IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDOLPH MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55091

FILED

AUG 01 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY K. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the denial of a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Randolph Moore was convicted of murder with the use of a deadly weapon (two counts), conspiracy to commit burglary, conspiracy to commit robbery, conspiracy to commit murder, burglary, and robbery with the use of a deadly weapon in connection with the deaths of Carl and Colleen Gordon, the grandparents of Moore's codefendant Dale Flanagan. The jury sentenced Moore to death, and we affirmed his convictions and death sentence. Moore v. State, 104 Nev. 113, 754 P.2d 841 (1988). During the course of appeals and post-conviction proceedings, Moore had three penalty hearings. At the third penalty hearing in June 1995, the jury found the following circumstances aggravated each murder: (1) Moore knowingly created a great risk of death to more than one person, (2) the murders were committed during the perpetration of a robbery, (3) the murders were committed during the perpetration of a burglary, and (4)

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Moore committed the murders for pecuniary gain. Flanagan v. State (Flanagan IV), 112 Nev. 1409, 1416-17, 930 P.2d 691, 696 (1996). The jury found three mitigating circumstances—(1) Moore had no significant criminal history of prior criminal activity, (2) the youth of the defendant at the time of the crimes, and (3) "any other mitigating circumstances." Id. at 1416, 930 P.2d at 696 (alteration omitted). After weighing the aggravating and mitigating evidence, the jury sentenced Moore to death for each murder, and this court affirmed those sentences. Id. at 1416, 1423-24, 930 P.2d at 696, 700.

Moore timely sought post-conviction relief. The district court granted relief in part by striking two felony aggravating circumstances based on McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), vacating the death sentences, and ordering a new penalty hearing.[1] Moore appealed and the State cross-appealed. We affirmed the denial of Moore's guilt-phase claims and the decision to strike the felony aggravating circumstances but remanded for the district court to enter detailed findings as to whether the jury's consideration of the invalid aggravating circumstances was harmless beyond a reasonable doubt. Moore v. State, Docket No. 46801 (Order Affirming in Part, Reversing in Part, and Remanding, April 23, 2008). This court also advised the district court that

[1]The district court denied Moore's claims that trial counsel provided ineffective assistance during the guilt phase of the original trial and concluded that his other claims related to the third penalty hearing were moot.

if it concluded that a new penalty hearing was not warranted under McConnell, the district court then must resolve Moore's ineffective-assistance claims related to the third penalty hearing. Id. at 21 n.40. On remand, the district court denied relief, concluding that the McConnell error was harmless. The district court also denied Moore's ineffective-assistance claims related to the third penalty hearing. This appeal followed.

Moore argues that the district court erred by (1) denying his claims of ineffective assistance of trial and appellate counsel, (2) denying him relief pursuant to McConnell, and (3) denying other claims identified below. After considering Moore's claims and reviewing the record, we conclude that he failed to establish that the district court erred by denying his post-conviction petition and therefore affirm the judgment.

Claims of ineffective assistance of trial and appellate counsel

Moore argues that the district court erred by denying his claims of ineffective assistance of trial and appellate counsel without conducting an evidentiary hearing. "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review." Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001). We give deference, however, to a district court's purely factual findings. Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). A successful ineffective-assistance claim requires a showing (1) that counsel's performance was deficient (counsel's representation fell "below an objective standard of reasonableness") and (2) prejudice (but for counsel's

errors there is a reasonable probability that the result of the proceeding would have been different). Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996). Moore was entitled to an evidentiary hearing on his ineffective-assistance-of-counsel claims only if he "assert[ed] specific factual allegations that [were] not belied or 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). As explained below, we conclude that the district court did not err by denying Moore's claims.

Claims of ineffective assistance of trial counsel

Moore raises several claims of ineffective assistance of trial counsel at the third penalty hearing, related to the following matters: (1) jury selection issues, (2) severance, (3) sufficiency of the information, (4) motion in limine to preclude prosecutorial misconduct, (5) admission of evidence, (6) bribery of State witnesses, (7) admission of testimony of John Lucas, (8) prosecutorial misconduct, (9) mitigation, (10) jury instructions, (11) constitutionality of the death penalty, and (12) clemency. He further argues that the cumulative effect of trial counsel's deficiencies requires reversal of his death sentences.

Jury selection issues

Moore argues that his counsel were ineffective for a number of reasons related to jury selection, including that counsel should have challenged: (1) voir dire questions about religion, (2) removal of a veniremember, (3) retention of biased jurors, (4) juror misconduct, (5)

inquiry into veniremembers' ability to equally consider all possible sentences, and (6) racial bias in the selection of the jury pool.

