

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42828

**FILED**

SEP 15 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Roy D. Moraga's motion for release of DNA evidence under the Nevada Open Records Act. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On July 7, 1990, the district court convicted Moraga, pursuant to a jury verdict, of two counts of burglary and two counts of sexual assault. The district court sentenced Moraga to serve a term of life without the possibility of parole in the Nevada State Prison. This court affirmed the conviction but issued an order of remand to resentence Moraga.<sup>1</sup> The remittitur issued on September 17, 1991. An amended judgment of conviction was entered on November 13, 1991, whereby Moraga was sentenced to two consecutive ten-year terms in the Nevada State Prison for the burglary offenses and a consecutive life term with the possibility of parole after five years for one of the sexual assault counts.

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<sup>1</sup>Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991). We remanded Moraga's appeal because he was convicted of four separate offenses, yet received only one sentence.

The district court also adjudicated Moraga as a habitual criminal, sentencing him to a consecutive term of life without the possibility of parole for the second sexual assault count. This court dismissed Moraga's appeal from the amended judgment of conviction.<sup>2</sup> The remittitur issued on October 24, 1995.

On February 20, 1996, Moraga filed a post-conviction petition for a writ of habeas corpus. He asserted, among other claims, that his counsel was ineffective for failing to have the blood and semen samples tested to exclude him as a possible source of the semen collected from the victim. On September 6, 1996, the district court denied Moraga's petition. Moraga's subsequent appeal was docketed in this court in Docket No. 29321. On April 30, 1998, Moraga filed a motion to correct an illegal sentence. The district court denied the motion. Moraga's appeal was docketed in this court as Docket No. 32542. This court dismissed both appeals.<sup>3</sup>

On December 16, 2003, Moraga filed a motion for release of DNA evidence under the Nevada Open Records Act<sup>4</sup> in the district court.<sup>5</sup>

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<sup>2</sup>Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995).

<sup>3</sup>Moraga v. State, Docket Nos., 29321, 32542 (Order Dismissing Appeals, April 20, 1999).

<sup>4</sup>NRS 239.010.

<sup>5</sup>Moraga labeled his petition a motion for release of DNA evidence under the Nevada Open Records Act. However, because he challenged his conviction and sentence, we construe Moraga's motion as a post-conviction  
*continued on next page . . .*

The State opposed the motion. On January 5, 2004, the district court conducted a hearing to listen to arguments of counsel regarding Moraga's motion. During that hearing, the judge noted that Moraga's defense at trial was that the sexual contact between him and the victim was consensual, and thus identity was not at issue. On January 7, 2004, the district court denied Moraga's motion.<sup>6</sup> This appeal followed.

Moraga filed his motion more than eight years after this court issued the remittitur from his direct appeal of his amended judgment of conviction. Thus, Moraga's motion was untimely filed.<sup>7</sup> Moreover, Moraga's motion was successive because he had previously filed a habeas corpus petition.<sup>8</sup> Moraga's motion was procedurally barred absent a demonstration of good cause and prejudice.<sup>9</sup>

Moraga offers no explanation for the delay in filing his motion or why he did not assert his claim in his previous habeas corpus petition.

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*... continued*

petition for a writ of habeas corpus. See NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them").

<sup>6</sup>We note that Moraga's motion falls outside the purview of NRS 239.010.

<sup>7</sup>See NRS 34.726(1).

<sup>8</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>9</sup>See NRS 34.726(1); NRS 34.810(3).

Based upon our review of the record on appeal, we conclude Moraga has not demonstrated good cause to excuse his procedural defaults.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Moraga is not entitled to relief and that briefing and oral argument are unwarranted.<sup>10</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

cc: Hon. Lee A. Gates, District Judge  
Roy D. Moraga  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>10</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>11</sup>We have reviewed all documents that Moraga has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.