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IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent

FILED  
Feb 19 2014 08:30 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

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**Docket No. 63703**

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Appeal from the Denial of a Post-Conviction Petition  
District Court, Clark County  
The Honorable Michelle Leavitt, District Judge  
District Court No. 85-C069269-1

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**APPELLANT'S OPENING BRIEF**

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## TABLE OF CONTENTS

Rule 26.1 Disclosure .....	i
Table of Authorities.....	iii
I. Jurisdictional Statement .....	1
II. Introduction .....	1
III. Statement of the Issues.....	3
IV. Statement of the Case.....	3
A. Nature of the Case .....	3
B. Procedural History.....	3
V. Statement of Facts .....	5
VI. Argument: The District Court Improperly Dismissed Mr. Flanagan’s Petition. ....	8
A. Mr. Flanagan Established “Good Cause” For His Inability To Present The Claims In Accordance With Any Procedural Rules.....	12
B. Mr. Flanagan Established That Applying Nevada Revised Statutes Sections 34.726, 34.800, Or 34.810 Would Prejudice Him. ....	20
C. Alternatively, The Procedural Defaults May Not Be Applied Because Mr. Flanagan Was Deprived Of His Right To Counsel In The Previous Proceedings.....	30
VII. Conclusion.....	31

## **TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Aron v. United States</i> , 291 F.3d 708 (11th Cir. 2002) .....	17
<i>Bagley v. Lumpkin</i> , 798 F.2d 1297 (9th Cir. 1986) .....	26
<i>Banks v. Dretke</i> , 540 U.S. 668 (2004).....	14, 20, 28
<i>Benn v. Lambert</i> , 283 F.3d 1040 (9th Cir. 2002) .....	26
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	<i>passim</i>
<i>Byford v. State</i> , 123 Nev. 67, 156 P.3d 691 (2007).....	8
<i>Colley v. State</i> , 105 Nev. 235, 773 P.2d 1229 (1989).....	18, 19, 20
<i>Crump v. Warden</i> , 113 Nev. 293, 934 P.2d 247 (1997).....	30
<i>Flanagan v. Nevada</i> , 503 U.S. 931 (1992).....	4
<i>Flanagan v. State</i> , 104 Nev. 105, 754 P.2d 836 (1988).....	4
<i>Flanagan v. State</i> , 107 Nev. 243, 810 P.2d 759 (1991).....	4
<i>Flanagan v. State</i> , 109 Nev. 50, 846 P.2d 1053 (1993).....	4
<i>Flanagan v. State</i> , 112 Nev. 1409, 930 P.2d 691 (1996), <i>cert. denied</i> , 523 U.S. 1083 (1998).....	4

1	<i>Flanagan v. State,</i>	
2	Case No. 40232 (Feb. 22, 2008) .....	4, 16
3	<i>Giglio v. United States,</i>	
4	405 U.S. 150 (1972) .....	20, 21, 25
5	<i>Hall v. Director of Corr.,</i>	
6	343 F.3d 976 (9th Cir. 2003) .....	14
7	<i>Hasan v. Galaza,</i>	
8	254 F.3d 1150 (9th Cir. 2001) .....	17
9	<i>Hathaway v. State,</i>	
10	119 Nev. 248, 71 P.3d 503 (2003) .....	11, 18
11	<i>Jackson v. Brown,</i>	
12	513 F.3d 1057 (9th Cir. 2008) .....	30
13	<i>Johnson v. Dretke,</i>	
14	394 F.3d 332 (5th Cir. 2004) .....	20
15	<i>Kyles v. Whitley,</i>	
16	514 U.S. 419 (1995) .....	20, 22, 26
17	<i>Martinez v. Ryan,</i>	
18	— U.S. —, 132 S. Ct. 1309 (2012) .....	30, 31
19	<i>Mazzan v. Warden,</i>	
20	116 Nev. 48, 993 P.2d 25 (2000) .....	20
21	<i>Napue v. Illinois,</i>	
22	360 U.S. 264 (1959) .....	14, 20, 30
23	<i>NOLM, LLC v. County of Clark,</i>	
24	120 Nev. 736, 100 P.3d 658 (2004) .....	9
25	<i>Pyle v. Kansas,</i>	
26	317 U.S. 213 (1942) .....	21
27	<i>Russell v. Rolfs,</i>	
28	893 F.2d 1033 (9th Cir. 1990) .....	9

1	<i>Sheriff, Humbolt County v. Acuna,</i>	
2	107 Nev. 664, 819 P.2d 197 (1991).....	13
3	<i>Starns v. Andrews,</i>	
4	524 F.3d 612 (5th Cir. 2008) .....	17
5	<i>State v. Bennett,</i>	
6	119 Nev. 589, 81 P.3d 1 (2003).....	21, 22
7	<i>State v. Greene,</i>	
8	___ Nev. ___, 307 P.3d 322 (2013).....	8
9	<i>State v. Huebler,</i>	
10	___ Nev. ___, 275 P.3d 91 (2012).....	10, 11, 19, 21
11	<i>Sterling Builders, Inc. v. Fuhrman,</i>	
12	80 Nev. 543, 396 P.2d 850 (1964).....	9
13	<i>Strickler v. Greene,</i>	
14	527 U.S. 263 (1999).....	20, 25
15	<i>Thomas v. Goldsmith,</i>	
16	979 F.2d 746 (9th Cir. 1992) .....	14
17	<i>United States v. Agurs,</i>	
18	427 U.S. 97 (1976).....	21, 30
19	<i>United States v. Bagley,</i>	
20	473 U.S. 667 (1985).....	21, 22
21	<i>United States v. Bernal-Obeso,</i>	
22	989 F.2d 331 (9th Cir. 1993) .....	26
23	<i>United States v. McCaskey,</i>	
24	9 F.3d 368 (5th Cir. 1993) .....	9
25	<i>Whitehead v. State,</i>	
26	___ Nev. ___, 285 P.3d 1053 (2012).....	8
27	<i>Wilson v. Beard,</i>	
28	426 F.3d 653 (3rd Cir. 2005) .....	17

**Statutes**

28 U.S.C. § 2254 .....	2, 5, 9
Nev. Rev. Stat. § 34.575 .....	1
Nev. Rev. Stat. § 34.726 .....	8, 10, 18
Nev. Rev. Stat. § 34.800 .....	8, 10, 18
Nev. Rev. Stat. § 34.810 .....	9, 10, 18, 19

## **I. Jurisdictional Statement**

The basis of this Court's appellate jurisdiction is Nevada Revised Statutes section 34.575(1). The district court's order dismissing Mr. Flanagan's second Petition for Writ of Habeas Corpus ("Second Petition") was filed on June 28, 2013, and the Notice of Entry of Findings and Fact, Conclusions of Law and Order was filed on July 1, 2013. Mr. Flanagan timely filed a Notice of Appeal on July 26, 2013.

## **II. Introduction**

Mr. Flanagan was convicted and sentenced to death for the murder of his grandparents based on the critical testimony of his "girlfriend" Angela Saldana. In his first state habeas corpus proceedings ("First Petition"), Mr. Flanagan challenged his convictions and death sentence in part because the State manufactured the incriminating evidence used against him at trial. Appellant's Appendix ("App.") 573-706; 753-801; *see also* App. 580-83, 588-89, 754, 757-58. The district court denied Mr. Flanagan's motions for discovery and an evidentiary hearing, concluding that the "naked allegations [were] unsubstantiated by facts." App. 941. Following this Court's decision affirming the district court, App. 972-93, Mr. Flanagan instituted habeas corpus proceedings in the federal district court. *Flanagan v. Baker*, No. 2-09-cv-00085 (D. Nev.). After obtaining funding for investigation, Mr. Flanagan located and interviewed for the first time two witnesses—Ms. Saldana's aunt Wendy Peoples (nee Mazaros) and her daughter Amy Hanley-Peoples—who confirmed that not only was Ms. Saldana's testimony false, but also that it had been fabricated and coerced by state actors. App. 1280-89.

Mr. Flanagan presented the federal district court with the declarations of these two witnesses in support of the federal constitutional misconduct claims previously presented to this Court. Amended Petition for Writ of Habeas Corpus, *Flanagan v.*



1 *Baker*, No. 2-09-cv-00085 (D. Nev. Feb. 11, 2011), Electronic Case Filing (ECF)  
2 No. 46; *see also* App. 1320-67. In response, the State asserted that the misconduct  
3 claims, as supplemented by the new evidence, had not been fairly presented to the  
4 state courts in violation of the exhaustion doctrine. Motion To Dismiss First  
5 Amended Petition for Writ of Habeas Corpus by a Person in State Custody  
6 Pursuant to 28 U.S.C. § 2254 or in the Alternative, Motion for a More Definite  
7 Statement, *Flanagan v. Baker*, No. 2-09-cv-00085 (D. Nev. Sept. 2, 2011), ECF  
8 No. 55, at 15.