Moore first argues that trial counsel should have objected when the district court asked veniremembers about their religious affiliations and whether they regularly attended religious services. In the context of a capital prosecution, we have recognized that a juror's personal beliefs and convictions, including religious beliefs, are highly relevant in empaneling a jury. Bean v. State, 86 Nev. 80, 87-88, 465 P.2d 133, 138 (1970) (observing that juror's religious or personal convictions is ground for removal for cause where beliefs are so "fixed that he is unable to return the death penalty under any case"), holding limited on other grounds by Browning v. State, 124 Nev. 517, 530-31, 188 P.3d 60, 70 (2008). Nothing in the trial transcript suggests that the challenged inquiry was undertaken for an improper purpose and therefore counsel's omission was not deficient or prejudicial.

Second, Moore argues that counsel should have objected to the removal for cause of a veniremember based on his views on the death penalty. During voir dire, the veniremember stated that he did not believe in the death penalty. Although after further questioning he expressed that under some undefined theoretical circumstance he might be able to impose death, considering his comments as a whole, he was opposed to the death penalty as a matter of conscience and conveyed that his feelings about the death penalty would "substantially impair" his ability to carry out his juror duties. Because the record supports the trial court's decision

to remove the juror for cause, see Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005), counsel's omission was not objectively unreasonable.

Third, Moore argues that counsel should have challenged four veniremembers on various grounds, including (1) a juror's statement that child killers should be executed and that the defendants would not want him on the jury because "nobody wants to die," (2) a juror's revelation that his wife was a former police officer and he would give more credence to a police officer's testimony, (3) a juror's statement that "the law should be carried out to the maximum," and (4) a juror's refusal to consider a sentence that would allow parole. After reviewing the relevant voir dire, we conclude that even assuming counsel was deficient, Moore has not shown prejudice because the first three jurors were excused by peremptory challenges and his claim of prejudice related to the fourth juror is speculative.

Fourth, Moore argues that counsel should have requested further inquiry into an instance of potential juror misconduct where a veniremember informed the trial court that he knew that the case was a second retrial and had mentioned that to other veniremembers and he was aware of Moore's conduct in prison through his employment at the detention center. The veniremember was excused, but Moore complains that counsel should have questioned other veniremembers about the matter. However, the venire already was aware that the penalty hearing was a retrial, as that subject surfaced during voir dire, and there is no indication that the veniremember detailed to the others the bases for

retrial. Therefore, we conclude that counsel's omission was not objectively unreasonable.

Fifth, Moore argues that counsel should have objected to erroneous instructions to the jurors and disqualifications of the jurors based upon whether they could equally consider the three possible sentencing options: death or life with or without parole. Our first pronouncement that equal consideration by the jury of three possible punishments in death penalty cases was not required came in Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001), which was decided six years after Moore's third penalty hearing. It also appears that the "equal consideration" inquiry was not uncommon at the time of the third penalty hearing. Given those circumstances, counsel's omission was not deficient, and, even assuming any deficiency, Moore failed to show prejudice.

Sixth, Moore argues that counsel should have challenged the jury panel because it was not selected from a fair cross section of the community as evidenced by the fact that he was sentenced by an all-white jury from which African Americans were systematically excluded. His claim lacks citations, supporting documents, or relevant legal authority and is supported only by general statements regarding Clark County's racial makeup and the jury pool selection process. Moore's bare allegation is wholly insufficient to support his ineffective-assistance claim.

Severence

Moore advances an unsupported argument that trial counsel should have moved to sever his trial from Flanagan's; his bare allegation

fails to establish that counsel were ineffective. Moreover, we rejected severance arguments in the appeals related to his original trial and second penalty hearing. See Flanagan v. State (Flanagan II), 107 Nev. 243, 250, 810 P.2d 759, 763 (1991), vacated on other grounds sub nom. Moore v. Nevada, 503 U.S. 930 (1992); Moore v. State, 104 Nev. 113, 754 P.2d 841 (1998).

Challenges to the information

Moore argues that counsel should have challenged the information because it did not charge the aggravating circumstances and there was no pretrial probable cause finding for the aggravating circumstances. Nothing in the United States or Nevada Constitutions mandates that aggravating circumstances be charged in an indictment or information and subjected to a pretrial probable cause determination. Therefore, counsel's omission was not objectively unreasonable.

Motion in limine to preclude prosecutorial misconduct

Moore makes a perfunctory argument that trial counsel should have filed a motion in limine to preclude the prosecutor from committing misconduct, as the prosecutor had a history of misconduct in capital prosecutions. He does not explain on what grounds trial counsel could have successfully pursued the motion. Moreover, past instances of prosecutorial misconduct are insufficient to support such a broad pretrial motion. Accordingly, counsel's omission was not objectively unreasonable.

