 6, §19; SCR 10.