9 On August 23, 2012, the federal district court resolved the exhaustion issue by  
10 staying the federal proceedings and ordering Mr. Flanagan to present the new  
11 allegations to the Nevada courts. Order, *Flanagan v. Baker*, No. 2:09-cv-00085 (D.  
12 Nev. Aug. 23, 2012), ECF No. 100, *see also* App. 1369-73. In so ruling, the court  
13 held that:

14 The allegations supporting Claim One, if taken as true, arguably  
15 present a meritorious challenge to his conviction or sentence. As  
16 noted, Flanagan contends, among other things, that the State failed to  
17 disclose material evidence that would have undermined the credibility  
18 of a witness that testified against him and that the State knowingly  
19 offered false or misleading testimony and evidence. Claim One  
20 contains factual allegations sufficient to raise colorable grounds for  
21 relief under *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v.*  
*Illinois*, 360 U.S. 264 (1959).

22 App. 1372. The court further concluded that there was “no indication” that Mr.  
23 Flanagan engaged in any dilatory litigation tactics, *id.*; indeed; the court found that  
24 “Flanagan has demonstrated that he made a good faith effort to develop this  
25 specific claim in state court by directing his investigator to locate [Wendy] Peoples  
26 and by seeking leave to conduct discovery related to Angela Saldana,” App. 1371.  
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1 Mr. Flanagan immediately complied with the federal district court's order by  
2 filing the Second Petition in the district court on September 28, 2012. App. 994-  
3 1104. In response to the Second Petition and accompanying exhibits, the State  
4 filed a Motion to Dismiss, seeking to avoid any inquiry into its wrongdoing by  
5 asserting that Mr. Flanagan's claims are barred for his failure to comply with  
6 procedural rules. App. 1290-1373. Without conducting an evidentiary hearing or  
7 permitting fact finding on the claims, the district court summarily dismissed the  
8 Second Petition, opining on the credibility of the witnesses supporting the claims  
9 and citing a host of procedural default doctrines. App. 1417 (Court: "let's not  
10 forget who this affidavit is being authored by, and apparently, she doesn't have  
11 anything good to say about her ex-husband"), 1432-42 (finding that Mr. Flanagan's  
12 claims are barred by NRS 34.726, 34.800, and 34.810).

### 13 **III. Statement of the Issues**

14 Whether the district court erred in denying Mr. Flanagan's post-conviction  
15 habeas petition, concluding it was procedurally barred, thereby depriving him of  
16 his state and federal constitutional rights to due process, fair trial, and effective  
17 assistance of counsel, despite the State's misconduct in concealing the facts  
18 supporting those constitutional claims and Mr. Flanagan's diligence in uncovering  
19 the misconduct.

### 20 **IV. Statement of the Case**

#### 21 **A. Nature of the Case**

22 Mr. Flanagan appeals the denial of his Second Petition for a writ of habeas  
23 corpus challenging his convictions and death sentence.

#### 24 **B. Procedural History**

25 Mr. Flanagan was charged by Information with conspiracy to commit  
26 burglary, conspiracy to commit robbery, conspiracy to commit murder, burglary,  
27 robbery with the use of a deadly weapon and first-degree murder with the use of a  
28

1 deadly weapon. Trial began in September 1985, and the jury convicted Mr.  
2 Flanagan on all charges on October 11, 1985, and sentenced him to death on  
3 October 17, 1985. On May 18, 1988, this Court affirmed Mr. Flanagan's  
4 convictions, but reversed his death sentence. *Flanagan v. State*, 104 Nev. 105, 754  
5 P.2d 836 (1988).

6 At the retrial, Mr. Flanagan was again sentenced to death. Although this  
7 Court affirmed Mr. Flanagan's sentence, *Flanagan v. State*, 107 Nev. 243, 810 P.2d  
8 759 (1991), the United States Supreme Court reversed the judgment. *Flanagan v.*  
9 *Nevada*, 503 U.S. 931 (1992). On February 10, 1993, this Court remanded the case  
10 for a new penalty trial. *Flanagan v. State*, 109 Nev. 50, 846 P.2d 1053 (1993). At  
11 the third penalty trial, Mr. Flanagan again was sentenced to death. On December  
12 20, 1996, this Court affirmed the judgment. *Flanagan v. State*, 112 Nev. 1409, 930  
13 P.2d 691 (1996), *cert. denied*, 523 U.S. 1083 (1998).

14 On May 28, 1998, Mr. Flanagan filed a Pro Per Petition for Post Conviction  
15 Relief and requested appointment of counsel. On June 5, 1998, counsel was  
16 appointed, and filed a Supplemental Petition for Writ of Habeas Corpus ("First  
17 Petition") on November 30, 1999. App. 573-706. On August 16, 2000, the district  
18 court denied Mr. Flanagan's Motion for Discovery, and on February 14, 2002, the  
19 court held a limited evidentiary hearing. App. 897-937. On August 9, 2002, the  
20 court entered Findings of Fact, Conclusions of Law and ordered the First Petition  
21 denied. App. 938-71. This Court affirmed the district court's decision on February  
22 22, 2008. Order of Affirmance, *Flanagan v. State*, Case No. 40232 (Feb. 22,  
23 2008), App. 972-93.

24 On February 11, 2011, Mr. Flanagan filed an Amended Petition for Writ of  
25 Habeas Corpus in the federal district court. *Flanagan v. Baker*, No. 2-09-cv-00085  
26 (D. Nev. Feb. 11, 2011), ECF No. 46; *see also* App. 1320-67. The State thereafter  
27 filed a motion to dismiss, arguing, *inter alia*, that Mr. Flanagan's misconduct  
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1 claims, as supplemented by the new evidence, had not been fairly presented to the  
2 Nevada courts in violation of the exhaustion doctrine. Motion To Dismiss First  
3 Amended Petition for Writ of Habeas Corpus by a Person in State Custody  
4 Pursuant to 28 U.S.C. § 2254 or in the Alternative, Motion for a More Definite  
5 Statement, *Flanagan v. Baker*, No. 2-09-cv-00085 (D. Nev. Sept. 2, 2011), ECF  
6 No. 55, at 15. On August 23, 2012, the federal district court issued an order  
7 staying the federal proceedings and ordering Mr. Flanagan to present the new  
8 allegations to the Nevada courts. Order, *Flanagan v. Baker*, No. 2:09-cv-00085 (D.  
9 Nev. Aug. 23, 2012), ECF No. 100, *see also* App. 1369-73.

10 In accordance with the federal district court's order, on September 28, 2012,  
11 Mr. Flanagan filed the Second Petition in the district court.<sup>1</sup> App. 994-1104. On  
12 January 16, 2013, the State filed a Motion to Dismiss. App. 1290-1373. Mr.  
13 Flanagan opposed the motion on March 26, 2013, App. 1374-1406, and the State's  
14 rely was filed on April 18, 2013, App. 1407-11. On June 6, 2013, the district court  
15 heard argument on the motion, App. 1412-31, and thereafter summarily dismissed  
16 the Second Petition, App. 1432-37.

## 17 **V. Statement of Facts**

18 On November 5, 1984, Colleen and Carl Gordon, Mr. Flanagan's  
19 grandparents, were killed in their Las Vegas home. Mr. Flanagan and five other  
20 teenage boys were charged with their murders. The cornerstone of the  
21 prosecution's case in the guilt trial and the two penalty retrials was Angela Saldana.  
22 Ms. Saldana, a stripper and prostitute, engaged in a sexual relationship with Mr.  
23 Flanagan and later another co-defendant, Tom Akers, in an effort to implicate Mr.  
24 Flanagan in the killing of his grandparents. App. 239-355, 459-78, 509-44. Ms.

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26 <sup>1</sup> Claim 1 of the Second Petition detailed the state misconduct concerning the  
27 development and presentation of Angela Saldana's testimony. App. 1021-41.  
28 Claims 2 through 5, which included additional allegations of misconduct and

1 Saldana's testimony at trial proved to be critical to the prosecution's case, not only  
2 because she testified that Mr. Flanagan had confessed his guilt, but also because,  
3 unlike the other "witnesses" to the crime, she was not involved in the conspiracy or  
4 "diabolical plot" to commit the crimes. App. 1466 (prosecutor's closing  
5 arguments). Indeed, during closing arguments, the prosecutors repeatedly relied on  
6 Ms. Saldana's testimony—that Mr. Flanagan confessed to planning the crimes in  
7 an effort to obtain his grandparents' inheritance, to his and others' actions inside  
8 the house, replacing the knife that he lost on the night of the crime, and killing his  
9 grandmother—and her trustworthiness as unimpeachable evidence of Mr.  
10 Flanagan's guilt. *See, e.g.*, App. 372-73, 378, 387-88, 390, 405, 412-13, 429-30,  
11 444-45, 453.