Admission of evidence

Moore argues that counsel should have objected to the admission of certain evidence, including statements made by codefendants, the prior testimony of several State witnesses, and unidentified hearsay evidence. His arguments lack merit on the grounds that they are irrelevant because they relate to the guilt phase of trial or are inadequately supported by facts or legal authority. Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (summarily rejecting claim unsupported by argument or legal authority).

Bribery of State witnesses

Moore argues that counsel should have challenged three State witnesses on the ground that the State paid them or provided inducements for their testimony. However, the witnesses were cross-examined about those matters, and Moore fails to identify what else counsel should have done. And, nothing in the record supports his allegation that the witnesses received payments and benefits for specific testimony.

Admission of testimony from John Lucas

Moore contends that counsel should have filed a motion in limine or objected to John Lucas' testimony that Moore or Flanagan threatened him. The premise underlying this claim is belied by the record—Lucas did not testify that Moore or Flanagan threatened him. Lucas' testimony that he learned that something might happen to him because he was testifying against his friends and that inmates do not like "snitches" did not implicate Moore or Flanagan and was admissible to

bolster Lucas' credibility after the defense challenged his credibility on cross-examination. See Wesley v. State, 112 Nev. 503, 513, 916 P.2d 793, 800 (1996).

Prosecutorial misconduct

Moore argues that counsel should have objected to extensive prosecutorial misconduct that included withholding evidence, presenting false and coerced testimony, coaching and influencing witnesses, improperly eliciting incriminating statements and physical evidence from witnesses, investigating backgrounds of potential jurors, introducing evidence of witchcraft and satanic worship during the guilt and penalty phases of trial, and making improper argument during the guilt and penalty phases of trial. Moore's claims are largely unsupported and relate to the guilt phase of the original trial, and therefore are irrelevant to this appeal. As to alleged improper argument during the third penalty hearing, Moore has done nothing more than quote roughly 43 excerpts and designated them as improper argument, providing absolutely no legal authority or analysis to support any of his allegations. Although we are not obligated to consider claims presented in this manner, see Jones, 113 Nev. at 468, 937 P.2d at 64 (summarily rejecting claim unsupported by argument or legal authority); Sheriff v. Gleave, 104 Nev. 496, 498, 761 P.2d 416, 418 (1988) (observing that "[t]his court need not consider assignments of error that are not supported by relevant legal authority"), we have reviewed the challenged arguments and conclude that counsel's failure to object to them was not deficient or, if deficient, not prejudicial.

Mitigation evidence

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.

Jury instructions

Moore argues that counsel should have requested several instructions and objected to other instructions. First, he complains that counsel should have requested instructions on the elements of burglary, robbery, escape, and attempt, but he does not argue that the robbery and burglary did not occur and he fails to explain the import of attempt and escape instructions. Second, Moore's argument that counsel should have challenged the anti-sympathy instruction lacks merit because we have repeatedly upheld this instruction where the trial court, as here, also instructed the jury to consider mitigating factors. See, e.g., Byford v. State, 116 Nev. 215, 233, 994 P.2d 700, 712 (2000); Wesley v. State, 112 Nev. at 519, 916 P.2d at 804; Lay v. State, 110 Nev. 1189, 1195, 886 P.2d 448, 451-52 (1994). Third, Moore argues that counsel should have challenged instructions that failed to clearly advise the jury that it did not have to unanimously find mitigating circumstances and, the flipside of that argument, that the jury was not expressly instructed that it must unanimously find an aggravating circumstance. We reject his argument

because (1) the jury was instructed that it had to find any aggravating circumstances beyond a reasonable doubt; (2) the verdict form on which the jury could indicate whether it found any aggravating circumstances beyond a reasonable doubt began with language, "we the jury," which would lead a reasonable juror to understand that a unanimous finding was required; (3) and no instruction limited the jury's ability to find mitigating circumstances. Cf. Nika v. State, 124 Nev. 1272, 1297-98, 198 P.3d 839, 856 (2008). Fourth, we reject Moore's claim that counsel should have challenged instructions that did not expressly inform the jury that death is never mandatory because we have concluded that an instruction similar to the one given here was sufficient to inform the jury that a death sentence is never mandatory. See Geary v. State, 114 Nev. 100, 103-04, 952 P.2d 431, 432-33 (1998); see also Bennett v. State, 111 Nev. 1099, 1109, 901 P.2d 676, 683 (1995); Riley v. State, 107 Nev. 205, 217, 808 P.2d 551, 558 (1991). Lastly, Moore argues that counsel should have challenged an instruction informing the jury that although the Board of Pardons Commissioners has the power to modify sentences, it may not speculate on any possible subsequent sentence modification, because the instruction failed to apprise the jury that his chances for executive clemency were remote. However, the instruction was correct at the relevant time and was not misleading. See Flanagan v. State (Flanagan IV), 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996) (concluding that no patently prejudicial error occurred in instruction regarding parole and possible modification of sentences because instruction given was

prescribed by Petrocelli v. State, 101 Nev. 46, 56, 692 P.2d 503, 511 (1985)). We conclude that counsel's omission was not deficient.