12 What defense counsel at trial, the jurors, the trial judges, and this Court  
13 during Mr. Flanagan's first habeas corpus proceedings did not know was that Ms.  
14 Saldana's testimony was false, manufactured by her uncle Robert Peoples in  
15 concert with law enforcement officials. Almost from the discovery of the crimes,  
16 Robert Peoples, acting on behalf of law enforcement, orchestrated the development  
17 of the case against Mr. Flanagan using his niece Angela Saldana. Ms. Saldana's  
18 aunt Wendy Mazaros explains the method by which the state manufactured her  
19 testimony:

20 Very soon after this [the death of Mr. Flanagan's grandparents],  
21 Robert [Peoples] let [Las Vegas District Attorney Chief Investigator]  
22 Beecher Avants know that Angie [Saldana] was Dale's girlfriend.  
23 Beecher had left Las Vegas Metro police and was Chief Investigator  
24 for the Las Vegas District Attorney's office. Within a day, Beecher  
25 came over to our house. Beecher had already made up his mind that  
26 Dale was involved in the killings. . . . Robert realized that this case  
27 posed an opportunity to keep in good standing with the authorities and  
28 hatched a plan with Beecher [Avants] to have Angie [Saldana] "solve"

1 the case. Robert always took every opportunity to cooperate with law  
2 enforcement because it paid off for him. He set about manipulating  
3 and controlling Angie just as he did me when he was secretly working  
4 with the police in the [Al] Bramlet case. Robert told Angie that if she  
5 did not cooperate with him and Beecher, Angie could be charged with  
conspiracy and be executed.

6 App. 1286-87 (Declaration of Wendy C. Mazaros). After meeting with Las Vegas  
7 District Attorney Chief Investigator Beecher Avants and discussing the case against  
8 Mr. Flanagan, Robert Peoples “told Angie [Saldana] exactly what to say to the  
9 police and at trial. *Robert coerced Angie to say anything Beecher [Avants] wanted*  
10 *her to say.*” App. 1287 (emphasis added). Ms. Saldana’s cousin, Amy Henley-  
11 Peoples, corroborates Ms. Mazaros’s account, stating that, prior to the guilt trial,  
12 “Robert Peoples instructed Angie how to testify and rehearsed her testimony,” a  
13 process that he repeated prior to the penalty retrial:

14 Robert Peoples constantly talked to Angie [Saldana] about what was  
15 contained in the [police] reports from the Flanagan boxes. He also  
16 told Angie over and over how she had testified at the first trial and that  
17 she had to do so again. Robert Peoples threatened over and over. He  
18 said “you have to do this. You got paid, if you don’t do it you’re  
going to fry.”

19 App. 1280-81 (Declaration of Amy Henley-Peoples). Thus, only by fabricating her  
20 testimony and through undisclosed threats and inducements did Ms. Saldana  
21 provide the key evidence—most importantly, Mr. Flanagan’s alleged confession—  
22 necessary to secure his conviction and death sentences.  
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1 **VI. Argument: The District Court Improperly Dismissed Mr.**  
2 **Flanagan's Petition.**

3 In dismissing the Second Petition, the district court adopted verbatim the  
4 State's position regarding the application of procedural default rules.<sup>2</sup> First, the  
5 district court concluded that Mr. Flanagan failed to comply with the statute of  
6 limitations provision set forth in Nevada Revised Statutes section 34.726 because  
7 the Second Petition was filed "more than 24 years after the issuance of Remittitur  
8 following direct appeal on June 7, 1988, and more than 14 years since new death  
9 sentences were affirmed on appeal and Remittitur issued on June 3, 1998." App.  
10 1434.<sup>3</sup> Second, the district court invoked the laches doctrine codified in Nevada  
11 Revised Statute section 34.800, which creates a rebuttable presumption of  
12 prejudice because more than five years have elapsed between the issuance of the  
13 remittitur regarding the conviction and the death sentences and filing of the Second  
14 Petition. App. 1434. Third, the district court concluded that the Second Petition  
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16 <sup>2</sup> This Court held in *Byford v. State*, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007),  
17 that "the district court should have . . . either drafted its own findings of fact and  
18 conclusions of law or announced them to the parties with sufficient specificity to  
19 provide guidance to the prevailing party in drafting a proposed order." As is  
20 evident from the transcript of the hearing on the Motion to Dismiss, the district  
21 court provided no "express findings in support of its determination and provided  
22 no guidance for the prevailing party." *State v. Greene*, \_\_\_ Nev. \_\_\_, 307 P.3d 322,  
23 325-26 (2013); App. 1430 ("At this time, the Court is going to grant the State's  
24 motion to dismiss based on procedural default rules. Make a ruling that the  
25 petitioner has failed to show good cause by failing to timely file the claim in state  
26 court. The State can prepare the order.").

27 <sup>3</sup> The district court did not explain why the issuance of the remittitur from this  
28 Court's 1988 decision remanding the case for a new penalty trial began the statute  
of limitations period. Section 34.726's one-year statute of limitations period did  
not commence until the judgment against Mr. Flanagan was final after this Court  
denied the appeal from the 1995 penalty retrial. See *Whitehead v. State*, \_\_\_ Nev.  
\_\_\_, 285 P.3d 1053, 21055 (2012).

1 was barred by Nevada Revised Statutes section 34.810, allegedly because it  
2 contains claims that were or could have been presented in the first state habeas  
3 corpus proceedings. App. 1434 (“Many of the grounds could have been raised in a  
4 direct appeal or the first post-conviction petition or were in fact raised previously  
5 and were denied on the merits.”).<sup>4</sup>

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7 <sup>4</sup> Neither the State nor the district court identified which claims Mr. Flanagan  
8 could have presented—but did not present—in the direct appeal or the First  
9 Petition. Moreover, although Mr. Flanagan readily admitted that the state  
10 misconduct claims had been presented in the First Petition, the State asserted in  
11 federal court that the exhaustion doctrine required Mr. Flanagan to re-present the  
12 claims with the additional declarations. *See* Motion To Dismiss First Amended  
13 Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28  
14 U.S.C. § 2254 or in the Alternative, Motion for a More Definite Statement, Sept. 2,  
15 2011, ECF No. 55, at 15 (“because the claims therein are unexhausted in that they  
16 have not been fully and fairly presented to any state court”). The State’s position  
17 in federal district court—that Claim 1 differs from the claims previously  
18 presented—precludes a contrary argument in the district court. As Mr. Flanagan  
19 argued in the district court, the doctrine of judicial estoppel precludes the State  
20 from taking inconsistent positions in litigation. *See, e.g.,* App. 1384-85; *see also*  
21 *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 549, 396 P.2d 850, 854 (1964)  
22 (“‘Under the doctrine of judicial estoppel a party may be estopped merely by the  
23 fact of having alleged or admitted in his pleadings in a former proceeding the  
24 contrary of the assertion sought to be made.’”) (quoting 31 C.J.S. Estoppel § 121 at  
25 649); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (judicial estoppel  
26 prevents parties from “‘playing fast and loose’ with the courts, and prohibit[s them]  
27 from deliberately changing positions according to the exigencies of the moment.”);  
28 *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (state barred from asserting  
procedural default defenses when state informed petitioner adequate state remedies  
available). “The primary purpose of judicial estoppel is to protect the judiciary’s  
integrity, and a court may invoke the doctrine at its discretion.” *NOLM, LLC v.*  
*County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). Moreover, the  
State’s original position in federal court—that the claims had not been exhausted  
and implicitly that there was an available state forum for their consideration—must  
be construed as a concession estopping it from arguing in this Court that Mr.  
Flanagan’s claims are procedurally barred. *See Russell v. Rolfs*, 893 F.2d at 1037.  
The district court did not rule on whether estoppel barred the State from taking



Each of the purported procedural defaults is excused because Mr. Flanagan has established his diligence in developing the claims, cause for his inability to present the claims in accordance with state procedural rules and prejudice would result from the invocation of the procedural bars. *See, e.g.*, Nev. Rev. Stat. § 34.726 (bar is inapplicable where petitioner establishes “good cause” for failing to file the Petition within one year of the issuance of the remittitur); Nev. Rev. Stat. § 34.800(1)(a) (laches bar is inapplicable if “petitioner could not have had knowledge” of the grounds alleged herein “by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred”); Nev. Rev. Stat. § 34.810(3) (bar is inapplicable when petitioner establishes “good cause” and “actual prejudice”). In *State v. Huebler*, this Court explained the circumstances that permit merits review of constitutional claims despite a failure to comply with procedural default rules:

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate two things: “[t]hat the delay is not the fault of the petitioner” and that the petitioner will be “unduly prejudice[d]” if the petition is dismissed as untimely. Under the first requirement, “a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). “An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.’” *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed.2d 397 (1986) (citations and quotations omitted)). Under the second requirement, a petitioner must show that errors in the proceedings underlying the judgment

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these inconsistent positions.

1 worked to the petitioner's actual and substantial disadvantage. *Hogan*  
2 *v. Warden*, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993).

3 *Huebler*, \_\_\_ Nev. \_\_\_, 275 P.3d 91, 95 (2012), *cert. denied*, 133 S. Ct. 988 (2013).

4 In *Huebler*, this Court explained how these principles apply when a violation of  
5 *Brady v. Maryland*, 373 U.S. 83 (1963), is alleged:

6 When a *Brady* claim is raised in an untimely post-conviction petition  
7 for a writ of habeas corpus, the petitioner has the burden of pleading  
8 and proving specific facts that demonstrate both components of the  
9 good-cause showing required by NRS 34.726(1). Those components  
10 parallel the second and third prongs of a *Brady* violation: establishing  
11 that the State withheld the evidence demonstrates that the delay was  
12 caused by an impediment external to the defense, and establishing that  
13 the evidence was material generally demonstrates that the petitioner  
would be unduly prejudiced if the petition is dismissed as untimely.

14 *Huebler*, 275 P.3d at 96 (citing *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8  
15 (2003)). As the federal district court found<sup>5</sup> and as detailed below, Mr. Flanagan  
16 has more than satisfied this standard.<sup>6</sup>

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19 <sup>5</sup> App. 1371 (finding that “Flanagan has demonstrated that he made a good  
20 faith effort to develop this specific claim in state court by directing his investigator  
21 to locate [Wendy] Peoples and by seeking leave to conduct discovery related to  
Angela Saldana,”); App. 1372 (concluding that there was “no indication” that Mr.  
Flanagan engaged in any dilatory litigation tactics).

22 <sup>6</sup> The district court's factual findings normally are entitled to deference, and  
23 this Court reviews the district court's “application of the law to those facts novo.”  
24 *Huebler*, 275 P.3d at 95. In this case, however, in which the district court did not  
25 conduct an evidentiary hearing, apparently disbelieved a critical witness because  
26 she had divorced her husband, and adopted verbatim the State's proposed findings,  
27 such deference is unwarranted. *See, e.g., Hathaway v. State*, 119 Nev. 248, 71 P.3d  
28 503, 508 (2003) (remanding “for an evidentiary hearing to determine whether  
Hathaway can demonstrate good cause”).

1           **A. Mr. Flanagan Established “Good Cause” For His Inability To**  
2           **Present The Claims In Accordance With Any Procedural Rules.**

3           Since his arrest, Mr. Flanagan has maintained, and his attorneys have  
4 attempted to prove, that Ms. Saldana operated as a police agent during her multiple  
5 attempts to interrogate Mr. Flanagan and obtain allegedly incriminating evidence,  
6 Ms. Saldana’s testimony was false, and the State withheld critical impeachment  
7 information from Mr. Flanagan that would have discredited her testimony. At  
8 every turn, however, the State has concealed its misconduct, and Mr. Flanagan was  
9 able to develop the evidence in support of his claims only through extraordinary  
10 and diligent efforts that demonstrate good cause to excuse any procedural defaults.

11           Prior to the guilt trial, Mr. Flanagan’s counsel sought to exclude Ms.  
12 Saldana’s testimony because she was acting as a police agent. App. 173-74 (trial  
13 counsel arguing that Ms. Saldana’s testimony should be excluded because she was  
14 a “police agent” “trying to get information for Officer [Ray] Berni that she could  
15 turn over to him or the district attorney’s office”); 177-78 (co-defendants joining in  
16 motion to exclude her testimony). The district court, however, denied the motion,  
17 stating that it found no evidence to “substantiate that [theory of agency]. Miss  
18 Saldana indicated she was acting on her own volition.” App. 178.<sup>7</sup>

19           In his First Petition, Mr. Flanagan raised two claims regarding Ms. Saldana’s  
20 testimony. In Claim One, Mr. Flanagan alleged numerous instances of  
21 prosecutorial misconduct that infected the capital proceedings, including the  
22 following regarding Mr. Saldana:

23           Law enforcement improperly elicited incriminating statements and  
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25           <sup>7</sup> Defense counsel at the subsequent penalty retrials similarly lacked proof that  
26 Ms. Saldana’s testimony was false or that she operated as a police agent. *See, e.g.*,  
27 App. 473-77 (cross-examination of Ms. Saldana during the 1989 retrial); 532-39,  
28 543-44 (cross-examination of Ms. Saldana during the 1995 retrial).

1 physical evidence from Petitioner by employing Angela Saldana as a  
2 police agent, who had sexual relations with officers of the Las Vegas  
3 Metropolitan Police Department. In order to obtain information for  
4 law enforcement, Ms. Saldana engaged in sexual relations and began  
5 living with Petitioner. In exchange for her assistance as a police  
6 agent, Ms. Saldana was not prosecuted for prostitution and other  
crimes. Such benefits were not disclosed to the defense.

7 App. 580-81. The Claim further alleged that law enforcement agents coached Ms.  
8 Saldana to testify in the false manner:

9 The State improperly and unconstitutionally coached and influenced  
10 the testimony of numerous prosecution witnesses, encouraged  
11 witnesses to hear the testimony and accounts of other prosecution  
12 witnesses and to shape their testimony in accordance with others'  
13 accounts, and instructed witnesses not to reveal exculpatory or  
impeachment evidence to the defense or the court.

14 ....

15 The State improperly and unconstitutionally presented false testimony  
16 regarding the “planning” of the crime, including false evidence that  
17 Petitioner discussed killing his grandparents in order to obtain an  
18 inheritance.

19 App 581. In Claim Two, Mr. Flanagan alleged that the prosecution’s payment for  
20 testimony, including Ms. Saldana’s receipt of \$2000, violated *Sheriff, Humbolt*  
21 *County v. Acuna*, 107 Nev. 664, 819 P.2d 197 (1991), Nevada Supreme Court Rule  
22 1881(1), and Mr. Flanagan’s constitutional rights. App. 588-89.<sup>8</sup>

23 In support of these claims, Mr. Flanagan submitted, *inter alia*, the declarations  
24 of Angela Saldana (nee Ficklin) and Ms. Saldana’s uncle, Robert Peoples. Ms.

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26 <sup>8</sup> Claims One and Two from the first petition were re-presented in the second  
27 Petition as Claims 2 and 3. *Compare* App. 1041-58 (Second Petition), *with* App.  
28 579-89.

1 Saldana's declaration described her desire to "solve the crime because [she] wanted  
2 to be a police officer," the general assistance that Robert Peoples provided, and her  
3 contacts with law enforcement during the time that she was allegedly obtaining  
4 incriminating information from Mr. Flanagan." App. 860-61. Mr. Peoples's  
5 declaration described his role as a "police agent" during the investigation of the  
6 murder of Al Bramlet in 1977, his realization that his niece Ms. Saldana knew the  
7 suspects in this case, and his encouragement of her to assist law enforcement by  
8 obtaining "incriminating evidence against Dale Flanagan." App. 872-73.

9 Despite these indications that Ms. Saldana testified falsely, throughout the  
10 first habeas corpus proceedings the State misled Mr. Flanagan, the district court,  
11 and this Court about the extent to which the prosecution was involved in  
12 manufacturing Ms. Saldana's testimony.<sup>9</sup> In the State's Response to Defendant's  
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14 <sup>9</sup> In so doing, the State violated its obligation to disclose material exculpatory  
15 and impeachment evidence, which extends into post-conviction proceedings. *See*,  
16 *e.g.*, *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004) (noting the state's suppression  
17 of evidence during collateral proceedings and ruling that "it is ordinarily  
18 incumbent on the State to set the record straight"); *Thomas v. Goldsmith*, 979 F.2d  
19 746, 749-50 (9th Cir. 1992) ("We do not refer to the state's past duty to turn over  
20 exculpatory evidence at trial, but to its present duty to turn over exculpatory  
21 evidence relevant to the instant habeas corpus proceeding."). In addition, the State  
22 violated its obligation to correct Ms. Saldana's false testimony. *See, e.g.*, *Banks*,  
23 540 U.S. at 694 (habeas corpus petitioner's showing of "cause" bolstered by fact  
24 that "the prosecution allowed [witness's] [false] testimony to stand uncorrected").  
25 Accordingly, the State's current knowledge that Ms. Saldana acted as a police  
26 agent contrary to its assertion and testified falsely at trial imposes an obligation  
27 upon it in the instant habeas corpus proceeding to correct that false testimony. *See*  
28 *Hall v. Director of Corr.*, 343 F.3d 976, 981 (9th Cir. 2003) ("[Petitioner] does  
argue that to allow his conviction to stand, based on the present knowledge that the  
evidence was falsified, is a violation of his right to due process under the  
Fourteenth Amendment.") (citation omitted); *see also Napue v. Illinois*, 360 U.S.  
264, 269 (1959) ("The same result obtains when the State, although not soliciting  
false evidence, allows it to go uncorrected when it appears.") (citation omitted).

1 Petition for Writ of Habeas Corpus (Post-Conviction), the State asserted that Claim  
2 One was merely re-raised claims “decided on appeal” and failed “to include any  
3 type of substantiation for” the claims. App. 711-12. With respect to Claim Two,  
4 the State contended that the witnesses who received payments in exchange for their  
5 testimony—including Ms. Saldana—had fully disclosed those benefits at trial and  
6 expressly denied “that the testimony of these three (3) was somehow scripted.”  
7 App. 714-15.