Constitutionality of the death penalty

Moore complains that counsel should have challenged the constitutionality of Nevada's death penalty scheme on the grounds that it (1) fails to genuinely narrow the class of defendants eligible for the death penalty, (2) is cruel and unusual, and (3) violates international law. We have resoundingly rejected similar challenges. See, e.g., Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005) (rejecting claim that death penalty violates international law); Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001) (concluding that death penalty is not cruel and unusual punishment and that Nevada's statutory scheme genuinely narrows class of defendants eligible for death penalty). He also argues that counsel should have challenged the weighing equation set forth in NRS 200.030(4) and instruction 6 as unconstitutional because they allow a sentence of death when aggravating and mitigating circumstances are found to be in equal balance. However, he has identified no constitutional proscription against such a scheme and therefore has failed to show that counsel's omission was deficient.

Clemency

Moore complains that counsel should have challenged Nevada's clemency procedures because they violate due process and clemency does not exist in Nevada as a practical matter because it is rarely granted. As this court has observed, a defendant has no due

process right to clemency, Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); rather, clemency is merely an act of grace and not a matter of constitutional dimension, Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-81 (1998). Because Moore failed to articulate a legitimate basis upon which counsel reasonably could have challenged Nevada's clemency procedures, his ineffective-assistance claim fails.

Cumulative error

Moore argues that the cumulative effect of trial counsel's deficiencies warrants reversal of his convictions and death sentence. We disagree, as he has not demonstrated prejudice resulting from the cumulative effect of any deficiencies in counsel's representation, see McConnell v. State, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009).[2]

Claims of ineffective assistance of appellate counsel

Moore contends that appellate counsel should have raised nearly all of the substantive trial errors underlying his ineffective-assistance-of-trial-counsel claims discussed above. We disagree. All of the underlying trial errors would have been reviewed for plain error and

[2]Moore argues that trial counsel were ineffective for inadequately investigating and presenting defenses to the charges, which would have revealed inconsistencies between the physical evidence and testimony and that he was under the influence of psychotropic drugs on the night of the murders and therefore was incapable of forming any plan or intention to kill. As this claim relates to the guilt phase of the trial, it is irrelevant to this appeal.

because he failed to demonstrate ineffective assistance of trial counsel, appellate counsel's performance cannot be said to have been deficient for failing to raise unpreserved error. Nor does it appear that any of those underlying claims could be considered plain error.

Moore raises additional claims of ineffective assistance of appellate counsel, including that counsel should have argued that (1) the great-risk-of-death aggravating circumstance was invalid, (2) the lower court judges were biased, and (3) the use of elected judges is unconstitutional. He further argues that the cumulative effect of appellate counsel's deficiencies requires reversal of his death sentences.

Great-risk-of-death aggravating circumstance

Moore argues that appellate counsel should have challenged the great-risk-of-death aggravating circumstance. His claim fails because appellate counsel challenged the aggravating circumstance on the same grounds that he now advances, Flanagan IV, 112 Nev. at 1420-21, 930 P.2d at 698-99, and he does not explain what additional or different argument appellate counsel could have provided to secure relief on this claim.

Fair tribunal

Moore argues that appellate counsel should have argued that his conviction and death sentence are unconstitutional due to the lack of a fair tribunal. Moore's complaints about the fairness of the tribunal are focused on two judges—Judge Donald Mosley, who presided over the original trial and the second penalty hearing, and Judge Addeliar Guy,

who presided over the third penalty hearing. The bulk of Moore's argument is aimed at Judge Mosley. As this appeal concerns counsel's performance related to the third penalty hearing, Judge Mosley's actions are irrelevant, and Moore fails to adequately explain how Judge Mosley's actions affected the third penalty hearing. As to Judge Guy, Moore's claims of bias are either unsupported by the record or do not show bias such that appellate counsel should have challenged Judge Guy's impartiality.