8 Nonetheless, based on the allegations contained in the First Petition and the  
9 declarations,<sup>10</sup> counsel for Mr. Flanagan filed a Motion for Discovery, App. 802-  
10 40,<sup>11</sup> and a Motion for an Evidentiary Hearing, App. 841-58<sup>12</sup>—seeking authority  
11 to use the district court’s subpoena power to prove that Ms. Saldana’s testimony  
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13 <sup>10</sup> Mr. Flanagan also proffered declarations from Debora L. Samples Smith,  
14 who operated a prostitution business with Ms. Saldana, and Michelle Grey Thayer,  
15 who also knew Ms. Saldana. Ms. Smith’s declaration stated that Ms. Saldana told  
16 her that “the police told her they wanted her help and needed details about the  
17 crimes.” App. 876. Ms. Thayer’s declaration stated that Ms. Saldana stated that  
18 she was working with law enforcement on the case and that she dated Las Vegas  
Metropolitan Police Officer Ray Berni, who afforded her lenient treatment when  
she was arrested. App. 880.

19 <sup>11</sup> The discovery motion specifically sought access to all information relating to  
20 the prosecution’s witnesses, including Ms. Saldana, “produced or maintained by  
21 various law enforcement agencies or by the Clark County District Attorney’s  
22 Office.” App. 813-14. At the hearing on the motion, Mr. Flanagan urged the  
23 district court to permit discovery in light of the “clear *Brady* violations” with  
24 respect to the testimony of Ms. Saldana and other witnesses, and evidence that Ms.  
25 Saldana “was acting as a police agent throughout this investigation.” App. 910.  
26 Counsel for Mr. Flanagan further argued that “until we get discovery on it, we  
27 don’t know the extent to which there were *Brady* violations committed.” App. 911.  
28 The State responded by characterizing Mr. Flanagan’s discovery request as “a  
blatent [sic] fishing expedition.” App. 923.

<sup>12</sup> The evidentiary hearing motion sought a hearing, *inter alia*, on Claims One  
and Two. App. 846.

1 was false and the product of government overreaching—but the district court  
2 denied both motions, App. 906-08, 930.

3 Finally, deprived of any ability to obtain the corroborating evidence from the  
4 state, Mr. Flanagan attempted to locate Ms. Saldana’s aunt, Wendy Mazaros, by  
5 employing the services of a private investigator, Jon Frappier. App. 1289. Mr.  
6 Frappier “searched numerous records in public and proprietary databases,” sought  
7 the services of “Las Vegas investigators and their sources,” and visited previous  
8 addresses for her. App. 1289. Even with “exhaustive efforts,” he was unable to  
9 locate her. App. 1289. Thereafter, the district court denied relief on Claim One  
10 because it previously had been addressed by this Court on appeal and denied Claim  
11 Two because Mr. Flanagan’s “naked allegations [were] unsubstantiated by facts.”  
12 App. 940-41.<sup>13</sup>

13 After instituting federal habeas corpus proceedings, Mr. Flanagan was unable  
14 to locate Wendy Mazaros, and subsequently her daughter Amy Hanley-Peoples,  
15 until July 2010. Mr. Flanagan sought to prove his constitutional claims by again  
16 retaining the service of private investigator Mr. Frappier, who—after over a decade  
17 of trying to locate Wendy Mazaros—was finally able to do so. App. 1289. Prior to  
18 that time, Ms. Mazaros “intentionally made [herself] difficult, if not impossible, to  
19 locate.” App. 1286-87. Upon interviewing Ms. Mazaros and her daughter, Mr.  
20 Flanagan learned for the first time that Robert Peoples, in concert with law  
21 enforcement officials, orchestrated and compelled Angela Saldana’s fabricated  
22 testimony. With these triggering facts from Ms. Mazaros and Ms. Hanley-Peoples,  
23 Mr. Flanagan began the investigation of Robert Peoples and located the  
24 information contained in Claim 1 of the Second Petition. Only after obtaining the  
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26 <sup>13</sup> Although Mr. Flanagan appealed the denial of Claims One and Two to this  
27 Court, this Court’s order did not expressly address them. *See* Order of Affirmance,  
28 *Flanagan v. State*, Case No. 40232 (Feb. 22, 2008), App. 972-93.

1 sworn declarations from Ms. Mazaros and Ms. Hanley-Peoples in February 2011  
2 was Mr. Flanagan able to present his claims to the federal court, requesting plenary  
3 review of the claim without the need to comply with the exhaustion doctrine.

4 Unquestionably, as the federal district court found, Mr. Flanagan has been  
5 diligently investigating the factual basis for his claims and established good cause  
6 to excuse any purported procedural defaults:<sup>14</sup> Until February 2011, despite his  
7 diligent efforts, Mr. Flanagan did not possess the sworn statements of the two  
8 disinterested witnesses. Within days, he filed his federal petition, seeking an  
9 adjudication on the merits without the need to return to the district court. After the  
10 State invoked the exhaustion doctrine, requiring Mr. Flanagan to file the Second  
11 Petition, he did so immediately. Where, as here, a habeas petitioner raises a *Brady*  
12 claim “within a reasonable time after the withheld evidence was disclosed to or  
13 discovered by the defense,” good cause exists to excuse any procedural defaults.  
14 *Id.* at 95 n.3.<sup>15</sup>

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16 <sup>14</sup> Mr. Flanagan’s attempts to prove the merits of his claim satisfy even the more  
17 stringent standard of “due diligence” required by the federal court. *See, e.g.,*  
18 *Starns v. Andrews*, 524 F.3d 612 (5th Cir. 2008) (finding that petitioner acted with  
19 due diligence for not discovering exculpatory witness earlier when state “severely  
20 downplayed the importance” of the witness); *Wilson v. Beard*, 426 F.3d 653, 662  
21 (3rd Cir. 2005) (finding no failure to exercise due diligence despite the fact that  
22 petitioner could have learned the existence of evidence from watching local news  
23 broadcasts: “The essential question is not whether the relevant information was  
24 known by a large number of people, but whether the petitioner should be expected  
25 to take actions which would lead him to the information”); *Aron v. United States*,  
26 291 F.3d 708, 712 (11th Cir. 2002) (“[d]ue diligence . . . does not require a prisoner  
27 to undertake repeated exercises in futility or to exhaust every imaginable option,  
28 but rather to make reasonable efforts”).

15 To the extent that there is any question about Mr. Flanagan’s exercise of due  
diligence, an evidentiary hearing was necessary before dismissal of the claim. *See,*  
*e.g., Hasan v. Galaza*, 254 F.3d 1150, 1154-55 (9th Cir. 2001) (remanding for  
further factfinding on when petitioner discovered the factual basis for the claim and



1 Despite Mr. Flanagan's diligent and persistent attempts to prove the bona  
2 fides of his claims, the district court faulted him for failing to present the claim  
3 immediately upon locating the two witnesses in July 2010. App. 1434. In support,  
4 the district court cited to this Court's decision in *Colley v. State*, 105 Nev. 235, 773  
5 P.2d 1229 (1989), in which the Court held that the one-year statute of limitations  
6 requirement applied to a petitioner who intentionally by-passed the state post-  
7 conviction process to litigate in the first instance in federal court and returned to  
8 file his first state petition five years after the state judgment became final. App.  
9 1438. The decision in *Colley* is wholly inapplicable to the circumstances presented  
10 in this case. First, because of "an impediment external to the defense," Mr.  
11 Flanagan could not have complied with any of the procedural default rules cited by  
12 the district court. *See, e.g., Hathaway*, 71 P.3d at 506; *see also id.* at 507 (holding  
13 that the test for whether a procedural default rule bars merits review is whether the  
14 claim was "reasonably available" at the time of the default). The statute of  
15 limitations period contained in Nevada Revised Statutes section 34.726 expired in  
16 1999, while the State continued to conceal its misconduct and Ms. Mazaros and  
17 Ms. Haney-Peoples were unavailable. Similarly, the five-year period of presumed  
18 prejudice contained in the laches provisions in Nevada Revised Statutes section  
19 34.800 began in 2003, again while the State was concealing its misconduct and the  
20 witnesses were unavailable.<sup>16</sup> Finally, Nevada Revised Statutes section 34.810 is

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22 concluding that if petitioner "did not have, or with the exercise of due diligence  
23 could not have had, knowledge of the factual predicate of both elements of his  
24 claim until on or after May 24, 1996, his June 1, 1998 filing was timely").

25 <sup>16</sup> This provision similarly is inapplicable because the State of Nevada will not  
26 be prejudiced in its ability to conduct a retrial, as all of the witnesses or their  
27 previous sworn testimony are readily available, and the grounds upon which Mr.  
28 Flanagan seeks relief constitute a "fundamental miscarriage of justice." Nev. Rev.  
Stat. § 34.800(1)(b).

1 inapplicable because, at the time of the first state habeas proceedings, the State was  
2 concealing its misconduct and the witnesses were unavailable. In short, Mr.  
3 Flanagan fully complied with all procedural rules because he filed his *Brady* claim  
4 “within a reasonable time after the withheld evidence was disclosed to or  
5 discovered by the defense.” *Huebler*, 275 P.3d at 95 n.3.<sup>17</sup>

6 Second, the principle that formed the basis of this Court’s decision in  
7 *Colley*—that the rule was necessary to discourage offenders from filing  
8 “groundless petitions for federal habeas corpus relief, secure in the knowledge that  
9 a petition for post-conviction relief remained indefinitely available to them, *Colley*,  
10 773 P.2d at 1230—is inapplicable here. As the federal district court concluded, the  
11 claims presented to the district court are potentially meritorious. App. 1372.  
12 Moreover, unlike *Colley*, Mr. Flanagan sought to avoid unnecessary litigation and  
13 wasting of scarce judicial resources. As noted above, Mr. Flanagan presented the  
14 state misconduct claims arising from Angela Saldana’s false and coerced testimony  
15 in the first state habeas corpus proceedings. Had the State waived the exhaustion  
16 doctrine or the federal district court determined that the additional evidence in  
17 support of Claim 1 did not alter the nature of the previously exhausted claim, there  
18 would have been no need for Mr. Flanagan to return to the state district court.  
19 Under such circumstances, waiting for the federal district court’s decision advances  
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21 <sup>17</sup> Similarly, good cause exists for the representation of Claims 2, 3, 4, and 5.  
22 Although these claims previously were presented to the district court, the new  
23 allegations in Claim 1 require that court’s reconsideration of their merits. As  
24 alleged below, state misconduct permeated this case at trial, which is further  
25 supported by the previously unavailable facts alleged in Claim 1. In addition, the  
26 merits of Claim 1 must be considered within the totality of the record, including the  
27 previously alleged state misconduct and the failure of trial and appellate counsel to  
28 protect Mr. Flanagan’s constitutional rights. Thus, the failure of the district court  
to reconsider the previously presented claims resulted in actual prejudice to Mr.  
Flanagan. Nev. Rev. Stat. § 34.810(3).

1 the “orderly administration of justice.” *Colley*, 773 P.2d at 1230.

2 **B. Mr. Flanagan Established That Applying Nevada Revised**  
3 **Statutes Sections 34.726, 34.800, Or 34.810 Would Prejudice**  
4 **Him.**

5 In addition to providing “cause” for Mr. Flanagan’s inability to comply with  
6 procedural requirements, the State’s suppression of material exculpatory and  
7 impeachment information and its role in manufacturing and presenting false  
8 testimony establishes prejudice to require merits review of his constitutional  
9 claims. *See, e.g., Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (“If  
10 Mazzan proves that the state withheld evidence, that will constitute cause for not  
11 presenting his claim earlier. If he proves that the withheld evidence was material  
12 under *Brady*, that will establish actual prejudice.”) (citing *Strickler v. Greene*, 527  
13 U.S. 263, 282 (1999)); *see also Banks*, 540 U.S. at 691-95; *Johnson v. Dretke*, 394  
14 F.3d 332, 336-37 (5th Cir. 2004).

15 As the federal district court found, the State’s misconduct constitutes serious  
16 constitutional violations that, if proved, require the granting of a new trial. App.  
17 1372 (“Claim One contains factual allegations sufficient to raise colorable grounds  
18 for relief under *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*,  
19 360 U.S. 264 (1959)). In addition, the allegations and supporting exhibits establish  
20 a prime facie case of at least several constitutional violations, including the  
21 following: (1) failure to provide the defense with exculpatory information  
22 concerning the veracity of Ms. Saldana and the benefits that she received in  
23 exchange for her testimony, *see, e.g., Strickler v. Greene*, 527 U.S. 263, 282 (1999)  
24 (failure to disclose impeachment evidence violates the Due Process Clause); *Kyles*  
25 *v. Whitley*, 514 U.S. 419, 437 (1995) (prosecution “has a duty to learn of any  
26 favorable evidence known to the others acting on the government’s behalf . . .  
27 including the police”); *Brady*, 373 U.S. at 87 (suppression of favorable evidence  
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1 material to either guilt or punishment violates due process); (2) Ms. Saldana's  
2 testimony was influenced by unconstitutional coercive techniques, *Pyle v. Kansas*,  
3 317 U.S. 213 (1942) (allegations that the state coerced and threatened witnesses to  
4 testify falsely, if proved, entitle the granting of habeas corpus relief); and (3) the  
5 state's knowing use of perjured testimony, *see, e.g., United States v. Bagley*, 473  
6 U.S. 667, 678 (1985) ("[A] conviction obtained by the knowing use of perjured  
7 testimony is fundamentally unfair, and must be set aside if there is any reasonable  
8 likelihood that the false testimony could have affected the judgment of the jury.")  
9 (quotation omitted); *United States v. Agurs*, 427 U.S. 97, 103 (1976) (conviction  
10 must be set aside if there is any reasonable likelihood that the false testimony could  
11 have affected the judgment of the jury).

12 The evidence presented in the district court unquestionably establishes the  
13 violation of Mr. Flanagan's due process rights guaranteed by *Brady*. "*Brady* and  
14 its progeny require a prosecutor to disclose evidence favorable to the defense when  
15 that evidence is material either to guilt or to punishment." *State v. Bennett*, 119  
16 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting *Mazzan*, 116 Nev. at 66, 993 P.2d at  
17 36); *see also Huebler*, 275 P.3d at 95. Such violations occur when the State has  
18 suppressed information affecting a witness's credibility, including promises and  
19 threats made by government agents. *See, e.g., Bagley*, 473 U.S. at 676 (1985)  
20 (ruling that favorable evidence under *Brady* includes impeachment evidence);  
21 *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). The "suppression by the  
22 prosecution of evidence favorable to an accused . . . violates due process where the  
23 evidence is material either to guilt or to punishment, irrespective of the good faith  
24 or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

25 A *Brady* violation is established when a habeas petitioner demonstrates that  
26 (1) the evidence is favorable to the accused, either because it is exculpatory or  
27 impeaching; (2) the state withheld the evidence, either intentionally or  
28

1 inadvertently; and (3) “prejudice ensued, i.e., the evidence was material.”  
2 *Bennett*, 119 Nev. at 599 (quoting *Mazzan*, 116 Nev. at 67, 993 P.2d at 37).  
3 Suppressed evidence is “material” when there is a reasonable probability that it  
4 affected the jury’s determination. *See, e.g., Bagley*, 473 U.S. at 682 (a “reasonable  
5 probability” is “a probability sufficient to undermine confidence in the outcome”).  
6 Materiality does not depend on whether there would have been adequate evidence  
7 to convict if the favorable evidence had been disclosed, but whether “the favorable  
8 evidence could reasonably be taken to put the whole case in such a different light  
9 as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435.

10 Mr. Flanagan has established each of these elements. First, the suppressed  
11 evidence would have been favorable to the defense both to support the motion to  
12 exclude Ms. Saldana’s testimony entirely and as impeachment during the guilt trial  
13 and the penalty retrials. The allegations and exhibits before the district court  
14 established that a wealth of favorable information was suppressed:

- 15 • Contrary to Ms. Saldana’s sworn testimony and the State’s  
16 representation throughout the proceedings in this case, Ms. Saldana  
17 acted as a police agent. Her uncle Robert Peoples, a longtime snitch  
18 who needed to maintain a positive relationship with authorities,  
19 immediately recognized an opportunity to further ingratiate himself  
20 with the police by using Ms. Saldana to “solve” the crime. Beecher  
21 Avants, then Chief Investigator for the District Attorney’s Office,  
22 provided Mr. Peoples with police reports and information about the  
23 case and conspired with Mr. Peoples to use Ms. Saldana to obtain  
24 incriminating evidence, including a confession from Mr. Flanagan.  
25 App. 1286-87.
- 26 • Robert Peoples “set about manipulating and controlling” Ms. Saldana  
27 as he had done with Wendy Peoples “when he was secretly working  
28

1 with the police” in the Al Bramlet case. App. 1287. Mr. Peoples  
2 “carefully” reviewed the police reports about the case and coerced Ms.  
3 Saldana to provide Mr. Avants with the information Mr. Avants sought.  
4 App. 1287. “During the investigation,” Mr. Peoples “had long  
5 conversations with Ms. Saldana.” App. 1287. “He told Angie  
6 [Saldana] exactly what to say to the police and at trial.” App. 1287.  
7 Ms. Peoples heard Mr. Peoples tell Ms. Saldana, “You’re going to do  
8 this Angie,” and then he told “her exactly what to say.” App. 1287.  
9 This manipulation and fabrication of evidence was done with Mr.  
10 Avants’s knowledge and authorization. Indeed, Mr. Avants orchestrated  
11 it; as Ms. Mazaros states, “Peoples did what Beecher told him to do.  
12 This is how Beecher operated and used Peoples.” App. 1287; *see also*  
13 App. 1287. (“Beecher told Robert that we needed to find the gun and  
14 to get a confession.”).

- 15 • Robert Peoples told Ms. Saldana that if she did not cooperate with him  
16 and Beecher Avants, she could be charged with conspiracy and be  
17 executed. App. 1287.
- 18 • Prior to Mr. Flanagan’s first trial, Amy Henley-Peoples went with Mr.  
19 Peoples and Ms. Saldana to Mr. Flanagan’s trailer when he was not  
20 there. App. 1280. Mr. Peoples took Saldana “there to get everything  
21 straight with her” and to look for things in the trailer that Ms. Saldana  
22 “could use to support a ‘confession.’” App. 1287. In particular, he was  
23 looking for weapons and signs of devil worship.” App. 1287-88.  
24 “Robert Peoples pointed to a picture and said to Angie [Saldana] that it  
25 was a picture of the devil and told Angie that she had to testify against  
26 Dale Flanagan and say that Dale Flanagan was a devil worshiper.”  
27 App. 1280; *see also* App. 1287-88. While in the trailer, Ms. Henley-  
28

Peoples witnessed Mr. Peoples instruct Ms. Saldana “how to testify and rehearsed her testimony.” App. 1280.

- Mr. Peoples’s manipulation and coercion of Ms. Saldana continued after the this Court ordered a new penalty trial. During Ms. Henley-Peoples’s visits to Mr. Peoples’s apartment, she saw “boxes of paperwork in his room with the name ‘Flanagan’ on papers in the boxes.” App. 1280. She also heard “Robert Peoples talking to [Ms. Saldana] on the telephone for hours at a time. Robert Peoples constantly talked to [Ms.] Saldana about what was contained in the reports from the Flanagan boxes.” App. 1281. Ms. Henley-Peoples also heard Mr. Peoples tell Ms. Saldana “over and over how she had testified at the first trial and that she had to do so again. Robert Peoples threatened her over and over. He said, ““You have to do this. You got paid, if you don’t do it you’re going to fry. They will put you in the electric chair.”” Robert Peoples said “that dirty little wh\*\*\*is not doing what she is supposed to be doing.”” App. 1281.
- “During that same time period, Beecher Avants and Robert Peoples frequently met and discussed” Mr. Flanagan’s case. App. 1281. Ms. Hanley-Peoples was present at the Gold Coast Casino, where Robert Peoples met “many times with Beecher Avants and police officer Bob Hilliard and had dinner. Avants, Hilliard, and Robert Peoples talked about the case against Dale Flanagan. During one of the dinners, Avants told Peoples ““you better get that little b\*\*\*\* under control” referring to Angie [Saldana].”” App. 1281.
- Finally, prior to the final penalty trial, Ms. Saldana expected to receive \$10,000 in exchange for her testimony, in addition to the \$2,000 that she already had received. App. 1288.

1 Information concerning the role of Ms. Saldana as a police agent, the  
2 manufacturing of evidence against Mr. Flanagan, Ms. Saldana's false testimony,  
3 the threats, promises, and coercion made against Ms. Saldana, and information that  
4 impeaches her credibility constitutes favorable information to the defense. *See*,  
5 *e.g.*, *Strickler*, 527 U.S. at 282 (evidence is favorable if it is "exculpatory" or  
6 "impeaching"); *Giglio*, 405 U.S. at 154 (information that affects the credibility of a  
7 witness must be disclosed).

8 Second, the State withheld all of this information from Mr. Flanagan. At no  
9 time did the state reveal that Mr. Avants and Mr. Peoples conspired to use Ms.  
10 Saldana as a police agent and manufacture her testimony, Mr. Peoples's fabrication  
11 of Ms. Saldana's testimony, Mr. Peoples's threats to and coercion of Ms. Saldana,  
12 and Ms. Saldana's expectation that she would receive an additional \$10,000 in  
13 exchange for her testimony. Indeed, throughout these proceedings, the State has  
14 denied that this pattern of misconduct existed. *See, e.g.*, App. 714-15 (expressly  
15 denying that Ms. Saldana's testimony "was somehow scripted").

16 Mr. Flanagan similarly has established the third *Brady* element, that the  
17 withheld material is material. Had trial counsel possessed the withheld  
18 information, he would have prevailed on his motion to exclude Ms. Saldana's  
19 testimony in its entirety because she was acting as a police agent, it was the  
20 product of outrageous government misconduct, and was false and unreliable.<sup>18</sup> To  
21

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22 <sup>18</sup> Adopting the State's version of the evidence, the district court minimizes the  
23 testimony that Ms. Mazaros and Ms. Hanley-Peoples would have provided had Mr.  
24 Flanagan been afforded an evidentiary hearing. App. 1435. Contrary to the district  
25 court's unsupported conclusion, their declarations directly conflict with "Saldana's  
26 testimony" and "demonstrate it was false." App. 1435. The sworn declarations are  
27 from witnesses who observed Mr. Peoples tell Ms. Saldana "exactly what to say to  
28 the police and at trial," App. 1287, and "instructed" her "how to testify and  
rehearsed her testimony," App. 1280. As Ms. Mazaros explained, Robert coerced  
Angie to say anything Beecher [Avants] wanted her to say." App. 1287. When



1 the extent she was permitted to testify, her credibility would have been thoroughly  
2 undermined. *See, e.g., Kyles*, 514 U.S. at 435 (defining materiality as whether “the  
3 favorable evidence could reasonably be taken to put the whole case in such a  
4 different light as to undermine confidence in the verdict”); *Benn v. Lambert*, 283  
5 F.3d 1040, 1062 (9th Cir. 2002) (“state suppressed material exculpatory and  
6 impeachment evidence that would have destroyed the credibility of its principal  
7 witness”); *United States v. Bernal-Obeso*, 989 F.2d 331, 336 (9th Cir. 1993) (had  
8 the prosecution disclosed the impeachment material, the witness’s testimony would  
9 have been “flatly rejected”); *Bagley v. Lumpkin*, 798 F.2d 1297, 1301 (9th Cir.  
10 1986) (“When the evidence shows that the government’s only witnesses lied under  
11 oath, it is contrary to reason that confidence in the outcome of the case would not  
12 objectively be undermined.”).

13 Cloaked with the false status as Mr. Flanagan’s “girlfriend” and her  
14 manufactured altruistic motivation to perform her civic duty, Ms. Saldana provided  
15 the critical evidence in the case about the knife found at the crime scene belonging  
16 to Mr. Flanagan. She alone testified that Mr. Flanagan “was a little upset” because  
17 a police officer said he had found his knife “by the broken window” at the crime  
18 scene. App. 246; *see also* App. 464 (during her testimony in the 1989 penalty  
19 retrial, Ms. Saldana described Mr. Flanagan as “a little distraught”); App. 518  
20 during her testimony in the 1995 penalty retrial, Ms. Saldana described Mr.  
21 Flanagan as “very tense, very breathy, kind of puffy”). She further testified that  
22 two weeks after the discussion between Mr. Flanagan and the officer, Mr. Flanagan  
23 told her he had found his knife and showed it to her. She testified that she  
24 responded “No, that’s not your knife. That one looks new,” and Mr. Flanagan said  
25

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26 Ms. Saldana strayed from that story, she was threatened with prosecution and  
27 promised undisclosed funds. App. 1281.  
28

1 “Yes, but no one else will know that. And now the cops don’t have anything on  
2 me.” App. 248; *see also* App. 465 (testimony during 1989 penalty retrial); App.  
3 521 (testimony during 1995 penalty retrial).

4 Most importantly, Ms. Saldana alone provided the jury with Mr. Flanagan’s  
5 incriminating detailed confession. Ms. Saldana testified that, while upset with her,  
6 Mr. Flanagan stated “How do you like this, I did it. I killed my grandparents.”  
7 App. 249; *see also* App. 467 (during her testimony in the 1989 penalty retrial, Ms.  
8 Saldana uses the identical language that she had in the 1985 trial); App. 524  
9 (during her testimony in the 1995 penalty retrial, Ms. Saldana uses the identical  
10 language that she had in the 1985 trial). He said that “they planned to make it look  
11 like a robbery” and committed the crime “for the will and the insurance money.”  
12 App. 241; *see also* App. 470 (testimony during 1989 penalty retrial); App. 524-26  
13 (testimony during 1995 penalty retrial). She said that Mr. Flanagan named all of  
14 the other people involved, that they planned the crime, that Mr. Flanagan “had a  
15 handgun,” that he broke the window to the house “with a stick,” and that “he went  
16 into the bedroom of his grandmother, and she woke up screaming. And he wrestled  
17 her to the bed, put his hand over her mouth, and shot her.” App. 268-70; *see also*  
18 App. 470-72 (testimony during 1989 penalty retrial); App. 525-29 (testimony  
19 during 1995 penalty retrial). She said that Mr. Flanagan said that “Johnny Ray and  
20 Randy Moore had shot” his grandfather. App. 270; *see also* App. 471 (testimony  
21 during 1989 penalty retrial); App. 529 (testimony during 1995 penalty retrial). She  
22 testified that Mr. Flanagan said he then took his grandmother’s purse and they all  
23 left. App. 272; *see also* App. 531 (testimony during 1995 penalty retrial). She said  
24 that she and Mr. Flanagan and his sister, mother, and aunt looked for a will “every  
25 day for about a week,” but did not find one. App. 274; *see also* App. 472  
26 (testimony during 1989 penalty retrial); App. 530 (testimony during 1995 penalty  
27 retrial).

1 Not surprisingly, given Ms. Saldana's girlfriend relationship with Mr.  
2 Flanagan and her allegedly altruistic reasons for coming forward, the prosecutors  
3 referred to her testimony repeatedly, in opening statement, App. 232, 236, and  
4 closing argument, App. 372-73, 378, 387, 388, 390, 405, 412-13, 429-30, 444-48,  
5 453. *See also* App. 502, 504-05, 549-50, 562-63 (opening statements and closing  
6 arguments during 1995 penalty retrial).

7 The most critical reason why the withheld exculpatory information is material  
8 comes from the special status that the prosecution bestowed upon her as the  
9 cornerstone of its case. *See, e.g., Banks*, 540 U.S. at 673 (examining the  
10 prosecution's argument). In urging the jury to convict Mr. Flanagan of capital  
11 murder, the prosecutor emphasized that Ms. Saldana was especially important and  
12 uniquely credible because she was not a conspirator, unlike the testimony provided  
13 by the individuals involved in the offense:

14 There was one other person who wasn't present [at the crime] who  
15 took the stand and told you.

16 That was Angela Saldana. And she told you what happened in that  
17 last conspiratorial meeting through what she had heard from Dale  
18 Flanagan in the trailer that day. Dale had told her the whole deal and  
19 she wasn't there.

20 She just heard this secondhand, what is typically hearsay but allowed  
21 in because it is a co-conspirator statement. It is the act of one that  
22 binds all or the statement of one which binds all.

23 So we have four people who were there and heard the words spoken.  
24 Actually, a fifth, Dale Flanagan, as told through the sixth, Angela  
25 Saldana.

26 App. 377-78. "The stress placed by the prosecution" on Ms. Saldana's testimony  
27 refutes any suggestion that her testimony was merely cumulative. *Banks*, 540 U.S.

1 at 673. None of the witnesses provided the jury with Mr. Flanagan’s extensive  
2 confession, and two of them—Tom Akers and John Lucas—received substantial  
3 benefits for their testimony. Mr. Lucas was never charged with any crimes even  
4 though in one statement to police he admitted being present during the disposal of  
5 two of the weapons used in the offense. Both Mr. Akers and Mr. Lucas received  
6 significant compensation for their testimony—\$2,000 apiece—as well as other  
7 benefits. App. 1020.

8 Critically, Ms. Saldana’s account of Mr. Flanagan’s statements to her shaped,  
9 and resulted in, Mr. Akers’s and Mr. Lucas’s testimony. At the time that she was  
10 acting as a police agent, Ms. Saldana was sleeping with both Mr. Flanagan and Mr.  
11 Akers, and Ms. Saldana’s account of what Mr. Flanagan told her minimized Mr.  
12 Akers’s role in the offense. App. 1019-20. Soon thereafter, Mr. Akers provided a  
13 statement to police that largely corresponded to Ms. Saldana’s statement.<sup>19</sup> App.  
14 1257-65. Mr. Lucas, in turn, provided a statement to police after the police  
15 informed him of a reward available from Secret Witness, told him about Mr.  
16 Saldana’s statement and threatened him with charges. App. 865.

17 The district court further attempts to minimize the importance of Ms.  
18 Saldana’s testimony and the withheld exculpatory information by relying on the  
19 Nevada Supreme Court’s conclusion that the evidence was “overwhelming.” App.  
20 1436. The district court’s reliance on this Court’s assessment is misplaced as it was  
21 necessarily derived from Ms. Saldana’s manufactured and false testimony. Had  
22 Ms. Saldana’s testimony been excluded or had the jury learned of the nature of Ms.  
23

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24 <sup>19</sup> Following the arrest of Mr. Flanagan, Mr. Akers was released from jail and  
25 given a job by Mr. Saldana’s uncle, Robert Peoples. Shortly before trial, he  
26 pleaded guilty to voluntary manslaughter and received a sentence of five years in  
27 prison. He was placed on probation, however, and served none of the sentence.  
28 App. 1020.

1 Saldana’s relationship with law enforcement, the manufacturing of her testimony,  
2 and the multiple reasons why she testified falsely, the jury likely would have  
3 believed that the state’s remaining evidence—from persons receiving benefits for  
4 their testimony—was insufficient to convict Mr. Flanagan beyond a reasonable  
5 doubt or sentence him to death. *See, e.g., Napue*, 360 U.S. at 269 (“The jury’s  
6 estimate of the truthfulness and reliability of a given witness may well be  
7 determinative of guilt or innocence[.]”); *Agurs*, 427 U.S. at 113 (“[I]f the verdict is  
8 already of questionable validity, additional evidence of relatively minor importance  
9 might be sufficient to create a reasonable doubt.”); *Jackson v. Brown*, 513 F.3d  
10 1057, 1070, 1075-79 (9th Cir. 2008) (granting penalty phase relief where  
11 undisclosed *Brady* evidence was material to capital special circumstances that  
12 required a specific intent showing).

13 **C. Alternatively, The Procedural Defaults May Not Be Applied**  
14 **Because Mr. Flanagan Was Deprived Of His Right To Counsel**  
15 **In The Previous Proceedings.**

16 To the extent that this Court agrees with the district court’s conclusion that  
17 that the claims in the Second Petition should have been raised in the first state post-  
18 conviction proceeding, App. 1434, Mr. Flanagan is entitled to a hearing on whether  
19 that failure was the result of ineffective assistance of counsel, in a proceeding in  
20 which he had a right to effective assistance of counsel under state and federal law.  
21 *See, e.g., Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997) (holding  
22 that habeas petitioners are entitled to “effective assistance of counsel”). In  
23 *Martinez v. Ryan*, \_\_ U.S. \_\_, 132 S. Ct. 1309 (2012), the United States Supreme  
24 Court supported this position by holding that a state may not bar federal review of  
25 Sixth Amendment right-to-counsel claims when it failed to provide effective  
26 assistance of counsel in an initial post-conviction proceeding where such claims  
27 could and should have been raised. *Id.* at 1318. The Supreme Court’s reasoning  
28

1 applies with equal force to claims of government misconduct. *Id.* at 1321 (Scalia,  
2 J., dissenting) (noting no “difference in principle between those cases and many  
3 other cases in which initial state habeas will be the first opportunity for a particular  
4 claim to be raised: claims of ‘newly discovered’ prosecutorial misconduct, for  
5 example, *see Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215  
6 (1963), claims based on ‘newly discovered’ exculpatory evidence or ‘newly  
7 discovered’ impeachment of prosecutorial witnesses, and claims asserting  
8 ineffective assistance of appellate counsel”).<sup>20</sup>

## 9 VII. Conclusion

10 For the reasons detailed above, Mr. Flanagan is entitled to merits review of  
11 the constitutional claims presented in the Petition. Therefore, Mr. Flanagan  
12 respectfully requests that this Court vacate the district court’s judgment and  
13 remand this case for further fact development, an evidentiary hearing, and  
14 resolution of those claims. In the alternative, Mr. Flanagan respectfully requests  
15 that this Court vacate the district court’s judgment and remand this case for an  
16 evidentiary hearing on whether good cause existed to exclude the application of  
17 any procedural default.

18 DATED this 18th day of February, 2014.

19  
20 By Michael Laurence  
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27 <sup>20</sup> In *Brown v. McDaniel*, Case No. 60065, this Court currently is considering  
28 the extent to which the United States Supreme Court’s decision in *Martinez* affects  
the State’s procedural default rules.

1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this opening brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and  
4 the type style requirements of NRAP 32(a)(6) because:

5 [X] This opening brief has been prepared in a proportionally spaced  
6 typeface using Word 2007 in 14-point font, Times New Roman  
7 style.

8 2. I further certify that this opening brief complies with the page- or type-  
9 volume limitations of NRAP 32(a)(7)(B)(2) because it is:

10 [X] Proportionately spaced, has a typeface of 14 points or more, and  
11 contains 10,028 words.

12 3. Finally, I hereby certify that I have read this appellate brief, and to the best  
13 of my knowledge, information, and belief, it is not frivolous or interposed for any  
14 improper purpose. I further certify that this brief complies with all applicable  
15 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires  
16 every assertion in the brief regarding matters in the record to be supported by a  
17 reference to the page and volume number, if any, of the transcript or appendix  
18 where the matter relied on is to be found. I understand that I may be subject to  
19 sanctions in the event that the accompanying brief is not in conformity with the  
20 requirements of the Nevada Rules of Appellate Procedure.  
21

22 Dated this 18th day of February, 2014.  
23

24 By Michael Laurence  
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1 **CERTIFICATE OF MAILING**

2 I HEREBY CERTIFY that pursuant to NRAP 25(1)(d) on the of 19<sup>th</sup> day of  
3 February, 2014, I did serve at Las Vegas, Nevada a true and correct copy of  
4 **APPELLANT'S OPENING BRIEF**, on all parties to this action by:

5 ☐ Facsimile

6 ☒ U.S. Mail

7 ☐ Hand Delivery

8 ☒ Electronic Filing

9  
10 Addressed as follows:

11 Steven B. Wolfson, District Attorney  
12 Steven S. Owens, Deputy District Attorney  
13 200 Lewis Avenue  
14 Las Vegas, Nevada 89155

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16 \_\_\_\_\_  
17 An Employee of POTTER LAW OFFICES  
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