Elected judges

Moore argues that appellate counsel should have argued that his conviction and death sentence are unconstitutional due to unfair tribunals of elected judges. Once again, the bulk of his argument focuses on Judge Mosley, who presided over the original trial and second penalty hearing. Claims related to those proceedings are irrelevant here. To the extent he raises a general claim of bias regarding elected judges who preside over capital proceedings, we have rejected similar claims, McConnell v. State, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009). Therefore, appellate counsel's omission was not objectively unreasonable.

Cumulative error

Moore argues that the cumulative effect of appellate counsel's deficiencies warrants reversal of his convictions and death sentence. As he failed to demonstrate that appellate counsel's representation was deficient, there are no deficiencies to cumulate and therefore this claim

fails.[3] See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Application of McConnell

This court previously upheld the district court's decision to strike the two felony aggravating circumstances under McConnell v. State, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004) (holding that aggravating circumstances in capital prosecution may not be based on felony upon which felony-murder conviction is predicated), but remanded for the district court to determine whether the jury's consideration of the invalid aggravating circumstances was harmless. Moore v. State, Docket No. 46801 (Order Affirming in Part, Reversing in Part, and Remanding, April 23, 2008), at 6-7. On remand, the district court determined that the error was harmless. Moore challenges that decision.

After invalidating the felony aggravating circumstances, two aggravating circumstances remain—(1) Moore created a great risk of death to more than one person under NRS 200.033(3) and (2) he

[3]Moore argues that appellate counsel should have renewed issues presented during the second appeal that were applicable to the third penalty hearing. He provides no factual or legal support for this claim and therefore we need not consider it. Jones, 113 Nev. at 468, 937 P.2d at 64 (summarily rejecting claim unsupported by argument or legal authority); Gleave, 104 Nev. at 498, 761 P.2d at 418 (observing that "[t]his court need not consider assignments of error that are not supported by relevant legal authority").

committed the murders for pecuniary gain under NRS 200.033(6). The evidence regarding the facts and circumstances of the crimes support these aggravating circumstances. In mitigation, Moore presented several witnesses who testified to his good character, his abusive childhood, and his rehabilitation since his incarceration. The remaining aggravating circumstances are the most compelling of the original circumstances found by the jury—Moore killed two people for pecuniary gain. And the mitigating circumstances are not particularly compelling given the overwhelming evidence that Moore and his cohorts meticulously and callously planned and carried out the execution of an elderly couple for the sole purpose of getting a little money. We conclude that the jury would have found Moore death eligible and sentenced him to death absent the two invalid aggravating circumstances. Therefore, the jury's consideration of those aggravating circumstances was harmless. Clemons v. Mississippi, 494 U.S. 738, 741 (1990); State v. Haberstroh, 119 Nev. 173, 183, 69 P.3d 676, 682-83 (2003).[4]

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[4]Moore argues that trial and appellate counsel should have challenged instructions that did not make it clear that a felony aggravating circumstance applies only where the homicide occurred while a defendant is engaged in the commission of a felony, not where the felony is incidental to the homicide. Because the felony aggravating circumstances are invalid under McConnell and consideration of those aggravating circumstances was harmless, his ineffective-assistance claim would not warrant relief even if counsel had challenged the instructions.

Having considered Moore's arguments and concluded that they lack merit,[5] we

ORDER the judgment of the district court AFFIRMED.[6]

_______________, C.J.
Cherry

_______________, J.
Saitta

_______________, J.
Gibbons

_______________, J.
Pickering

_______________, J.
Hardesty

_______________, J.
Parraguirre

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[5]We reject Moore's claims that (1) this court provided inadequate appellate review and that appellate counsel should have challenged this matter; (2) his death sentence is unconstitutional because he may become incompetent before the sentence is carried out and that appellate counsel should have raised this issue on appeal; and (3) his punishment is cruel and unusual because he has had to endure multiple trials, which has left him on death row for more than 20 years and that appellate counsel should have made this argument on appeal. As to the last claim, counsel raised this claim on appeal from Moore's third penalty hearing. See Flanagan IV, 112 Nev. at 1423, 930 P.2d at 700. Moore also contends that his death sentence is excessive considering his lack of significant criminal history, his perfect prison record, and the lack of any evidence of future dangerousness. We have twice determined that a death sentence is not excessive in this case. See id. at 1423-24, 930 P.2d 691, 700 (1966); Flanagan v. State (Flanagan II), 107 Nev. 243, 250, 810 P.2d 759, 763 (1991). His current argument does not persuade us to conclude that his death sentences are excessive.

[6]The Honorable Michael L. Douglas, Justice, did not participate in the decision in this matter.

cc: Hon. Michelle Leavitt, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk