IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 63703

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

APPELLANT'S APPENDIX
Volume 5

CAL J. POTTER III, ESQ.
Nevada Bar No. 001988
POTTER LAW OFFICES
1125 Shadow Lane
Las Vegas, Nevada 89102
Telephone (702) 385-1954

MICHAEL LAURENCE
California Bar No. 121854
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800

Attorneys for Appellant Dale Edward Flanagan

***Flanagan v. State*, Nevada Supreme Court Case No. 63703**
Index to Appellant's Appendix

ORIGINAL

FILED
Mar 17 2 14 PM '00
Shirley B. Virginia
CLERK

RPLY
CAL J. POTTER III
Nevada Bar No. 001988
POTTER LAW OFFICES
1125 Shadow Lane
Las Vegas, Nevada 89102
Telephone (702) 385-1954

ROBERT D. NEWELL
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201
Telephone (503) 241-2300

Attorney for Petitioner
Dale Edward Flanagan

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

RECEIVED
MAY 17 2000
COUNTY CLERK

INTRODUCTION

The State's Response to Mr. Flanagan's Supplemental Petition was neither an answer nor a motion. Consequently, it is appropriate for this Court to grant Petitioner's Motion for Discovery and Motion for Evidentiary Hearing and set a date for that hearing.

Although not required, Petitioner offers the following Reply to the State's Response, indicating where available, the evidence that Petitioner has already gathered in support of his Petition. All such evidence, together with Petitioner's Motion for Discovery and Motion for Evidentiary Hearing are incorporated herein.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

F:\99\99-81680\REPLY\REPLY-F.DOC

This Reply addresses individually the State's response to each of Petitioner's claims, except where the State combined into one its response to more than one claim.

Claim One

A conviction and death sentence are invalid under state and federal guarantees of freedom of speech, rights to associate, separation of church and state, due process and equal protection and the right to be free from cruel and unusual punishments when they are induced by pervasive prosecutorial misconduct and a failure to disclose material exculpatory and impeachment evidence. U.S. Const. Amends. I, V, VI, VIII, XIV; Nev. Const. Art. 1, Secs. 4, 6, 8, and 9; Art. IV, Sec. 21.

The misconduct here during the guilt and prosecution here included:

(a) threatening witnesses, including Rusty Havens, John Lucas, and Mehlia Moore, if they did not cooperate with the prosecution and testify against the Petitioner;

(b) improperly eliciting incriminating statements and physical evidence by employing a police agent, Angela Saldana, to have sexual relations with petitioner and to live with him, and to offer her immunity from prosecution for such behavior;

(c) failing to disclose Saldana's role and payment to other witnesses to the defense;

(d) improper coaching of witnesses to shape testimony with other's accounts;

(e) instructing witnesses not to reveal exculpatory or impeachment evidence to the defense or to the court;

(f) inducing the testimony of key witnesses, including John Lucas, Rusty Havens, and Angela Saldana, with excessive cash payments, immunity from prosecution, and other benefits;

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

(g) presenting false evidence regarding the planning of the crime, including false evidence that Petitioner discussed killing his grandparents in order to obtain an inheritance.

(h) failing to disclose the existence of Petitioner's will until trial, thus precluding defense preparation;

(i) failing to disclose that the Petitioner had met with agents of the State from an agency called PROBE to assist in a program designed to discourage youth from participation in witchcraft;

(j) using preemptory challenges in a racially and gender discriminatory manner;

(k) improperly using law enforcement to investigate the background of potential jurors; and

(l) inflaming the jurors with improper argument. Specifically, the prosecutor improperly argued that Petitioner was associated with gangs, drug users, devil worshippers, and black magic, throughout the guilt phase of the proceeding. The prosecutor commented on Petitioner's invocation of his right to remain silent. The prosecutor also improperly injected his own personal opinion and referred to biblical dogma.

The State responds to this claim with several arguments, none of which have merit.

First, the State argues that prosecutorial misconduct has already been considered and rejected by the Nevada Supreme Court, and that such rejection is therefore the "law of the case." The State's "law of the case" argument in response to this claim and present throughout the State's response reveals a profound misunderstanding of Nevada law regarding post-conviction relief. Pursuant to NRS § 34.724, any person convicted of a crime and under a sentence of death or imprisonment who claims that the conviction was obtained, or the sentence

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

was imposed, "in violation of the Constitution of the United States or the constitution or the laws of this state" may file a post-conviction petition for writ of habeas corpus. To the extent that the Nevada courts have heard the claims raised here by Petitioner, NRS § 34.724 allows the Petitioner to ask this Court to revisit any previous rulings based on the argument that the previous rulings contravene Nevada law, the Nevada constitution, or the U.S. constitution. The State's "law of the case" argument proposes a complete evisceration of the Nevada law of post-conviction relief, and this Court should disregard it. Petitioner incorporates this response in each instance below where the State raised a "law of the case" argument.

Furthermore, the State ignores the fact that Petitioner is now asserting additional instances of prosecutorial misconduct that have not been previously considered. These new allegations must be viewed in the context of the totality of the misconduct in order for the aggregate effect to be perceived.

Second, the State argues that this claim is merely a "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual allegations, such as names of witnesses and other evidence demonstrating entitlement to relief. The Nevada post-conviction habeas provisions (NRS § 34.722 et seq.) and Hargrove both contemplate that discovery and an evidentiary hearing will be allowed when factual allegations are made, and especially so in capital cases. (See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery.)

Third, the State argues that its use of racially and gender-based discriminatory peremptory challenges in the second penalty hearing was mooted by the provision of a third such hearing. However, that argument ignores the fact that a habeas corpus proceeding is not a criminal appeal, but is a civil challenge to the constitutionality of the criminal procedures

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

afforded Petitioner. The second penalty hearing is part of the context from which the third hearing originated. The third penalty hearing would not have been necessary if the second hearing had been conducted in accordance with constitutional requirements. Moreover, the errors cited in the second hearing may have prevented Petitioner's only opportunity to receive a sentence other than death. Under these circumstances, the errors that occurred in Petitioner's second penalty hearing should properly be considered in this proceeding.

Finally, the State argues that one of Petitioner's co-defendants was responsible for the introduction of evidence concerning Petitioner's involvement with witchcraft and satanic worship. This assertion completely ignores the fact that the State continually made arguments based on this evidence throughout the guilt stage of the proceeding. See Thayer Dec., Smith Dec., Ficklin Dec, Havens Dec., Lucas Dec., Pike Affidavit.

Claim Two

State and federal constitution guarantees of due process and equal protection and freedom from cruel and unusual punishments prohibit the excessive payment of money, inducement of key witnesses, and purchase of specific testimony. Such payments render the trial and sentencing fundamentally unfair. U.S. Const. Amends V, VI; VIII, XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

Petitioner requires discovery and investigation to develop the following facts:

(a) The state paid for key witnesses, and at least once, that payment was conditioned on specific testimony.

(b) The payments were excessive. The State's key witnesses, John Lucas, Rusty Havens, and Angela Saldana, were paid $2,000, an excessive sum of money for teenagers in 1985.

(c) Key witnesses, including Mr. Lucas and Mr. Havens, received special favors for their testimony, including agreements that they would not be prosecuted.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

(d) In Mr. Lucas's case, the State bargained for testimony so particularized, that it was tainted.

The State argues that this claim is merely a "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background, names of witnesses, and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to pursue discovery and an evidentiary hearing to provide additional support for this claim. (See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery).

The State also mistakenly argues that Petitioner misinterprets the decision in Sheriff, Humboldt County v. Acuna, 107 Nev. 664 (1991). The Acuna court held that (1) any consideration by the State in exchange for testimony affects the weight, not the admissibility of the testimony, **and** (2) the State may not bargain for "testimony so particularized that it amounts to following a script, or requires that the testimony produce a specific result." 107 Nev. at 669. The Petitioner alleges the latter. If the State is prohibited from bargaining for scripted testimony, that testimony is not admissible under Acuna. Contrary to the State's assertion, simply because Mr. Lucas denied the charge does not belie Petitioner's allegation.

The Court cannot deny review in this matter without granting Petitioner the right to obtain discovery and an evidentiary hearing to explore the improper payment and bribery of key witnesses. See Havens Dec., Lucas Dec., and Ficklin Dec.

Claim Three

The state and federal constitutions guaranteed Petitioner freedom of speech, freedom of religion, due process of law, equal protection, trial by an impartial jury, a reliable sentence, and effective assistance of counsel. U.S. Const. Amends. 1, V, VI, VII, and XIV; Nev.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Const. Art. I, Secs. 3, 6, and 8, Art. IV, Sec. 21. The introduction of evidence regarding the Petitioner's participation in black magic and satanic worship violated those guarantees.

The State responds by arguing that the Nevada Supreme Court's decision on this issue is the "law of the case." As indicated above, this argument reveals a profound misunderstanding of Nevada law regarding post-conviction relief. Pursuant to NRS § 34.724, any person convicted of a crime and under a sentence of death or imprisonment who claims that the conviction was obtained, or the sentence was imposed, "in violation of the Constitution of the United States or the constitution or the laws of this state" may file a post-conviction petition for writ of habeas corpus. To the extent that the Nevada courts have heard the claims raised here by Petitioner, NRS § 34.724 allows the Petitioner to ask this Court to revisit any previous rulings based on the argument that the previous rulings contravene Nevada law, the Nevada constitution, or the U.S. constitution. The State's "law of the case" argument proposes a complete evisceration of the Nevada law of post-conviction relief, and this Court should disregard it.

To the extent that counsel raised objections to the introduction of satanic worship evidence at trial or on appeal, the Nevada Supreme Court's refusal to reverse Petitioner's conviction violated Nevada law, the Nevada constitution, and the U.S. constitution. The State's attempt to use "harmless error" to explain the Supreme Court's unwillingness to reverse Petitioner's conviction fails. The introduction of satanic worship evidence so inflamed the passion and prejudice of the jury as to render Petitioner's guilty verdict completely unreliable. The Nevada Supreme Court's conclusion that the introduction of satanic worship evidence did not contribute to the verdict contravenes the state and U.S. constitution.

Moreover, the courts on direct review did not hear all the necessary objections to the introduction of the satanic worship evidence. Contrary to the State's contentions, Petitioner raised this claim under the rubric of ineffective assistance of counsel. Petitioner alleged that trial counsel was ineffective for failing to file a motion in limine to exclude witchcraft evidence which counsel knew co-defendant Luckett would offer (Supplemental Petition at p. 22).

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Petitioner further alleged that trial counsel was ineffective for failing to inform the court that even if Luckett did take the stand, his testimony need not include the prejudicial witchcraft evidence. (Id.) Petitioner alleged that appellate counsel did not assert all necessary arguments objecting to the introduction of this evidence on appeal. (Id. at p. 56.) Petitioner would have prevailed had counsel raised all the necessary arguments at trial or on appeal, as this evidence so inflamed the passion and prejudice of the jury as to violate his constitutional rights. See Pike Aff.

Claim Four

The state and federal constitutions guarantee Petitioner due process of law, equal protection, trial by an impartial jury, a reliable sentence, and effective assistance of counsel. U.S. Const. Amends. I, V, VI, VII, and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8, Art. IV, Sec. 21. Trial counsel's constitutionally deficient performance violated those guarantees. See Claims 3, 5, 6, 8, 14, 15, 22, 29 and 31 herein.

The State argues that this claim is merely a "bare/naked" allegation that cannot withstand scrutiny absent evidentiary supp , as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background, names of witnesses, and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to pursue discovery and an evidentiary hearing to provide additional support for this claim. (See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery.)

Counsel's performance during Petitioner's trials was so deficient that it violated the constitution and rendered the jury verdict unreliable. The State's mantra that the evidence against Petitioner was "overwhelming" misses the point. Counsel did not interview critical State's witnesses, investigate the crime, explore the possibility of raising a diminished capacity

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

defense, or move for a continuance, among other things. It is precisely because of counsel's failings that the evidence against Petitioner appeared overwhelming. Had counsel performed in a constitutionally acceptable manner, the jury's verdict at the guilt phase and at sentencing would have been different.

A significant indicator that counsel did not perform the necessary investigation was that he never requested funds for such an investigation, as is allowed under the Nevada statutes and generally guaranteed by the U.S. Constitution. Counsel, who was appointed only days before the evidentiary hearing, proceeded to trial in a short time frame, without requesting a continuance, and lacked assistance from co-counsel or an investigator. Petitioner was facing a possible penalty of death, yet counsel did not bother to seek appropriate and available assistance.

The fatal gaps in counsel's pretrial investigation, if filled, would have left reasonable doubt in the minds of the jurors. The jurors, however, never learned that Petitioner went on a three-day alcohol and drug binge before the killings. Indeed, counsel did not know this because, if he did, he would have been compelled by the constitution to present this evidence in the form of a diminished capacity defense. Counsel never bothered or did not have time to perform even a perfunctory investigation of the crime, which would have cast doubt on Petitioner's culpability. The revelation that the defendants left no fingerprints at the crime scene, or that the method of entry into the residence was not clear, would have left reasonable doubt in the minds of the jurors. Counsel could have placed the State's "overwhelming" evidence in serious doubt, but did not do so.

In addition to the failure to present important facts and introduce issues that would have raised reasonable doubt in the juror's eyes, counsel was ill-equipped to properly elicit important testimony from Petitioner's witnesses or cross examine the State witnesses. While counsel did engage some of the State witnesses in cross-examination, as the State notes in response, counsel did not do so in a manner sufficient to survive constitutional scrutiny. The stories provided by several witnesses varied significantly from before trial to trial, as will be

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

more fully developed through discovery, investigation, and an evidentiary hearing. Yet counsel's cross examination did not reveal these crucial discrepancies.

Petitioner fared no better during the penalty phase of his trial. The jury was charged with weighing aggravating factors against mitigating factors, yet counsel presented no evidence of Petitioner's family history and mental state. Without these facts, to be further developed through discovery, investigation, and an evidentiary hearing, which include evidence of Petitioner's mental impairment and of his years of abuse at the hands of his own family, the jurors had no choice but to return a sentence of death. At each of Petitioner's three penalty trials, he lost the chance of a life, rather than death, sentence. While counsel presented meager expert testimony at the third penalty trial, this evidence was constitutionally deficient because the expert did not perform a sufficient, comprehensive examination of Petitioner. A proper examination would have revealed sufficient mitigating factors to outweigh any aggravating factors.

Trial counsel did not perform even the most basic, constitutionally required tasks such as investigation and witness interviews. There is no "second-guessing" where a constitutionally sufficient performance would have led to reasonable doubt. Counsel's deficient performance violated the constitution and rendered the jury verdict unreliable. See all Declarations.

Claim Five

The state and federal constitutions guarantee Petitioner due process of law, equal protection, trial by an impartial jury, a reliable sentence, and effective assistance of counsel. U.S. Const. Amends. V, VI, VII, and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8, Art. IV, Sec. 21. Counsel's failure to invoke a formal competency hearing where Petitioner was not competent to stand trial violated those guarantees.

As set forth in more detail in Claim Four of the Supplemental Petition, Petitioner endured a marginal childhood during which he was subject to repeated abuse and terror, resulting in mental illness. This pre-existing condition combined with the conditions he faced in jail,

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

which included substantial doses of psychotropic medication, left Petitioner incompetent to stand trial.

Trial counsel never raised the issue of Petitioner's inability to comprehend the nature of the charges against him and the magnitude of the penalty he faced. Had counsel done so, and had the trial court held a competency hearing, Petitioner would have been found incompetent to stand trial. Petitioner will develop the full extent of his lack of competence through investigation, full discovery, and an evidentiary hearing.

The State's argument that this claim is "belied and repelled" by the record is disingenuous. It is undisputed that trial counsel never requested, and thus Petitioner never had, a competency hearing. Thus, the record is silent on the subject of Petitioner's competence. The State's conclusory statement that Petitioner and the court enjoyed "clear communication" is not supported by Petitioner's conduct during the Petrocelli hearing. That Petitioner may have responded to the court's questions does not prove that he was competent to stand trial. The Court must fully develop the facts of Petitioner's lack of competence to stand trial during an evidentiary hearing. See Pike Aff.; Clark County Detention Center medical records.

Claim Six

The state and federal constitutions guarantee Petitioner due process of law, equal protection, trial by an impartial jury, a reliable sentence, and effective assistance of counsel. U.S. Const. Amends. V, VI, VII, and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8, Art. IV, Sec. 21. The trial court's failure rule on the motion to change the venue of the trial, and counsel's failure to request that the trial court rule on the motion before proceeding to trial and failure to conduct a meaningful voir dire, violated those guarantees.

While the State contends that Petitioner's allegation is "belied and repelled" by the record, the State does not contest that the murders of Carl and Colleen Gordon stand among the most notorious in the history of Clark County. The State also does not contest that the crimes and the arrest and trials of the defendants were the subjects of nearly continuous television,

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

radio, and newspaper coverage. This coverage emphasized the "satanic" nature of the killings, evidence of which unconstitutionally influenced the jury's verdict as described in more detail in claim three. The record contains substantial evidence that the pervasive nature of the media coverage of the trial made it impossible for Petitioner to be tried in Eighth Judicial District Court by an impartial jury.

While trial counsel requested a change of venue, the trial court never ruled on the motion. Trial counsel's failure to pursue the change of venue did not result from sound strategy, as the State suggests, but rather from constitutionally defective performance. Not only were the jurors subject to the intense media coverage of the crimes, they were privy to voir dire conversations during which one prospective juror stated that he thought the defendants were guilty and a second prospective juror stated that he could not be objective. These juror comments were not innocuous as the State contends, but rather indicative of the prejudicial effect of the media coverage, particularly in light of the universally repugnant family nature of the killings. Moreover, had trial counsel conducted a constitutionally sufficient voir dire, the extent of the juror prejudice would have become apparent. Petitioner will present evidence of the impartiality of the jurors through additional discovery, investigation, and an evidentiary hearing.

Nevada law, the Nevada constitution, and the U.S. constitution required counsel to demand that the trial court grant the motion to change venue and to conduct a meaningful voir dire to ferret out impartial jurors. The trial court should have, at the end of voir dire, granted the motion to change venue. Petitioner suffered prejudice because he was denied his right for a trial before an impartial jury and for a reliable sentence. See Pike Aff.

Claim Seven

The state and federal constitutions guarantee Petitioner due process of law, equal protection, the right to an impartial jury drawn from a fair cross section of the community, a reliable sentence, and effective assistance of counsel. U.S. Const. Amends. V, VI, VII, and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8, Art. IV, Sec. 21. Counsel's failure to object to Petitioner's

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

conviction and sentencing by an all white jury from which African Americans were systematically excluded and unrepresented violated those guarantees.

Petitioner was tried, convicted, and sentenced to death by an all-white jury in a county where 8.3 percent of the population is African American. Petitioner's preliminary investigation revealed that the Clark County jury process is subject to abuse and is not racially neutral.

The State argues that this claim is merely a "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. The under-representation of African Americans on jury venires in Clark County is well-documented by studies. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to pursue discovery and an evidentiary hearing to provide additional support for this claim. (See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery.) Petitioner will present further evidence that African Americans were systematically excluded from the jury pool through additional discovery, investigation, and an evidentiary hearing.

Counsel, faced with an all-white jury pool and later with an all-white jury, should have objected to the jury itself and the process for jury selection at trial and on appeal. The State's suggestion that Petitioner somehow did not suffer prejudice because he is white lacks merit. The U.S. Constitution requires a jury that represents a fair cross section of the community, regardless of whether the defendant is white, African American, Asian, or any other race. Petitioner suffered substantial prejudice because the jury that tried, convicted, and sentenced him did not fulfill this constitutional mandate. See Pike Aff., Blaskey Aff.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Claim Eight

Petitioner's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, and trial before an impartial jury because all defense counsel were forced to agree the exercise of a limited number of peremptory challenges to prospective jurors despite their inability to do so. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

The State's response erroneously assumes that this claim addresses the effectiveness of counsel. On the contrary, this claim addresses the fundamental constitutional defect that resulted from the limitations imposed by the court. Requiring agreement among codefendants on the exercise of joint peremptory challenges, and refusing to grant additional challenges where codefendants disagree, is constitutionally inadequate where the jury selected is not representative of the community. See United States v. McClendon, 782 F.2d 785, 788 (9th Cir. 1986).

The trial court imposed a requirement that counsel for all four defendants had to agree upon the jurors against whom eight peremptory challenges would be exercised (10 ROA 2206). While defense counsel were in agreement (but only after compromises) on seven of the eight peremptory challenges allotted to them (10 ROA 2205-2206), they disagreed as to the juror to be challenged with the eighth challenge (10 ROA 2206). Counsel for Mr. Flanagan had "strong tactical reasons" for wanting a former parole officer on the jury were the trial to go into a penalty phase (10 ROA 2206). However, because of the court's ruling, counsel for Mr. Flanagan acceded to the wishes of other counsel that the former parole officer be removed with the final peremptory challenge (10 ROA 2206-2207).

Mr. Flanagan is entitled to discovery and an evidentiary hearing to show that the refusal to grant an additional peremptory challenge forced Mr. Flanagan to accept a jury that was not representative of the community. The State's claim that Mr. Flanagan has not made such a showing begs the question because he has not been given an opportunity to gather the evidence

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

necessary to make such a showing. Moreover, where federal constitutional standards warrant relief, state law, as cited by the state, is inapposite.

Claim Nine

The state and federal constitutions guaranteed Petitioner due process, equal protection, a public trial, the effective assistance of counsel, and a reliable sentence. U.S. Const. Amends. V, VI, VIII, and XIV; Nev. Const. Art. 1, Secs. 1, 3, and 8; Art. IV, Sec. 21. The trial judge's objection procedure for defense counsel violated those guarantees.

Judge Mosley required defense counsel to make their objections and motions in a sidebar to the court reporter, rather than in open court (11 ROA 2251-53, 14 ROA 2965; 15 ROA 3284). Defense counsel were not allowed to make objections contemporaneous with the testimony or event at issue, but instead were required to communicate those objections off the record directly to the court reporter at the next break in the proceedings. The trial court did not make rulings on objections and motions made in this manner, effectively denying them without making a ruling to that effect (14 ROA 2965-66; 15 ROA 3120-22, 3284). The State was not required to follow the same objection procedure, but rather was allowed to make timely objections on the record, often in the presence of the jury, which were then ruled upon by the judge.

The State argues that this claim is merely a "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to pursue discovery and an evidentiary hearing to provide additional support for this claim. (See Petitioner's Motion for

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Evidentiary Hearing and Motion for Discovery.) Moreover, the record documents Petitioner's allegations.

Judge Mosley's novel procedure was patently prejudicial and deprived Petitioner of due process and a fair trial. The jury was given the mistaken impression that Petitioner had no meaningful defense to certain evidence, eliminating possible bases for reasonable doubt. Moreover, the trial judge pre-judged the objections and motions subject to this procedure instead of considering and ruling upon each objection and motion in turn. Respondent's suggestion that the objections were meritless anyway (Response at 21) asks this Court to make the same assumptions the trial judge did. Moreover, contrary to Respondent's contention (id.), the fact that the jury might not have been allowed to hear some of the objections anyway does not obviate the mistaken impression left in the minds of the jury that Petitioner had no objections to make – in contrast to Respondent, which was allowed to make its objections in front of the jury.

Claim Ten

Petitioner was denied effective assistance of counsel on appeal in violation of state and federal constitutional guarantees of due process, equal protection and a reliable sentence. U.S. Const. Amends. V, VI, VIII, and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

Once again, the State argues that this claim is merely a "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations as set forth below that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to pursue discovery and an evidentiary hearing to provide additional support for this claim. (See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery.)

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Defendant was denied effective assistance of counsel at all stages in the proceeding. As discussed throughout the Supplemental Petition, appellate counsel failed to raise on appeal all of the available arguments supporting constitutional issues. Counsel failed to secure a complete record for appeal. Counsel also failed to object to unconstitutional objection procedure imposed by the federal court, failed to assert Petitioner's first amendment rights in regards to the witchcraft evidence, failed to argue the inadmissibility of that evidence in the guilt phase, and failed to point out the inadequacy of the jury instructions, as evidence, for example, by the failure of the first jury to find any mitigating factors.

Contrary to the State's bare assertion, there were no tactical or strategic reasons for failing to raise these constitutional issues on appeal. That failure did not increase the likelihood of success on other issues raised. In this case, counsel's performance was so deficient so as to render the jury verdict unreliable under Strickland v. Washington, 466 U.S. 687 (1984).

Claim Eleven

The failure of a state appellate court to conduct fair and adequate appellate review violates state and federal guarantees of due process, equal protection and a reliable sentence. U.S. Const. Amends. V, VI, VIII, and XIV; Nev. Const. Art. I, Secs. 3, 6, 8; Art .IV, Sec. 21. Nevada law imposes a duty to review a death sentence to determine (a) whether the evidence supports the finding of aggravating circumstances; (b) whether the sentence of death was imposed under the influence of passion, prejudice, and other arbitrary factors; and (c) whether the sentence of death is excessive considering both the crime and the defendant. NRS § 177.055(2).

The Nevada Supreme Court failed to do so in this case. First, the opinions provide no indication that such mandatory review was ever conducted. Petitioner is informed that court staff members have been instructed to insert a "macro" at the end of each death penalty affirmance; there is no individualized consideration. Indeed, two of the five Nevada Supreme Court Justices have admitted that they do not read briefs. Second, Petitioner alleges that during

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

the period in which his petition was pending, the Nevada Supreme Court invited the Chief Deputy for the Criminal Division of the Attorney General's Office, who is charged with prosecuting all capital cases on behalf of the State, to instruct its clerks and staff attorneys on federal and state law in habeas cases, instructing them on how to insulate Nevada Supreme Court capital decisions from federal scrutiny. Third, the Nevada Supreme Court has enacted Nevada Supreme Court Rule 250, singling out death penalty cases for expedited review, fewer attorney resources, fewer appellate court staff resources, and less time for preparation than other cases on the Court's docket.

The State has failed to even address this claim, but merely asserts baldly and without any authority that it is "not a genuine matter" for consideration. See Motion for Discovery.

Claim Twelve

Mr. Flanagan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence because the jurors were misinformed about their responsibilities during trial. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

Several of the jury instructions issued to the jurors during the trial and sentencing phases of Mr. Flanagan's case violated state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence, and use of such instructions requires reversal. U.S. Const. Amends. V, VI, VIII, and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21; see also Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (holding that finding of unconstitutional reasonable doubt instruction requires reversal and is not subject to harmless error analysis). Despite the State's arguments to the contrary, allegations regarding the constitutional infirmity of the jury instructions issued in Mr. Flanagan's case are not required to be raised as claims of ineffective assistance of counsel. Instead, a writ of habeas

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

corpus is appropriate whenever the State cannot demonstrate that the constitutional error was harmless.

A. Reasonable Doubt Instruction.

The court's reasonable doubt instruction used during the trial and sentencing phases of Mr. Flanagan's trial inflates the constitutional standard of doubt necessary for acquittal, creating a reasonable likelihood that the jury would convict and sentence Mr. Flanagan based on a lesser standard of proof than required by the Constitution. See Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam); Estelle v. McGuire, 502 U.S. 62, 72 (1991) (establishing standard of review for challenged jury instructions as inquiry into whether there exists a "reasonable likelihood" that the jury applied the instruction in a manner violative of the constitution). Considered on the whole and in the context in which it was given, the reasonable doubt instruction did not adequately instruct the jurors as to the proper reasonable doubt standard. This error is per se prejudicial, requiring reversal. Sullivan, 508 U.S. at 281. The deprivations of Mr. Flanagan's fundamental federal constitutional rights was prejudicial, and had a substantial and injurious effect on the outcome of the trial and sentencing phases of his trial.

B. Premeditated/Deliberate Instruction.

In addition, the trial court failed to properly instruct the jury as to the elements of first degree murder. Nevada law establishes first degree murder as murder "perpetrated by means of lying in wait, torture or child abuse, or by any other kind of willful, deliberate and premeditated killing . . . ." NRS § 200.030(1). In its instructions on the meaning of premeditation and deliberation, the trial court instructed the jury in a manner that read the dual statutory elements as a single term whose only meaning was that the accused has an intent to kill. See 4 ROA 599, Instruction 18.

The Nevada Supreme Court has recently disapproved of this instruction, the Kazalyn instruction, holding that the instruction blurs the line between first- and second-degree murder by incorrectly informing the jury on the distinct meanings of deliberation and

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

premeditation. Byford v. State, 994 P.2d 700, 713 (Nev. 2000). The court emphasized that premeditation and deliberation "are the truly distinguishing elements of first-degree murder" and must each be separately defined in instructions to jurors on the elements of first-degree murder. Id.

The State argues that the Nevada Supreme Court's holding in Byford should not be applied retroactively. First, the court's opinion in Byford does not announce a new rule, but makes clear the previously confused state of the law in Nevada regarding the requirements for jury instructions regarding premeditation and deliberation. See Byford, 994 P.2d at 713 ("We therefore take this opportunity to **adhere to long-established rules of law** and abandon the modern tendency to muddle the line between first-and second-degree murder.") (emphasis added). The rule articulated in Byford then is not a new rule, but the state of the law in Nevada, and must be applied to Petitioner's claims in this case.

Even if the court's opinion in Byford announced a new rule, such a rule will be applied retroactively if it is based on constitutional concerns. Franklin v. Nevada, 98 Nev. 266, 269 n.2, 646 P.2d 543 (1982). The Byford rule is clearly based on constitutional concerns. The court repeatedly emphasizes the importance of finding deliberation in order to convict an accused of first-degree murder. The court notes, "[i]t is clear from the statute that all three elements, willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder." Byford, 994 P.2d at 713-14 (internal citations omitted). As the court noted, "[d]eliberation remains a critical element of the mens rea necessary for first-degree murder . . . ." Id.

Even if new, retroactive application to Mr. Flanagan's petition is warranted based on the three factors considered by Nevada courts in determining the retroactive application of new constitutionally-based rules. The Nevada courts consider: 1) the purpose of the rule; 2) the reliance on prior, contrary law; and 3) the effect of retroactive application on the administration of justice. Franklin, 98 Nev. at 269 n. 2. The Byford rule announces an elementary principal of

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

constitutional law, that a jury must find each of the elements of crime established beyond a reasonable doubt in order to convict an accused of the crime. The Byford court establishes deliberation as a necessary element of first-degree murder, and finds that the Kazalyn instruction, given in Mr. Flanagan's case, impermissibly folds premeditation and deliberation into one term. The purpose of the Byford rule is to ensure the constitutionality of convictions for first degree murder, and ensures that the administration of justice in Nevada comports with federal constitutional requirements. Finally, the Byford rule should be applied here because Petitioner is similarly situated to those who have received the benefits of the rule and the refusal to confer similar benefits on Petitioner violates the equal protection clause of the U.S. Constitution.

Because the jurors in Mr. Flanagan's case were improperly instructed on the separate, necessary element of deliberation, the writ of habeas corpus should be granted. As a result of the erroneous instruction, the jurors did not find one of the elements of first degree murder, deliberation, was established beyond a reasonable doubt. Mr. Flanagan's conviction cannot stand in the face of such a substantial and injurious influence on the jury's determination of guilt and the availability of the death penalty in sentencing. Considered together with the "implied malice" instruction given to the jurors in this case, which instruction creates a mandatory presumption that "malice shall be implied" foreclosing any independent jury consideration of whether the facts of the case establish malice aforethought, it is clear that the jury instructions regarding the elements of capital murder impermissibly relieved the state of its burden of proving each element of the offense beyond a reasonable doubt.

Claim Thirteen

The state and federal constitutions guarantee Petitioner due process, equal protection and a reliable sentence. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. 1, Secs. 3, 6 and 8; Art IV, Sec. 21. These guarantees were violated by the finding of the aggravating circumstance that the killing was committed by someone who "knowingly created a

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

great risk of death to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person."

As stated above, the State's "law of the case" argument in response to this claim is irrelevant. Pursuant to NRS § 34.724, any person convicted of a crime and under a sentence of death or imprisonment who claims that the conviction was obtained, or the sentence was imposed, "in violation of the Constitution of the United States or the constitution or the laws of this state" may file a post-conviction petition for writ of habeas corpus. To the extent that the Nevada courts have heard the claims raised here by Petitioner, NRS § 34.724 allows the Petitioner to ask this Court to revisit any previous rulings based on the argument that the rulings contravene Nevada law, the Nevada constitution, or the U.S. constitution. The State's "law of the case" argument contradicts the Nevada law of post-conviction relief, and this Court should disregard it.

The Court should also disregard the State's argument, unsupported by any case law, that this claim is improperly before the Court. The State first claims that no prejudicial error occurred because Petitioner was granted three penalty hearings during the tortured history of this case. As stated above, NRS § 34.724 specifically allows this Court to revisit previous rulings, including those made in any of the three prior penalty hearings, if the claim is made that they violate Nevada law, the Nevada constitution, or the U.S. Constitution. For similar reasons, the Court should dismiss the State's argument that Petitioner should have raised this issue in his direct appeals to the Nevada Supreme Court.

The record shows that the evidence was insufficient to support the application of the "great risk of death to more than one person" as an aggravating factor. Furthermore, the application of the aggravating factor was constitutionally infirm due to the failure to apply the required narrowing construction in Petitioner's favor. Finally, the inclusion of this invalid aggravating factor, inappropriately construed, is prejudicial error in a weighing state such as

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Nevada. For these reasons, Petitioner is entitled to an evidentiary hearing and discovery to correct this error.

Claims Fourteen and Fifteen

The state and federal constitutions guarantee Petitioner due process, equal protection, effective assistance of counsel, and a reliable sentence. U.S. Const. Amends. V, VI, VIII, and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8, Art. IV Sec. 21. Counsel's failure to object to the finding of the aggravating circumstance that the killing was committed "in the commission of a burglary" and of the aggravating circumstance that the killing was committed "in the commission of a robbery" violated those guarantees.

Contrary to the State's contentions, Petitioner has raised both these claims in the context of ineffective assistance of counsel. Petitioner alleged that trial counsel was ineffective for failing to object to the use of the "great risk" aggravator and for failing to request jury instructions that would have required a nexus between the burglary or the robbery and the killing. (Supplemental Petition at pp.23-24) Petitioner further alleged that that appellate counsel was ineffective for failing to pursue these claims on appeal. (Supplemental Petition at p.56) Petitioner suffered prejudice because counsel would have prevailed either at trial or on appeal had counsel made the appropriate objections, requested the proper instructions, or raised the necessary appellate arguments. Specifically, the record does not contain sufficient evidence under Nevada law to support the aggravating factors and, in any case, the Court's method for applying the factors was constitutionally infirm. Moreover, the State's observation that Petitioner's claim is not "supported by even one case," is irrelevant because the Nevada habeas corpus procedural statutes do not require legal argument or citation at this point in the proceedings (State's Response at p. 29). NRS § 34.370(4).

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Claim Sixteen

The state and federal constitutions guarantee Petitioner due process, equal protection, the prohibition against double jeopardy, and a reliable sentence. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21. The State's use of the same felony charges both to support Petitioner's conviction on a felony murder theory and to support one of the aggravating factors violates these constitutional guarantees.

Contrary to the State's argument, Petitioner does not claim that merely using the same facts for a conviction and to support an aggravating factor makes his sentence invalid. Rather, it is the "double counting" of the felony convictions in a weighing state which is impermissible, where the required narrowing function is not performed at the guilt phase. Because the statute does not sufficiently narrow the class of death-eligible defendants, such "double counting" violated Petitioner's constitutional guarantees.

Furthermore, as stated in Petitioner's Reply in Claim 21 below, the Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder accompanied by an aggravating circumstance. However, the statutory aggravating circumstances are so numerous and so vague that they could be found in every first degree murder case. The narrowing function required by the Eighth Amendment is therefore also nonexistent under the Nevada sentencing scheme. The Nevada Supreme Court has held that the weighing of aggravating and mitigating factors is a balancing process that requires the sentencer "to follow capital sentencing procedures which are designed to preclude imposition of the death penalty in an arbitrary or capricious manner." Bennett v. State, 787 P.2d 803 (1990). The use of the same facts as an element of first-degree murder and as an aggravating factor in favor of imposition of the death penalty resulted in an arbitrary and unreliable sentence in this case, violating Petitioner's constitutional guarantees of due process, equal protection, and a reliable sentence.

Finally, the Court should disregard the State's assertion that the "double counting" was irrelevant because "the jury at the guilt phase and each of the penalty hearings

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

was bound to find evidence beyond a reasonable doubt" (Response at p. 31). This unsubstantiated and conclusory assertion is precisely the type of "evidence" which the Nevada and U.S. Constitutions are designed to examine in a habeas proceeding.

Claim Seventeen

The state and federal constitutions guarantee Petitioner due process, equal protection, effective assistance of counsel, and a reliable sentence. U.S. Const. Amends. V, VI, VIII, and XIV; Nev. Const. Art. 1, Secs. 3, 6, and 8, Art. IV Sec. 21. Counsel's failure to object to the trial court's instructions to the jury during the sentencing hearing violated those guarantees.

Contrary to the State's contentions, Petitioner raised the jury-instructions claim in the context of ineffective assistance of counsel. Petitioner alleged that trial counsel failed to object to improper instructions given to the jury and that appellate counsel did not raise all available arguments on appeal (Supplemental Petition at pp. 24, 56). Petitioner suffered prejudice because counsel would have prevailed either at trial or on appeal had counsel made appropriate objections to the instructions.

Four of the defective instructions relate to aggravating or mitigating circumstances. Counsel did not object at trial or on appeal to the anti-sympathy instruction where this instruction obliterated the constitutional mandate that all mitigating evidence be considered. Counsel did not object at trial or on appeal to the mitigating-circumstances instruction where the instruction given at trial did not inform the jury that Nevada law does not require unanimity on mitigating circumstances, rather, each individual juror may consider mitigating evidence. Counsel did not object at trial or on appeal to the aggravating-circumstances instruction where the instruction did not convey to the jury the requirement of unanimity under Nevada law for finding aggravating circumstances. Finally, counsel did not object at trial or on appeal to the instruction regarding the application of the aggravating factors where the instruction did not adequately inform the jury of the nature of the factors. Petitioner

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

suffered prejudice sufficient to undermine confidence in the jury's sentence where Nevada law requires the jury to weigh aggravating factors against mitigating factors. The defective aggravating- and mitigating-circumstances instructions, precluded the jury from engaging in the appropriate weighing and resulted in a sentence that was fundamentally unconstitutional.

The two remaining instructions relate to the jury's understanding of the sentence. Counsel did not object at trial or on appeal to the instruction regarding the imposition of the death penalty where the instruction did not inform the jury of its discretion under Nevada law to return a penalty other than death. Petitioner suffered prejudice because the jury was, in effect, forced to return a sentence of death. Counsel did not object at trial or on appeal to the instruction regarding commutation where the instruction did not accurately inform the jury as to the true meaning of the sentences. Petitioner suffered prejudice because the instruction erroneously suggested to the jury that commutation of Petitioner's sentence was possible where, in fact, such commutation was impossible.

Claims Eighteen and Nineteen

Mr. Flanagan's death sentence is invalid under the state and federal constitutional guarantees of due process of law, equal protection of the laws, trial by an impartial jury and a reliable sentence because of the trial court's refusal to grant a challenge for cause against a juror who did not meet constitutional standards of impartiality, and because the trial court improperly granted a peremptory challenge by the prosecution to a juror who expressed reluctance to impose the death penalty. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

In these two claims, Petitioner alleges that two errors were committed during the jury selection for his second penalty hearing. First, the trial court improperly forced Mr. Flanagan's attorney to use a peremptory challenge to remove a prospective juror who should have been removed for cause, because the juror stated during voir dire that anybody convicted of intentional murder should automatically be executed (Claim 18). Second, the trial court

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

improperly granted a peremptory challenge by the prosecution to a juror who expressed reluctance to impose the death penalty, despite her willingness to join in a consensus with the other jurors in favor of the death penalty (Claim 19).

In a combined response to both these claims, the State's only argument is that the claims are moot because Petitioner was eventually granted a third penalty hearing, which would have been the only remedy available for the errors cited. The State's response ignores the fact that a habeas corpus proceeding is not a criminal appeal, but is a civil challenge to the constitutionality of the criminal procedures afforded Petitioner. The second penalty hearing is part of the context from which the third hearing originated. The third penalty hearing would not have been necessary if the second hearing had been conducted in accordance with constitutional requirements. Moreover, the errors cited in the second hearing may have prevented Petitioner's only opportunity to receive a sentence other than the death penalty. Under these circumstances, the errors that occurred in Petitioner's second penalty hearing should properly be considered in this proceeding.

Claim Twenty

Mr. Flanagan was denied a fair trial and sentencing because of judicial bias. The state and federal constitution guarantee to every defendant due process, equal protection, a fair and impartial tribunal, and a reliable sentence. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

The State argues that this claim is merely another "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background, names of witnesses and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

pursue discovery and an evidentiary hearing to provide additional support for this claim. See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery.

Claim Twenty-One

The state and federal constitutions guarantee Petitioner due process, equal protection and a reliable sentence. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. 1, Secs. 3, 6 and 8; Art. IV, Sec. 21. The Nevada capital punishment system violates those guarantees because it operates in an arbitrary and capricious manner.

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS § 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case. See NRS § 200.033. Nevada permits the imposition of the death penalty for all first degree murders that are "at random and without apparent motive." NRS § 200.033(9). Nevada statutes also appear to permit the death penalty for murder involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. See NRS § 200.033. The scope of the Nevada death penalty is thus clear: the death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment from the many that do not. The narrowing function required by the Eighth Amendment is accordingly nonexistent under the Nevada sentencing scheme. This is reflected in the fact that Nevada ranks near the top of all the states per capita in inmates sentenced to death.

The State asserts in its response that the Nevada Supreme Court has long held that Nevada's use of the death penalty meets both federal and state constitutional requirements. In support of its argument, Respondent cites to language from a 1984 Nevada Supreme Court case,

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984), which in turn relied upon two mid-1970s United States Supreme Court cases. Respondent completely ignores the changing attitudes of society in relation to the death penalty and the way that it is imposed. Indeed, Illinois and Nebraska have recently put a moratorium on any imposition of the death penalty pending further studies regarding its fairness. Respondent's reliance upon two United States Supreme Court cases from the 1970s is therefore misplaced.

In Ybarra, the Nevada Supreme Court addressed only the situation of whether it was constitutional for the State to place the burden on the accused to prove that his mitigating circumstances outweigh the aggravating circumstances in order to avoid the imposition of the death penalty. At the time of Ybarra, Nevada statutes listed only nine aggravating circumstances that could lead to imposition of the death penalty. Today, that number has blossomed to fourteen, giving weight to the argument that Nevada's statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case.

Just as Nevada has changed its statutory scheme to reflect a changing society by adding as an aggravating factor any murder committed because "of the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of that person" (See NRS § 200.033), so too should the Nevada Supreme Court look to society's changing attitudes toward the death penalty itself. It is inconceivable that twenty-five years ago the majority of Nevadans would have believed that the murder of a minority or homosexual for that reason alone would warrant a more extreme punishment. And yet such is the case today. Our society's prevalent beliefs and morals are not stagnant, and thus Respondent's reliance upon cases from over 20 years ago fail to take into account changing attitudes.

Indeed, virtually every European country has abolished the use of the death penalty in the past several years after concluding it to be uncivilized and inhumane. As the United States Supreme Court has recently held, a capital sentencing scheme must direct and limit the sentencer's discretion to minimize the risk of arbitrary and capricious action and must

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

genuinely narrow the class of persons eligible for the death penalty. Arave v. Creech, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). Nevada's open-ended definition of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every intentional killing, is an arbitrary, capricious and irrational scheme that violates the United States Constitution and is prejudicial per se.

Claim Twenty-Two

Mr. Flanagan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process of law, equal protection, the right to be informed of the nature and cause of a criminal accusation and a reliable sentence because the charging document prepared by the State did not specifically apprise Mr. Flanagan of those acts he was alleged to have committed. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

The State responds that Petitioner suffered a lengthy appellate process and was arraigned on the amended complaint and thus must have known of the allegations leveled against him. This response fails to address Petitioner's arguments. Petitioner's multiple penalty hearings and lengthy appellate review process fail to cure the initially defective amended complaint. Without an adequate and complete complaint, a criminal defendant lacks the ability to prepare properly for a confrontation with the significant legal resources wielded by the State.

Further, the State asserts that the amended complaint and subsequent preliminary hearing were sufficient to provide Mr. Flanagan with notice of charges alleged (6 ROA 1044-1048). This response ignores the assertions made by Petitioner that the amended complaint failed to include all counts.

Finally, contrary to the State's unsupported assertion, constitutional challenges must be capable of being raised at any stage of review. They should not be confined to the pre-trial proceedings when Petitioner's counsel was undoubtedly struggling to ascertain the full nature of the State's allegations against him.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Claim Twenty-Three

The Petitioner's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, ineffective assistance of counsel, and reliable sentence because Petitioner was absent during the critical stages of this proceeding. U.S. Const. Amends. V, VI, VIII, and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

As stated in the Petition, Mr. Flanagan was absent from numerous critical stages in the trial. Without a waiver, this error is prejudicial.

The State argues that this claim is merely another "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background, and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to pursue discovery and an evidentiary hearing to provide additional support for this claim. (See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery.) Moreover, in most of the cited instances, Petitioner's absence is apparent from the record.

The State cites Thomas v. State, 967 P.2d 1111 (Nev. 1998), for the proposition that defendant's absence does not necessarily prejudice him. But in that case, defendant was only absent at a single hearing. In that hearing, the State, because of defendant's absence, did not argue its motion, and the court did not make a ruling on it. Id. at 1120. Here, that was not the case, and there were numerous occasions when the defendant was absent.

Claim Twenty-Four

The state and federal constitutions guarantee Petitioner a public, recorded trial. U.S. Const. Amends. V, VI, VII, and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

The trial court violated these rights by failing to transcribe or otherwise record a multitude of substantive rulings at bench conferences, or the jury instructions.

The State argues that this claim is merely another "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background, and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to pursue discovery and an evidentiary hearing to provide additional support for this claim. (See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery.)

The State also responds by arguing that the lack of a complete record is the fault of trial counsel. Petitioner recognizes that this claim may also be incorporated into his various claims concerning ineffective counsel. Nevertheless, the failure of the trial court to preserve a record from which an effective appeal can be taken is such a fundamental constitutional flaw that Petitioner should not be penalized, let alone executed, for such a failure.

Claim Twenty-Five

Petitioner's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence based on the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systemic deprivation of Mr. Flanagan's right to the effective assistance of counsel. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. Art. 1, Secs. 3, 6, and 8; Art. IV, Sec. 21.

Specifically, each claim requires vacation of the conviction or sentence here. But even if one claim does not merit vacation of the judgment and sentence, the totality of the multiple errors and omissions resulted in substantial prejudice.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

The State's citation to La Pena v. State, 544 P.2d 1187 (1976) is unavailing. Numerous errors have been shown, and the State does not deny that cumulatively, if shown, these errors require vacation of the judgment and sentence. At the least, Petitioner is entitled to discovery and an evidentiary hearing for full development of these issues.

Claims Twenty-Six and Twenty-Seven

Mr. Flanagan's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because both the death penalty and execution by lethal injection violate the constitutional prohibition against cruel and unusual punishments. U.S. Const. Amends. VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

The State does not address the merits of Petitioner's claims that death by lethal injection is a cruel and unusual punishment in violation of the Constitutions of Nevada and the United States.

Instead, in response to numerous examples of cruelty and unusual suffering caused by the administration of lethal injection, the State simply argues that the examples are from states other than the state of Nevada. The State fails to explain how the state of Nevada's administration of lethal injection differs in any way which would avoid the same type of cruelty and unusual suffering so vividly demonstrated by the given examples. Indeed, the State does not even deny that such examples occur in Nevada.

The State argues that this court has already ruled that the Nevada death penalty statute is constitutional. The State cites Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979); Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985); Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990); and Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996) in support of its argument. None of these cases address the argument that, as applied, the Nevada death penalty is cruel and unusual punishment. In Bishop, the court held that the death penalty statute did not violate the state or federal constitutionals because it provided for consideration of mitigating factors. In

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Rogers, the court rejected the argument that Nevada's death penalty statute violated the Eight Amendment because it was applied in a discriminatory and infrequent manner insofar as most persons sentenced to death are indigent and represented by a public defender. In Bennett the issue addressed, as in Bishop, related to the availability of procedures with respect to mitigation. Finally, in Colwell, it is clear that no meaningful argument was proposed or considered. Rather, as acknowledged by the court, counsel was simply preserving the issue for appeal.[1]

Acknowledging that the court has not ruled on whether death by lethal injection violates constitutional muster, the State argues that other jurisdictions have ruled in favor of death by lethal injection. Again, the cases cited by the State do not address the argument raised by Petitioner. In Fairchild v. State, 286 Ark. 191, 690 S.W.2d 355 (1985), the court simply addressed a question of statutory interpretation. The court held that Arkansas' death penalty statue allowed all persons sentenced to death to choose between death by electrocution or death by legal injection. In Ex Parte Granviel, 501 S.W.2d 503 (Tex. Crim. App. 1978), the court rejected the argument that simply because death by lethal injection was "new and innovative" did not make it cruel and unusual. The court noted that "[p]revious changes in the mode of execution have been evaluated by an 'evolving standard of decency' in light of public opinion and social progress." Id. at 510. In reaching its decision, the court noted that the punishment of death is not a violation of the constitutional prohibition of cruel or unusual punishments "unless it is so inflicted that it involves lingering death . . . so long as the death inflicted is speedy, and without undue pain or torture, the provision is not violated." Id. at 509. In 1978, at the time of its ruling, death by lethal injection was virtually untested and was considered more humane than other forms of execution. The court ruled without the benefit of the numerous examples of unusual suffering, pain, and lingering death available to this court.

[1] The court noted: "Colwell's counsel merely desires to preserve his argument should this court change its mind. Id. at 809.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

In Romano v. State, 917 P.2d 12 (Okla. Crim. App. 1996), it is clear that the court was not substantively evaluating an argument based on cruel and unusual nature of death by lethal injection. Instead, the court was viewing the argument in light of the fact that it was not originally raised on appeal. The court held that counsel's failure to do so did not result in ineffective assistance of counsel. Id. at 18.

In People v. Steward, 121 Ill. 2d 93, 520 N.E.2d 348 (1988), the court merely rejected the argument that death by lethal injection was cruel and unusual punishment because no guidelines had been established regarding the method and manner of execution and because the procedure had not been approved by the Food and Drug Administration.

Finally, Harrison v. State, 644 N.E.2d 1243 (Ind. 1995), is not a case which considered the constitutionality of death by lethal injection.

The State's response simply does not address the issue raised by Petitioner's twenty-sixth and twenty-seventh claims: under the standards of today's society, is death by lethal injection cruel and unusual punishment? With respect to the constitutional prohibition against cruel and unusual punishment, the U.S. Supreme Court has held:

> "[T]he Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that 'a principle to be vital must be capable of wider application than the mischief which gave it birth.' Weems v. United States, 217 U.S. 349, 373, 54 L.Ed. 793, 30 S.Ct. 544 (1910). Thus, the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice. Id." Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976).

While 30 years ago, when death by lethal injection was first introduced as a form of capital punishment in the United States, society may have judged it to be more humane than hanging or electrocution, today's more enlightened society does not. It has not been denied by the State that death by lethal injection can cause prolonged death and unusual suffering.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

In light of the evidence which the court now has regarding death by lethal injection, and judged against today's standards of "decency" and "social progress," death by lethal injection is cruel and unusual punishment. The court should reject the State's adherence to the archaic and obsolete and should embrace the enlightened standards of public decency adhered to in all other modern societies and by numerous states within the Union.

Claim Twenty-Eight

Mr. Flanagan's sentence of death is invalid under the state and federal constitutional guarantees of due process, equal protection and a reliable sentence because Petitioner may become incompetent to be executed. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

The State argues that this claim is premature under the decision in Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997), aff'd, 118 S.Ct. 1618 (1998). In that case, the Ninth Circuit addressed the requirement that such a claim must be raised in an initial habeas petition in order to avoid being waived. The State may be correct that this requirement is inapplicable to this proceeding, but until the court so rules Petitioner will continue to assert it.

Claim Twenty-Nine

Mr. Flanagan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence because the trial court failed to sever Mr. Flanagan's trial from his co-defendants which resulted in the use of inadmissible evidence to convict Mr. Flanagan of first degree murder. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

The State's only response to Claim Twenty-Nine is the oft-repeated argument that the claim is barred by the Law of the Case Doctrine. As discussed above, this argument ignores the essential point that Petitioner seeks relief under NRS §34.724, which allows a collateral attack on a conviction under a habeas corpus petition. Under this statute, Petitioner is entitled to

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

challenge his conviction, regardless of any prior disposition of this claim by the Nevada Supreme Court, because he claims that the conviction was obtained in violation of the Nevada and United States Constitutions. NRS §34.724(1).

As discussed in the Supplemental Petition, the trial court erred in refusing to sever this trial, notwithstanding its clear notice that the evidence to be introduced in co-defendant Luckett's trial would be prejudicial to Petitioner. (Supplemental Petition, p. 117.) Moreover, the trial court compounded this error by refusing to allow Petitioner's counsel to seek severance openly during the course of the trial, and then not addressing Petitioner's motions for severance on the seven occasions they were raised during trial. The result is that co-defendant Luckett presented evidence of alleged devil worship and gang activity, which was inadmissible against Petitioner. See Dawson v. Delaware, 503 U.S. 159, 168, 112 S.Ct. 1093, 1099, 117 L.Ed.2d 309 (1992). Prosecutor Seaton then used this evidence against Petitioner, by arguing that it led to the murder. Exacerbating all of these errors, the trial court instructed the jury that it should consider "all of the evidence in the case" in arriving at its verdict.

Judge Mosley abused his discretion in requiring defendants to be tried jointly. Nevada and federal courts allow a joint trial of co-defendants if the jury is adequately instructed to mitigate prejudice. United States v. Gonzales, 749 F.2d 1329, 1333 (9th Cir. 1984); see also Nevada v. Lewis, 255 P. 1002 (Nev. 1927). Judge Mosley never gave the jury the instruction necessary to mitigate prejudice, but instead improperly instructed the jury that it should consider "all of the evidence in the case" in evaluating the charge against Petitioner. As discussed above. this was clearly prejudicial to Petitioner, because the jury was not merely allowed but instructed to consider the inflammatory claims of devil worship. (See Claim Three, supra.) This prejudice to Petitioner warrants entry of an order granting Petitioner a new trial.

Claim Thirty

Mr. Flanagan's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, trial by an impartial jury and a reliable sentence

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

because Nevada effectively has no mechanism to provide for clemency in capital cases. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that every one of the 38 states that has the death penalty also has clemency procedures. Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 118 S.Ct. 1244, 1256 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must now ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985).

The State argues that the current clemency procedures were upheld by the Nevada Supreme Court in Colwell v. Nevada, 112 Nev. 807, 919 P.2d 403 (1996). That case, however, addressed only the constitutionality of the current iteration of NRS §213.085, limiting the Nevada State Board of Pardons' powers to commute a death sentence. The court did not address the overall constitutionality of clemency procedures in the state, and specifically did not address the allegation made by Mr. Flanagan in his Supplemental Petition, that no death sentence has been commuted since 1973. (Supp. Pet. at p. 121.) The Board is limited in its ability to commute a death sentence to a sentence for a term of years. NRS §213.085. That a pardon from the executive branch of the state, when such pardons have historically never been granted, may be hypothetically available does nothing to guarantee that the state's clemency procedures pass constitutional muster. As a result of the limitations on both aspects of clemency, commutation and the power to pardon, the state's clemency procedures effectively do not exist for death row inmates, and as a result, the state's death penalty scheme unconstitutionally deprives Mr. Flanagan of his state and federal guarantees of due process, equal protection and a reliable sentence.

Furthermore, the clemency panel in Nevada is unconstitutional per se. Clemency requests are considered by the justices of the Nevada Supreme Court, the Attorney General and the Governor. The fact that each of these individuals is elected to office, and therefore beholden

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

to the electorate, renders their impartiality impossible and therefore unconstitutional. (See Claim Thirty-Two, infra.) In addition, the fact that the justices on the Supreme Court have already considered and rejected challenges to Petitioner's sentence and the Attorney General advocated for the sentence makes a clemency request futile in Petitioner's case, which is an independent violation of constitutional due process.

The State also argues that the court should not consider Mr. Flanagan's claim regarding the constitutionality of the state's clemency scheme. Nevada courts have long recognized their inherent power to consider plain error or constitutional issues sua sponte. See Sullivan v. Nevada, Nev., 990 P.2d 1258, 1260 n. 3 (1999). Because the state's clemency scheme results in the unavailability of clemency to death row inmates, Mr. Flanagan's sentence should be vacated.

Claim Thirty-One

The state and federal constitutions guarantee Petitioner due process, equal protection, trial before an impartial jury and a reliable sentence. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. 1, Secs. 3, 6, and 8; Art. IV, Sec. 21. Because Mr. Flanagan was seen by the jurors in shackles and because of the presence of armed guards in the courtroom during the trial, Mr. Flanagan's conviction and death sentence is invalid since the guarantees enumerated above were violated.

The State argues that this claim is merely another "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, supra. However, contrary of the State's assertion, Petitioner has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that the Petitioner set forth factual background, witness statements and other evidence demonstrating entitlement to relief. Furthermore, as Petitioner has demonstrated above, the requirement for factual substantiation cannot negate Petitioner's right to

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

pursue discovery and an evidentiary hearing to provide additional support for this claim. (See Petitioner's Motion for Evidentiary Hearing and Motion for Discovery.)

Mr. Flanagan was required to wear shackles throughout the trial, except while in the courtroom. However, on at least two occasions jurors saw him in shackles. The first occurred when the jurors came back into the courtroom before the guards had removed Mr. Flanagan's chains. In the second instance, the jurors were seated and the bailiff opened the door, exposing Mr. Flanagan in chains just before he was to enter the courtroom.

The Ninth Circuit has held that when erroneous shackling—i.e., shackling that is not justified by an essential state interest specific to that trial—is seen by jurors, and the case involves crimes of violence and at least some disputed evidence, the error is not harmless and requires the grant of habeas relief. Rhoden v. Rowland, 172 F.3d 633, 636 (9th Cir. 1999). Further, the United States Supreme Court has identified three "inherent disadvantages and limitations" in the use of shackling to maintain judicial control: (1) physical restraints may cause jury prejudice, reversing the presumption of innocence; (2) shackles may impede the communication between the defendant and his lawyer, thus violating the Sixth Amendment; and (3) shackles may detract from the dignity and decorum of the judicial proceedings. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Additionally, lower federal courts have observed two further weaknesses in the use of shackles: (1) shackles may impair the defendant's mental faculties and (2) shackles may be painful to the defendant.

The Ninth Circuit requires state trial courts to engage in a two-step process before permitting the shackling of a criminal defendant. First, the trial court must do an analysis of the security risk posed by the defendant to see if constraints are warranted. Second, the trial court must consider less restrictive alternatives before deciding upon shackling. Duckett v. Godinez, 67 F.3d 734, 748 (9th Cir. 1995). The trial court here did not perform either of the required steps.

Respondent argues that relief should not be granted since the allegations fail to indicate "which set of jurors supposedly saw the Defendant shackled" and how many of them

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

actually saw the alleged shackling. Respondent also states that Petitioner's reliance on Rhoden is misplaced since the defendant in Rhoden was required to wear shackles during the entire course of the trial and because Rhoden noted that "[a] jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom has not warranted habeas relief." (citing to United States v. Olano, 62 F.3d 1180, 1190 (9th Cir. 1995)). However, Respondent's factual interpretation of both Rhoden and Olano are misplaced.

Although the defendant in Rhoden was required to wear shackles throughout the trial, he was instructed to keep his feet under the counsel table so that jurors could not see the shackles; further, he was always escorted into and out of the courtroom outside of presence of the jury. Even with these precautions however, five jurors did see the defendant in shackles at one point during the trial. In that respect, the circumstances of the Rhoden case are no different than the circumstances of this case because despite the fact that Mr. Rhoden was required to wear the shackles during the entire course of the trial, he was only seen briefly by a few jurors. The same holds true here, and under those circumstances the Ninth Circuit has granted habeas relief.

Likewise, Respondent's reliance on Olano is misplaced. In Olano, the defendant was not shackled, but handcuffed and was only seen for a moment in the hallway as the jurors walked in to the courtroom. Shackling is a far cry from handcuffing, and thus the two situations are not comparable. Accordingly, because the jury saw Mr. Flanagan shackled on at least two separate occasions during the trial and because armed guards were present throughout the trial, his federal and state constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence have been violated. See Buchanan Dec.

Claim Thirty-Two

Petitioner's conviction and sentence of death are invalid under the state and federal constitutional guarantees of due process, equal protection and a reliable sentence because Petitioner was not tried before a fair and impartial tribunal in that the trial and appellate judges

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

were elected, were subject to re-election and therefore beholden to the electorate, thereby making it impossible to be impartial. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21. Without argument or citation, the State attempts to dismiss this claim with the bare assertion that it is groundless and inappropriate. On the contrary, this claim is firmly rooted in our nation's historical jurisprudence.

The tenure of judges of the Nevada state district courts and of the Nevada Supreme Court is dependent upon popular contested elections. Nev. Const. Art. 6 §§ 3, 5.

The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of unfettered discretion to determine whether a death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. NRS § 177.055(2). Petitioner incorporates the allegations of Claims 11, 20 and 21.

At the time of the adoption of the United States Constitution, the common law definition of due process of law included the requirement that judges who presided over trials in capital cases, which at that time potentially included all felony cases, have tenure during good behavior. All of the judges who performed the appellate function of deciding legal issues reserved for review at trial had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from the influence of the sovereign that would have improperly affected their impartiality.

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian, "lynch mob," pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "offer a possible temptation to the

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927); Acord, Aetna Life Ins. v. Lavoie, 475 U.S. 813, 824-25 (1986); In re: Murchison, 349 U.S. 133, 136 (1955). Judges or justices who are subject to these pressures cannot be impartial in compliance with due process standards in a capital case.

Indeed, judges and justices who are subject to popular election cannot be impartial in any capital case within due process standards because of the threat of removal as a result of unpopular decisions in favor of a capital defendant.

Petitioner's case involved both massive media attention in Las Vegas and intense prosecutorial exploitation of the jurors and potential jurors' knowledge of the media focus on the case. Petitioner incorporates the allegations of Claim Six. A ruling favorable to Petitioner on any dispositive issue in his capital case, at trial or on direct appeal, would have been devastating to the chances of re-election of any judicial officer who made such a ruling, and at minimum would have required the judicial officer to expend significant resources in time and money to retain his office.

Every judge in Nevada has a personal interest in retaining his position, by running in a contested popular election, which necessarily gives rise to an interest in deciding cases in a way that is consistent with popular opinion: thus judges may advertise that they have a record of fighting crime or publicly identify with law enforcement officials. Also, the need to obtain money and political support from lawyers results in the practical situation that lawyers give such support in anticipation of judicial favoritism, and that judicial candidates solicit and accept such support in anticipation of being able to provide such favoritism.

These particular forces are exacerbated by the general deterioration of judicial independence which results from contested judicial elections. Commentators have recognized that the relatively recent politicization of judicial election campaigns (particularly on the issue of vehement public support of the death penalty), and the crucial role of contributions from lawyers

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

in conducting judicial election campaigns, have significantly undermined traditional notions of judicial impartiality.[2] Further, the fairness of the proceedings is necessarily reduced by the fact that the justices have no protection against removal for making unpopular but correct decisions. The basic protection of judicial independence, and hence of impartiality, is tenure during good behavior rather than vulnerability to dismissal on the basis of decisions displeasing to the sovereign. That protection is inherent in the notion of due process of law under the federal constitution, which is measured by the state of the law at the time of the adoption of the constitution. E.g., Medina v. California, 505 U.S. 437, 112 S.Ct. 2577, 2578 (1992).[3] Whether or not judicial elections in the modern era are always inconsistent with due process of law, the circumstances of this case show that a state can allow conduct in judicial elections which is

---

[2] See, e.g., Bright, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 Boston U.L. Rev. 759, 776-780, 784-792, 822-825 (1995); Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U.L. Rev. 308, 312-314, 316-326, 329 (1997); Johnson and Urbis, Judicial Selection in Texas: A Gathering Storm?, 23 Tex. Tech. L. Rev. 525, 555 (1992); Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 Stan. L. Rev. 449, 478-483 (1988); Note, Safeguarding the Litigant's Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers, 86 Mich. L. Rev. 382, 399-400, 407-408 (1987).

[3] The tenure of judges during good behavior was firmly entrenched by the time of the adoption: almost a hundred years before the adoption, a provision requiring that "Judges' Commissions be made quamdiu se bene gesserint . . . ." was considered sufficiently important to be included in the Act of Settlement, 12, 14 Will. III c.7 (1700); W. Stubbs, Select Charters 531 (5th ed. 1884); and in 1760, a statute ensured their tenure despite the death of the sovereign, which had formerly voided their commissions. 1 Geo. III c.23; 1 W. Holdsworth, History of English Law 195 (7th ed., A. Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown." 1 W. Blackstone, Commentaries on the Laws of England *258 (1765). The framers of the constitution, who included the tenure during good behavior for federal judges under Article III of the Constitution, would not likely have taken a looser view of the importance of this requirement to due process than George III. In fact, the grievance that the kind had made the colonial "judges dependent on his will alone, for the tenure of their offices" was one of the reasons assigned as justification for the revolution. Declaration of Independence ¶ 11 (1776); see Smith, An Independent Judiciary: The Colonial Background, 124 U.Pa.L. Rev. 1104, 1112-1152 (1976). At the time of the adoption, there were no provisions for judicial elections in any of the states. Id. At 1153-1155.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

fundamentally inconsistent with the "fair tribunal" required by the federal due process clause. In re: Murchison, 349 U.S. 133, 136 (1955).

Conducting a capital trial or direct appeal before a tribunal that does not meet constitutional standards of impartiality is prejudicial per se and requires that Petitioner's capital conviction and sentence be vacated.

Claim Thirty-Three

Mr. Flanagan's death sentence is invalid under the state and federal constitutions because of the failure of his attorney to challenge for cause jurors who did not meet constitutional standards of impartiality. U.S. Const. Amends. V, VI, VII, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21. That State has two responses to this claim.

First, the State responds that, to the extent Petitioner challenges errors in the second penalty hearing, they were mooted by the third penalty hearing. The State is wrong. The constitutionality of all hearings afforded to Petitioner are properly considered in this habeas corpus proceeding, particularly since the second hearing may have been Petitioner's only opportunity to receive a lesser sentence had the errors not occurred. (See Claims Eighteen and Nineteen, supra.)

Second, the State argues that trial counsel's tactical decisions cannot be challenged in hindsight, but this argument is also flawed. The State cites the case of Doleman v. Nevada, 112 Nev. 843 (1996), for the proposition that tactical decisions are "virtually unchallengeable absent extraordinary circumstances." 112 Nev. at 848. However, that decision sustained such a challenge to the effectiveness of counsel in a capital murder case after a penalty hearing for which the counsel had failed to interview potential family witnesses. The errors of Petitioner's counsel were equally egregious.

Petitioner agrees that strategic decisions of counsel should be viewed from counsel's perspective rather than in hindsight. However, at the third penalty hearing Petitioner's trial counsel seated a juror who stated she would not consider a life sentence with the possibility

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

of parole (71 ROA III-184), and did not challenge for cause two other jurors who openly advocated for the death penalty. (69 ROA I-59-76; 71 ROA III-146-147; See, Petitioner's Supplemental Petition, pp. 126-128.) These decisions were clearly faulty when they were made, and are properly challenged in this proceeding.

Claim Thirty-Four and Thirty Five

Mr. Flanagan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence because the proceedings against him violated international law, as it applies now and as it may apply in the future. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

In its Response to this claim the State erroneously argues that it is not subject to the international treaties ratified by the United States. So long as Nevada remains one of the United States, such an assertion clearly flies in the fact of the Supremacy Clause of the federal Constitution. U.S. Const. Art. VI.

Several international treaties, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, recognize the right to life. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 3 (1948) (hereinafter "UDHR"); International Covenant on Civil and Political Rights, adopted December 19, 1966, Art. 6, 999 U.N.T.S. 171 (entered into force March 23, 1976) (hereinafter "ICCPR"). The United States has signed and ratified the ICCPR. The State of Nevada is required to honor the United State's treaty obligations by the Supremacy Clause.

Among the provisions of the ICCPR are prohibitions against the arbitrary deprivation of life (Art. 6), the right to review of conviction and sentence by a higher tribunal "according to the law" (Art. 8), and the prohibition against cruel, inhuman or degrading treatment or punishment (Art. 7). The State of Nevada must abide by these provisions of international law. In his Supplemental Petition, Mr. Flanagan included allegations demonstrating

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

that his conviction and sentencing violated provisions of international law and treaties. (Supp. Pet. at pp. 131-32). Mr. Flanagan is also entitled to claim the benefits of any applicable international treaties or legal principles as they may become applicable or interpreted in the future.

The State has failed to rebut any of these allegations, and has failed its burden to demonstrate beyond a reasonable doubt that these violations did not substantially interfere with the outcome of Mr. Flanagan's trial and sentencing.

Claim Thirty-Six

Mr. Flanagan's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection and a reliable sentence because, as a direct result of the state's egregious misconduct, he has been required to go through two trials and appeals ending in reversals of his sentence, thus leaving him on death row for nearly 15 years, which constitutes cruel and unusual punishment. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. 1, Secs. 3, 6 and 8, Art. IV, Sec. 21.

The State's sole response to this claim is to state that Petitioner cannot complain of delays that he caused. That response is meritless and irrelevant. Petitioner did not cause the State's repeated violation of his constitutional right to a fair trial, and he cannot be faulted for protecting that right. The sole cause of Petitioner's cruel and unusual punishment is the State's inability to conduct a fair trial. None of the cases cited by the State are relevant to this claim. Each of those cases addresses alleged violations of the Sixth Amendment right to a speedy trial for defendants who had sought multiple continuances, explicitly waived the right, or took other actions to delay trial. Petitioner has neither brought such a claim nor engaged in similar conduct.

Mr. Flanagan has been subjected to multiple penalty hearings as a direct result of unconstitutional conduct on the part of the State. That the State should now seek to further deny him constitutional rights as a result of his attempts to ensure that his conviction and sentence were constitutionally sound is ridiculous. To charge that Mr. Flanagan should be penalized for

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

attempting to secure his rights to a fair trial and a reliable sentence further highlights the State's inability to conduct this matter with the justice and fairness that it deserves.

Mr. Flanagan has been subjected to periods of unjustifiable detention on death row, facing death warrants and stays of execution stemming from death sentences unlawfully obtained by the State. As a result of these errors by the state, Mr. Flanagan has been the target of cruel and unusual punishment, and is entitled to relief in the form of a new trial or reduced sentence.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

A. Order Respondent to show cause why the requested relief should not be granted;

B. Grant Petitioner leave to conduct discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford Petitioner the means to preserve the testimony of witnesses;

C. Grant Petitioner sufficient funds to secure investigative and expert assistance as necessary to prove the facts alleged in this Petition;

D. Order an evidentiary hearing at which Petitioner will offer this and further proof in support of the allegations herein;

E. Permit Petitioner a reasonable opportunity to supplement the petition to include claims which become known as a result of discovery and further investigation and as the result of obtaining information previously unavailable to Petitioner;

F. After full consideration of the issues raised in this Petition, issue a writ of habeas corpus relieving Petitioner from the judgment of conviction and sentences of death imposed in the Eighth Judicial District Court Case Number C69269.

G. Grant such further relief as the Court may deem appropriate in the interests of justice.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

DATED this 16th day of May, 2000.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By _____
ROBERT D. NEWELL
Of Attorneys for Petitioner Dale Edward Flanagan

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

FILED

May 11 2 18 PM '00

Shirley B. Rogjum
CLERK

ORIGINAL

0043

CAL J. POTTER III
Nevada Bar No. 001988
POTTER LAW OFFICES
1125 Shadow Lane
Las Vegas, Nevada 89102
Telephone (702) 385-1954

ROBERT D. NEWELL
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201
Telephone (503) 241-2300

Attorneys for Petitioner
Dale Edward Flanagan

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

DATE: May 31, 2000
TIME: 9:00 a.m.

PETITIONER'S MOTION FOR DISCOVERY

COMES NOW, Petitioner, DALE EDWARD FLANAGAN, by and through his attorneys, CAL J. POTTER, III of POTTER LAW OFFICES, and ROBERT D. NEWELL of DAVIS WRIGHT TREMAINE LLP, and moves this Honorable Court for an Order granting Petitioner Discovery.

///

///

///

RECEIVED
MAY 12 2000
COUNTY CLERK

MC

CE42

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

F:\99\99-81680\REPLY\MOT - DISCOVERY.FDO

CE31

Portland

S

This Motion is made and based upon all the papers and pleadings on file herein, as well as the declarations, affidavits and exhibits filed herewith.

DATED this 16th day of May, 2000.

Respectfully Submitted,

DAVIS WRIGHT TREMAINE LLP

By _____
ROBERT D. NEWELL
Of Attorneys for Petitioner Dale Edward Flanagan

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the attached Motion for Discovery on for hearing before the above-entitled Court on the 31st day of May, 2000, at the hour of 9:00 a.m. or as soon thereafter as can be heard, in Department XI, at the Clark County Courthouse.

DATED this 16th day of May, 2000.

DAVIS WRIGHT TREMAINE LLP

By _____
ROBERT D. NEWELL
Of Attorneys for Petitioner Dale Edward Flanagan

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Petitioner seeks an order authorizing him to issue subpoenas duces tecum to the following entities, depose the following persons, and conduct other discovery allowed by the Nevada Rules of Civil Procedure that may be revealed by these specific requests:

1. **Las Vegas Metropolitan Police Department.** Seeking the production of documents relating to the investigation and prosecution of Petitioner in this and juvenile matters; Petitioner's detention in the Clark County Jail; and the investigation and prosecution of Clark County District Court Judge Donald Mosley, all of which have been identified with particularity in the Subpoena to the Las Vegas Metropolitan Police Department, attached hereto as Exhibit 1.

2. **Office of the District Attorney for Clark County.** Seeking the production of documents relating to the investigation and prosecution of Petitioner in this and juvenile matters; the policies and procedures developed and utilized by the Clark County District Attorney for determining whether to allege special circumstances in homicide cases and deciding whether to prosecute a homicide case as a capital case, the policies governing the handling of potential conflicts of interest, and the policies governing the permissible scope of argument in capital cases; and documents relating to any arrest, investigation or prosecution of Clark County District Court Judge Donald Mosley, all of which have been identified with particularity in the Subpoena to the Clark County District Attorney's Office, attached hereto as Exhibit 2.

3. **Deposition of District Court Judge Donald Mosley.** Seeking information about Judge Mosley's bias in Petitioner's case, his investigation and prosecution by state and federal law enforcement agencies, the Nevada State Bar, and the Nevada Judicial Disciplinary Commission, and his fitness to serve in Petitioner's case.

4. **Clark County Coroner's Office.** Seeking the production of documents relating to the investigation and prosecution of the capital case against Petitioner, including all documents relating to the autopsies of Carl and Colleen Gordon, as set out in the Subpoena to the Clark County Coroner's Office, attached hereto as Exhibit 3.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

5. **Depositions of Deputy District Attorneys Dan Seaton and Melvyn Harmon**. Seeking information about the investigation and prosecution of Petitioner, the decision to seek the death penalty, the evidence available to the District Attorney's office and the policies of the Clark County District Attorney's office regarding prosecution of murder cases;

6. **Depositions of LVMPD officers Geary, Levos, and Berni**. Regarding the investigation of the murder of the Gordons, their contact with all witnesses in the case, their communications with the Clark County District Attorney's office, the Clark County Coroner's office and other agencies of law enforcement;

7. **Clark County Jury Commissioner's Office**. Seeking the production of documents relating to the jury selection process from 1980 through 1995, as set out in the Subpoena to the Clark County Jury Commissioner's Office, attached hereto as Exhibit 4;

8. **Nevada Department of Corrections**. Seeking the production of documents relating to the individuals convicted of first-degree murder from 1980 to 1995, as set out in the Subpoena to the Nevada Department of Corrections, attached hereto as Exhibit 5.

9. **Nevada Judicial Disciplinary Commission**. Seeking all records relating to any complaint made against Judge Donald Mosley, to the investigation of such complaints, to any other investigations of Judge Mosley, all documents relating to the status or fitness of Judge Mosley, all actions or recommendations for action taken or to be taken in regard to Judge Mosley, all internal memoranda regarding Judge Mosley and all files regarding Judge Mosley, all of which have been identified with particularity in the Subpoena to the Nevada Judicial Disciplinary Commission, attached hereto as Exhibit 6.

10. **Nevada Pardons Board**. Seeking all records of every application for pardon or clemency in any murder case since 1977, and all other records relating to such applications, including, without limitation, actions taken, recommendations made, correspondence, memoranda, files, notes, transcripts of hearings and any other record relating to

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

any such case, all of which have been identified with particularity in the Subpoena to the Nevada Pardons Board, attached hereto as Exhibit 7.

11. **Depositions of Nevada Supreme Court Justices and staff (current and past).** Seeking information and documents regarding Nevada Supreme Court review procedures and practices in capital cases.

12. **Nevada State Bar.** Seeking information and documents regarding ethical complaints and disciplinary proceedings concerning Dan Seaton or Melvyn Harmon.

The motion is supported by the accompanying Memorandum of Points and Authorities below, the entire record, including all pleadings, currently before this Court, and such other authorities and evidence as have been and may be presented at the hearing on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Petitioner requests leave to serve subpoenas duces tecum on and to depose third parties to obtain documents and information necessary to develop fully the facts and evidence supporting the claims alleged in the Supplemental Petition for Writ of Habeas Corpus. The documents Petitioner seeks are relevant to the legal claims in the Petition and, moreover, are central to the factual allegations respondent seems to dispute. Through discovery, Petitioner endeavors, inter alia, to clarify and narrow the disputed facts, expand the record with additional factual support to facilitate the Court's adjudication of the evidentiary hearing, ensure that Petitioner will be prepared to conduct that hearing as expeditiously as possible and permit this Court to adjudicate the merits of Petitioner's claims on a fully and fairly developed record.

The information Petitioner seeks is in the exclusive custody and control of the third parties from whom discovery is requested. Accordingly, Petitioner respectfully requests

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

this Court's permission to issue subpoenas to obtain necessary documents and testimony in support of his constitutional claims.

I. A HABEAS PETITIONER IS ENTITLED TO CONDUCT DISCOVERY UPON A SHOWING OF GOOD CAUSE

A habeas petitioner is "'entitled to careful consideration and plenary processing of [his claims], including full opportunity for presentation of the relevant facts,' which includes 'the benefit of compulsory process.'" Blackledge v. Allison, 431 U.S. 63, 82, 83, n.26, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (quoting Harris v. Nelson, 394 U.S. 286, 298 (1969)). Without discovery and the opportunity thereafter to develop the facts discovered, Petitioner cannot satisfy his obligation to "conduct a reasonable and diligent investigation" and based thereon, completely present his habeas claims to this Court. McCleskey v. Zant, 499 U.S. 467, 494 (1991); see also Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986). NRS § 34.780 provides that "a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so." Consequently, Petitioner respectfully requests access to this Court's subpoena power to compel disclosure of the information needed to create a fully developed factual record and, thereby, ensure a full and fair hearing on his constitutional claims.[1]

Although NRS § 34.780 has not yet been widely interpreted by the Nevada Supreme Court, it is virtually identical to Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts.[2] The United States Supreme Court has long held that federal

---

[1] In accordance with NRS 34.780(3), attached as Exhibits 1-5 to this Motion subpoenas which describe the documents sought to be produced.

[2] Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides:

> A party shall be entitled to invoke the process of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

district courts should authorize discovery proceedings whenever "necessary . . . in order that a fair and meaningful evidentiary hearing may be held." Harris v. Nelson, 394 U.S. 286, 300, 89 S.Ct. 1082, 1091, 22 L.Ed.2d 281 (1969). Indeed, the Court specified that district courts have the "duty . . . to provide the necessary facilities and procedures for an adequate inquiry" into any potentially viable claims raised by a habeas corpus petition, and into any claim that gives "reason to believe . . . [it] may, if the facts are fully developed . . . demonstrate that [the petitioner] is confined illegally." Id. In Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), the Supreme Court emphasized that a federal habeas petitioner is "'entitled to careful consideration and plenary processing of [his claim], including full opportunity for presentation of the relevant facts,'" which includes "the benefit of compulsory process." Id. at 82, 83 n.26 (quoting Harris v. Nelson, 394 U.S. at 298); see also Brown v. Vasquez, 952 F.2d 1164, 1167 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992).

The federal courts in habeas cases, using the "good cause" standard in Rule 6, routinely have permitted the type of discovery sought by Petitioner in this case. See, e.g., Coleman v. Zant, 708 F.2d 541, 547 (11th Cir. 1986) (permitting discovery since it was "unquestionably material" to the constitutional claims); Ward v. Gall, 865 F.2d 786, 787-88 (6th Cir. 1989) (permitting depositions and production of physical evidence); Ross v. Kemp, 785 F.2d 1467, 1469 (11th Cir. 1986) (permitting depositions and production of documents); United States ex rel. Williams v. Walker, 535 F.2d 383, 386 (7th Cir. 1976) (permitting depositions and affidavits); Wagner v. United States, 418 F.2d 618 (9th Cir. 1969) (permitting interrogatories and depositions); see also 1 J. Liebman, FEDERAL HABEAS PRACTICE AND PROCEDURE, § 19.4 at 518-26 (2nd Ed. 1994).

Indisputably, the requested discovery is relevant to a number of Petitioner's claims, including, for example, whether trial counsel rendered constitutionally deficient representation under the Sixth Amendment standard announced in Strickland v. Washington, 466

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).[3] Fundamentally, determining whether trial counsel's performance was reasonable depends, in part, on what trial counsel learned during his investigation of the case. Only after considering the results of any investigative efforts can counsel determine what steps necessarily must follow. Thus, it is not only what trial counsel actually knew, but also what trial counsel reasonably could have and should have known, that must inform the Court's analysis of deficient performance under Strickland. To learn what trial counsel reasonably could have and should have known, Petitioner must be permitted to conduct the investigation a reasonable defense attorney could have and should have conducted in this case. Such an investigation presumably would include, among other things, interviewing the percipient witnesses and following up on leads that indicated other suspects or alternative causes of death. It is only after conducting this type of investigation that the Court can determine whether trial counsel's decisions were "strategic" and, if so, whether such decisions were "sufficiently informed."

Much of the discovery that Petitioner seeks is the same discovery that the State was obligated to provide Petitioner's counsel at the time of trial or which grows out of the prosecutorial misconduct which pervaded the case. The State had a constitutional duty to disclose any evidence possessed by law enforcement regarding other suspects, all material gathered from any witness or potential witness or otherwise providing mitigating or impeachment evidence. See, e.g., Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); United States v. Montgomery, 998 F.2d 1468 (9th Cir. 1993) (reversing conviction because government failed to produce confidential informant when witness's testimony material

[3] The Court in Strickland set forth a two-part analysis for evaluating a claim of ineffective assistance of counsel: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." 466 U.S. at 687, 104 S.Ct. at 2064; see also Homick v. State, 112 Nev. 304, 913 P.2d 1280, 1285 (1996) (outlining requirements for ineffective assistance of counsel claim).

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

and favorable to defendant's entrapment defense); United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1993) (Brady violation required reversal of conviction when government withheld memorandum questioning informant's credibility and role in prosecution); Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) (Brady violation required habeas relief when state failed to disclose statements of accomplice made during a lie detector test); Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991) (habeas relief granted because prosecutor's failed to disclose that victim's property had been returned to victim's family and instead argued that property was stolen); Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996) (holding that State violated Constitution by failing to disclose exculpatory information and impeachment evidence). The State's obligation to disclose relevant information continues in habeas proceedings. See, e.g., Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992). It has been routine for the Clark County District Attorney's office to withhold evidence it was required to disclose to the defense. See, for example, Jiminez, supra.

Rule 6 of the Rules Governing § 2254 Cases in the United States District Courts ("Rule 6") provides that a party in a habeas proceeding "shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."[4] A habeas petitioner establishes "good cause" if the specific factual allegations before the court show reason to believe that petitioner may, if the facts are fully developed, be able to demonstrate the unlawfulness of his confinement and entitlement to relief, and petitioner cannot otherwise obtain access to the necessary facts, information, or evidence. Bracy v.

[4] Rule 6 derives from Harris v. Nelson, in which the United States Supreme Court held that federal courts have the power, pursuant to the All Writs Act, 28 U.S.C. § 1651, to permit a habeas corpus petitioner to conduct discovery as part of their judicial "duty . . . to provide the necessary facilities and procedures for an adequate inquiry" into potentially meritorious claims. 394 U.S. 286, 300, 89 S. Ct. 1082, 1091 (1969); see also id. at 300, 89 S.Ct. at 1091 (discovery required "as law and justice require").

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Gramley, 520 U.S. 899, 908-09, 117 S.Ct. 1793, 1799-99 (1997); see also Jones v. Wood, 114 F.3d 1002, 1009 (9th Cir. 1997) ("discovery is available to habeas petitioners at the discretion of the district court judge for good case shown"); Toney v. Gammon, 79 F.3d 693, 700 (8th Cir. 1996) ("[w]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry").

Good cause is shown even if Petitioner's allegations support "only a theory . . . [that] is not supported by any solid evidence" at the time of the discovery request. Bracy, 520 U.S. at 908, 117 S. Ct. at 1799.. Thus, a petitioner need not establish a right to relief or even a right to an evidentiary hearing to be entitled to conduct discovery. See, e.g., Jones, 114 F.3d at 1009. Indeed, Rule 6(a)'s good cause standard permits the use of discovery to establish a prima facie claim for relief. As the Supreme Court recently recognized, "it may well be . . . that petitioner will be unable to obtain evidence sufficient to" establish the claim, but if specific allegations are made that suggest petitioner may be able to demonstrate a right to relief, good cause is established and the district court has a duty to allow discovery. Bracy, 520 U.S. at 908, 117 S.Ct. at 1799; see also Blackledge v. Allison, 431 U.S. 63, 76, 97 S.Ct. 1621, 1630 (1977) (district court should consider ordering discovery whenever claim on which discovery is sought is not so "'palpably incredible' or 'patently frivolous or false' as to warrant summary dismissal") (quoting Machibroda v. United States, 368 U.S. 487, 495, 82 S.Ct. 510, 514 (1962), and Herman v. Claudy, 350 U.S. 116, 119, 76 S.Ct. 223 (1956)).

Consequently, a habeas petitioner is entitled to discovery whenever it is necessary to a fair, rounded, full development of material facts. See, e.g., Bracy, 520 U.S. at 904, 117 S. Ct. at 1797 (discovery warranted whenever the requested information relates to the "'essential elements'" of the claims in the petition); Jones, 114 F.3d at 1009 (district court grant of summary judgment reversed to permit discovery in support of ineffective assistance of counsel claim);

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995) (because evidence "suggests a strong possibility" of prejudice from counsel's omissions, petitioner's claim withstands a motion for summary judgment and requires discovery "to fully develop the facts"); East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1995) (petitioner established a prima facie due process claim and was entitled to discovery from facts giving rise to the inference that a private prosecutor effectively controlled the prosecution).

These rulings stem in part from the recognition that discovery is a means of achieving reliable fact finding. See Hickman v. Taylor, 329 U.S. 495, 501, 67 S.Ct. 385 (1947). Affording habeas petitioners access to discovery tools is particularly important in capital cases because of the heightened requirements for reliability and fairness. See McFarland v. Scott, 512 U.S. 849, 859, 114 S.Ct. 2568, 2574 (1994) (noting Congressional recognition of the "particularly important" role of habeas corpus proceedings "in promoting fundamental fairness in the imposition of the death penalty"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991 (1976) ("Because of th[e] qualitative difference [between a sentence of life and a sentence of death] there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

II. GOOD CAUSE EXISTS TO WARRANT THE DISCOVERY SOUGHT BECAUSE IT IS MATERIAL TO PETITIONER'S CLAIMS FOR RELIEF

The Petition contains thirty-six prima facie claims for relief, at least nineteen of which require factual development at an evidentiary hearing. See Motion for Evidentiary Hearing filed herewith. Petitioner is entitled to conduct discovery with respect to these claims because the allegations in his Petition provide "reason to believe" that he "may" be able to

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

demonstrate his entitlement to relief once he is able to garner, develop and present evidence sufficient to support those allegations. Bracy, 520 U.S. at 908-09, 117 S.Ct. at 1798-99.

A. The requested information directly relates to the legal and factual allegations in the petition.

Petitioner seeks discovery on nineteen of his claims, each of which falls into at least one of three broad categories: (1) documents and information related to the investigation and prosecution of Petitioner for capital murder and juvenile delinquency matters involving Petitioner, including the prosecutorial misconduct that was documented in his case, the records of the prosecutors who handled the case and the dealings with witnesses and potential witnesses in the case; (2) documents related and information related to the procedures followed by the Nevada courts in this and other murder cases, including the Clark County jury selection process, the election of judges, the Nevada appellate review process, the Nevada clemency process, the validity of the death penalty in this and other cases and the particular rulings and procedures followed in this case; (3) documents and information related to the handling of this case by each lawyer who represented Petitioner at any stage. These materials are relevant to the claims in the Petition because they "bear[] on or reasonably could lead to other matters that could bear on any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380 (1978).

1. Documents and Information Relating to the Investigation and Prosecution of Petitioner for Capital Murder and Juvenile Matters.

Representing the majority of Petitioner's requests, this category of information includes (1) documents relating to the capital crime and the prosecution of Petitioner and (2) documents relating to Petitioner's confinement in the Clark County Detention Center awaiting trial. The requests include all investigation reports, witness statements, requests for evidence analysis and any results of that analysis, and any other material relating to the investigation and

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

prosecution of these matters produced or maintained by various law enforcement agencies or by the Clark County District Attorney's Office.

This information was discoverable prior to and during petitioner's trial, see, e.g., Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1964), and was the subject of a discovery motion filed by Petitioner's counsel (3 ROA 487-492). Moreover, such information is the subject of the State's continuing duty to disclose "exculpatory evidence relevant to the instant habeas corpus proceeding." Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992).

The requested documents, relating to the investigation and prosecution of the capital crime, the aggravating evidence introduced at trial, and potential mitigating evidence, are directly relevant to virtually every claim in the Petition and are especially relevant to those claims for which an evidentiary hearing is requested. See, e.g., Petition, Claims 1, 2, 4, 5-8, 10, 11, 20, 21, 25, 26, 29, 30-33, 36. Petitioner unquestionably is entitled to discover law enforcement information, including lab notes and reports, coroner reports, and probation reports, relating to the investigation and prosecution for crimes that are challenged in the Petition. See, e.g., Warden v. Gall, 865 F.2d 786, 787-88 (6th Cir. 1989) (depositions, police notes, crime laboratory notes); Ross v. Kemp, 785 F.2d 1467, 1469 (11th Cir. 1986) (production of documents); East, 55 F.3d at 1002 (prosecutor's files and depositions); Gaitan-Campanioni v. Thornburgh, 777 F. Supp. 1355, 1356 (E.D. Tex. 1991) (granting discovery through interrogatories and document requests and noting that "the court should not hesitate to allow discovery, where it will help illuminate the issues underlying the applicant's claim").

The documents relating to the capital crime and the prosecution of Petitioner are also relevant to whether Petitioner was deprived of his Sixth Amendment rights (Claims 4, 10, 33). The Petition alleges, inter alia, that trial counsel rendered constitutionally deficient representation by failing (1) to investigate and pursue evidence material to Petitioner's innocence; (2) to investigate and introduce, as evidence in mitigation, Petitioner's mental disabilities, the abuse he suffered at the hands of his parents and others, and the multi-

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

generational patterns of abuse and mental illness evident in Petitioner's family. The documents requested are essential to the determination of the scope of trial counsel's deficient performance: to analyze adequately whether trial counsel was constitutionally ineffective, it is necessary to document what records – including records gathered by the prosecution and subject to discovery before trial – were available to trial counsel.[5]

As a practical matter, the fact that law enforcement agencies in Clark County often fail to abide by their constitutional obligations in providing discovery may have something to do with the labyrinthine structure of their records-keeping procedures generally. The Custodian of Records of the Las Vegas Metropolitan Police Department ("LVMPD"), who was recently deposed in another capital habeas corpus case from this district, testified that the "Records Section" of the LVMPD is not the only division of that agency in which records are kept. Records are also kept in the various sub-divisions themselves, including the homicide division, the fingerprint division, the photolab, the criminalistics division, the evidence vault, Metro communications and the Clark County Detention Center Records Division. Deposition of Arlene Ralbovsky, December 7, 1998, pp. 15-16, 30-31, filed herewith. In addition, the Technical Services Division, Information Services Systems and the Special Operations Division maintain their own records. Deposition of Arlene Ralbovsky, January 28, 1999, pp. 5-6, 8-9. Detective and investigator notes, as well as their daily logs, are kept with the detectives and investigators at the Investigative Bureau. Id. at 14, 50. The LVMPD's homicide section retains its own "homicide file," which is kept at the detective bureau and is not provided to the Records Section unless and until the detective on the case releases all or part of the file. Id. at 8-9. No

---

[5] The Petition also alleges that trial counsel failed to object to prosecutorial misconduct in closing arguments. To support Petitioner's claims that such misconduct did occur, the subpoena to the Clark County District Attorney also seeks documents relating to the training prosecutors received on the scope of permissible arguments in capital murder trials prior to and at the time of the investigation and prosecution of Petitioner. To explore the extent to which the prosecutor intended to make these arguments and thus deprive petitioner of his constitutional rights, Petitioner should be afforded the opportunity to review pertinent training materials maintained by the office.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

one at the Clark County District Attorney's Office routinely reviews what are in the LVMPD files. Id. at 45-46. Defense attorneys are never permitted to examine them. Id. at 48. No one in the LVMPD Records Section examines the files of other LVMPD "records" repositories to see what materials are available in response to a subpoena or other request. Ralbovsky Depo., January 28, 1999, p. 26, filed herewith. Some records, such as informant files, are kept under lock and key and are never provided and they are not stored in the Police Records Section. Id. at 56-57.

A similar situation exists with respect to the records kept by the Clark County District Attorney's Office and the Clark County Detention Center. The District Attorney's various specialty units maintain their own files, and the materials in their files pertaining to the LVMPD include whatever the police provide to the District Attorney. Deposition of Sharon Dean, Clark County District Attorney's Custodian of Records, October 15, 1998, pp. 22-23, filed herewith. According to the District Attorney's records custodian, the LVMPD is relied upon to provide the Clark County District Attorney's Office with everything in the LVMPD file. Id. at 22-23, 33. No one from the District Attorney's Office routinely examines the files of the LVMPD to ensure compliance with that expectation. Id. at 22-23.

With respect to the records of the Clark County Detention Center, a sub-division of the Las Vegas Metropolitan Police Department, a subpoena for "all records" will likely yield a copy of the "inmate file" and "official" classification files only, but not any materials in the possession of the unofficial files of the Classification Section, Business Record Section, and Medical and Mental Health Sections. Deposition of Patricia Schmitt, Clark County Detention Center Custodian of Records, December 7, 1998, pp. 9-12, 16, 32-33, 37-38, 41, 72 and 87 filed herewith. Nor will the request yield any materials contained in that agency's "unofficial files," that can remain in the possession of either the lieutenant who supervises the classification section, or in the personal custody of one of the other captains or lieutenants. Id. at 12, 16. Schmitt Depo., January 28, 1999, pp. 40-42, 53-54.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

2. Documents and Information Relating to the Procedures of the Nevada Criminal Justice System as it Relates to this and Other Murder Cases.

Petitioner seeks documents relating to the Clark County jury selection process, which is the subject of Claim 8 in the Petition. As detailed in the Petition, the Clark County jury selection procedures produced jury venires that grossly underrepresented African Americans. See Petition at p. 40. The discovery Petitioner seeks is precisely the type of information that habeas petitioners have been permitted to obtain in similar cases. See, e.g., Thomas v. Borg, 159 F.3d 1147, 1148 (9th Cir. 1998) (noting that district court granted discovery regarding jury selection process); Davis v. Warden, 867 F.2d 1003, 1005 (7th Cir.) (noting district court granted habeas petitioner leave to depose county jury supervisor), cert. denied, 493 U.S. 920 (1989); Ross v. Kemp, 785 F.2d 1467, 1469 (11th Cir. 1986) (noting district court granted permission to discover jury lists and selection procedures).

Petitioner also seeks documents relating to Petitioner's claim that the Clark County District Attorney made arbitrary and capricious capital charging decisions. Consequently, unconstitutional factors such as gender, race, age, and ethnicity contributed to all charging decisions, including the charging decision made in Petitioner's case. The documents maintained by the District Attorney's Office relating to charging will illuminate the degree to which impermissible factors shaped the charging decisions. Accordingly, Petitioner requests the opportunity to subpoena these records.

Petitioner seeks to subpoena all documents identifying the persons, dates of judgment and offense, county of commitment, and sentences received by persons convicted of first-degree murder within Nevada during the time period of January 1, 1980, through December 31, 1995, as well as the probation reports relating to the commitment offenses for this period. These documents will support Petitioner's Claim 21: that Nevada's death penalty scheme, at the time of Petitioner's conviction and sentence of death, unconstitutionally failed to narrow sufficiently the class of capital offenders, resulting in the capricious and arbitrary imposition of

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

the death penalty in Petitioner's case. Petitioner specifically alleges that Nevada's death penalty scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than did the pre-Furman death penalty schemes.

The question of whether or not a death penalty scheme narrows the death-eligible class sufficiently to produce an acceptable death sentence ratio under Furman depends upon empirical data. The data crucial to Petitioner's claim is contained in documents within the possession of the Department of Corrections. The documents sought by Petitioner will show the number of persons sentenced to prison upon a conviction of first degree murder during the relevant time period, as well as the sentence received, a factual summary of the offense, and whether or not a special circumstance finding was or could have been made. From this data, Petitioner can make the requisite comparison between the percentage of persons convicted of first degree murder who were death-eligible under the statutory scheme and the percentage of persons who actually received a sentence of death.

3. Documents and Information Relating to the Representation of Petitioner in this Case.

Petitioner has presented extensive and detailed claims of ineffective assistance of counsel throughout the direct trial and appeal phases of his case. Those range from the lack of time and resources available to Randall Pike to investigate the crime and to assemble any mitigation evidence, to the failure of appellate counsel to adequately pursue issues on appeal. In order to fully support those claims, it is necessary to show what might have been found had counsel looked or asked, such as jail and prison records, forensic records, jury selection procedures and virtually all of the documents and information sought herein.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

B. The Subpoenas Are Directed at Agencies That Possess the Necessary Information.

1. Las Vegas Metropolitan Police Department.

The LVMPD investigated this crime and was involved in the dealings with witnesses. Petitioner has learned that statements were made by witnesses and other exculpatory material obtained by LVMPD that were not made available to Petitioner. LVMPD has a history of fragmenting evidence so that not all of it is turned over, and only by subpoenaing all such evidence can Petitioner adequately protect his Brady rights. LVMPD also controls records concerning Petitioner's detention in the Clark County Detention Center and records regarding the investigation and prosecution of Clark County District Court Judge Donald Mosley, who was ultimately removed from the case for bias.

2. Office of the District Attorney for Clark County.

The District Attorney's office has documents relating to the investigation and prosecution of Petitioner in this and juvenile matters. Likewise, it has the policies and procedures developed and utilized by the Clark County District Attorney for determining whether to allege special circumstances in homicide cases, deciding whether to prosecute a homicide case as a capital case, and the policies governing the permissible scope of argument in capital cases; and documents relating to any arrest, investigation or prosecution of Clark County District Court Judge Donald Mosley.

3. District Court Judge Donald Mosley.

Judge Mosley was removed from this case for bias. He has had numerous problems with law enforcement and with the Bar and with the Judicial Disciplinary Commission. His testimony will be essential to understanding documents obtained from those bodies as well as his bias in this case.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

4. Clark County Coroner's Office.

The Coroner's office performed the autopsies on the victims and has pictures of the crime scene, which are necessary for any analysis of bullet trajectories, blood spatters and the like. None of these matters were investigated or analyzed by trial counsel.

5. Depositions of Deputy District Attorneys Dan Seaton and Melvyn Harmon.

Petitioner is informed and believes that Seaton and Harmon were involved in the decision to seek the death penalty, and certainly know what evidence was available to the District Attorney's Office, as well as the policies of the Clark County District Attorney's office regarding prosecution of murder cases.

6. Depositions of LVMPD officers Geary, Levos, and Berni.

These officers conducted the investigation of the murder of the Gordons, had contact with all witnesses in the case, communicated with the Clark County District Attorney's Office, the Clark County Coroner's Office and other agencies of law enforcement.

7. Clark County Jury Commissioner's Office.

This is the only place that has all relevant documents relating to the jury selection process from 1980 through 1995, which are relevant to Petitioner's claims of racially improper jury venires.

8. Nevada Department of Corrections.

This agency has documents relating to the individuals convicted of first-degree murder from 1980 to 1995, which are relevant to Petitioner's claims that Nevada's death penalty scheme is arbitrary and capricious.

9. Nevada Judicial Disciplinary Commission.

The Commission has records relating to complaints made against Judge Donald Mosley, investigation of such complaints, other investigations of Judge Mosley, documents relating to the status or fitness of Judge Mosley, actions or recommendations for action taken or

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

to be taken in regard to Judge Mosley, internal memoranda regarding Judge Mosley and files regarding Judge Mosley. These documents go to Petitioner's claim of bias by Judge Mosley.

10. Nevada Pardons Board.

The Board has records of clemency proceedings in all murder cases since 1977, including actions taken, recommendations made, correspondence, memoranda, files, notes, transcripts of hearings and any other record relating to any such case.

11. Nevada Supreme Court.

Only the members of the Court and staff (current and past) will know precisely how the Court handled capital cases. This information is necessary to support Petitioner's claims that the review process in Nevada is constitutionally inadequate.

12. Nevada State Bar. Dan Seaton has been referred to the Bar because of his repeated prosecutorial misconduct. See State v. Howard, 106 Nev. 713, 800 P.2d 175 (1990). Petitioner believes Mr. Harmon has likewise been disciplined by the Bar. Only the Bar has the records to investigate these matters.

III. PETITIONER IS ENTITLED TO DISCOVERY BECAUSE THE NEEDED INFORMATION CANNOT BE OBTAINED WITHOUT ACCESS TO THIS COURT'S SUBPOENA POWER

The discovery sought is all in the hands of governmental agencies and employees who have a vested interest in seeing Petitioner executed. Without the intervention of this Court, the evidence necessary to prove his claims is not available to Petitioner.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

CONCLUSION

Given the severity of the sentence imposed in this case, the necessity of this information to the full development and support of Petitioner's claims, the absence of prior discovery in state court, and the fact that Petitioner cannot obtain this material through other means, Petitioner's motion for leave to conduct discovery should be granted.

DATED this 16th day of May, 2000.

DAVIS WRIGHT TREMAINE LLP

By _____
ROBERT D. NEWELL
Of Attorneys for Petitioner Dale Edward Flanagan

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

SUBPOENA
Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Las Vegas Metropolitan Police Department
400 Stewart Avenue
Las Vegas, Nevada 89101
702-795-3111

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the ____ day of May, 2000, at the hour of ___M. in Department No. _____of the District Court, Clark County, Nevada. The address where you are required to appear is the Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

SHIRLEY PARRAGUIRRE, CLERK OF COURT

By:_____
DEPUTY CLERK DATE

Issued at the request of:

Dale Edward Flanagan, Petitioner

EXHIBIT 1
PAGE 1 OF 3

F:\99\99-81680\REPLY\SUBPOENA - LVMPD.DOC
Portland

EXHIBIT 1 – Las Vegas Metropolitan Police Department

1. All records, including but not limited to police reports, notes, arrest records, 911 tapes, and electronic communications, of contact with Dale Edward Flanagan.

2. All records, including but not limited to police reports, notes, arrest records, 911 tapes, and electronic communications, of contact with anyone at the scene of the murders of Carl and Colleen Gordon.

3. All records, including but not limited to police reports, notes, arrest records, 911 tapes, electronic communications, internal memoranda, press releases, forensic tests or reports, and residue of tests, relating in any way to the investigation of the murders of Carl and Colleen Gordon.

4. All records, including but not limited to logs, statements of any kind whether oral, written, tape recorded, videotaped, or otherwise, and correspondence, investigator notes, telephone logs, and any and all materials relating to contact with or about witnesses, potential witnesses, persons of interest, suspects, or any other person with information relating to the murders of Carl and Colleen Gordon or to the investigation thereof.

5. All records, including but not limited to notes, internal memoranda, statements of policy and procedure, and medical records, relating to Dale Edward Flanagan's incarceration in the Clark County Detention Center or in any other institution.

6. All records, including but not limited to logs, notes, internal memoranda, and reports, relating to physical evidence gathered in the investigation of the murders of Carl and Colleen Gordon.

7. All records, including but not limited to police reports, notes, arrest records, 911 tapes, and electronic communications, of contact with Judge Donald Mosley.

8. All records, including but not limited to logs, statements of any kind whether oral, written, tape recorded, videotaped, or otherwise, and correspondence, relating to contact with

witnesses, potential witnesses, persons of interest, suspects, or any other person with information about Judge Donald Mosley.

9. All records, including but not limited to police reports, notes, arrest records, 911 tapes, and electronic communications, of any investigation of Judge Donald Mosley.

10. All records, including but not limited to notes, logs, and electronic communications, of any communication between the Las Vegas Metropolitan Police Department and the Clark County Jail, the Office of the District Attorney for Clark County, and the Clark County Coroner's Office relating in any way to the murders of Carl and Colleen Gordon.

11. All records, including but not limited to notes, logs, and electronic communications, of any communication between the Las Vegas Metropolitan Police Department and the Clark County Jail, the Office of the District Attorney for Clark County, and the Clark County Coroner's Office relating in any way to the investigation of Judge Donald Mosley.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

SUBPOENA
Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Office of the District Attorney for Clark County
200 South Third Street
Las Vegas, Nevada 89155
702-455-4711

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the ____ day of May, 2000, at the hour of ____M. in Department No. _____of the District Court, Clark County, Nevada. The address where you are required to appear is the Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

SHIRLEY PARRAGUIRRE, CLERK OF COURT

By:_____
DEPUTY CLERK DATE

Issued at the request of:

Dale Edward Flanagan, Petitioner

EXHIBIT 2
PAGE 1 OF 3

F:\99\99-81680\REPLY\SUBPOENA - CLARK DA.DOC
Portland

EXHIBIT 2 – Office of the District Attorney for Clark County

1. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to or mentioning Dale Edward Flanagan.

2. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to or mentioning the murders of Carl and Colleen Gordon.

3. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating in any way to physical evidence gathered pursuant to the investigation of the murders of Carl and Colleen Gordon.

4. All records, including but not limited to logs, statements of any kind whether oral, written, tape recorded, videotaped, or otherwise, correspondence, telephone records and messages, interview notes and any other material relating to contact with or about witnesses, potential witnesses, persons of interest, suspects, or any other person with information relating to the murders of Carl and Colleen Gordon.

5. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, concerning or relating to the Clark County District Attorney's policies and procedures for homicide cases from 1980 to 1995.

6. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, concerning or relating to statewide policies and procedures for homicide cases from 1980 to 1995.

7. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, concerning or relating to the Clark County District Attorney's policies and procedures for addressing conflicts of interest from 1980 to 1995.

8. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, concerning or relating to statewide policies and procedures for addressing conflicts of interest from 1980 to 1995.

9. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, concerning or relating to the Clark County District Attorney's policies and procedures for cases from 1980 to 1995 in which the defendant faced the death penalty.

10. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, concerning or relating to the statewide policies and procedures for cases from 1980 to 1995 in which the defendant faced the death penalty.

11. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, concerning any arrest of Judge Donald Mosley.

12. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, concerning any investigation of Judge Donald Mosley.

13. All records, including but not limited to notes, memoranda, correspondence, electronic communications, concerning any prosecution of Judge Donald Mosley.

14. All records, including but not limited to notes, logs, and electronic communications, of any communication between the Office of the District Attorney for Clark County and the Las Vegas Metropolitan Police Department, the Clark County Jail, and the Clark County Coroner's Office relating in any way to the murders of Carl and Colleen Gordon.

15. All records, including but not limited to notes, logs, and electronic communications, of any communication between the Office of the District Attorney for Clark County and the Las Vegas Metropolitan Police Department, the Clark County Jail, and the Clark County Coroner's Office relating in any way to the investigation of Judge Donald Mosley.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

SUBPOENA
Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Clark County Coroner's Office
1704 Pinto Lane
Las Vegas, Nevada 89106
702-455-3210

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the ____ day of May, 2000, at the hour of ____M. in Department No. _____of the District Court, Clark County, Nevada. The address where you are required to appear is the Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

SHIRLEY PARRAGUIRRE, CLERK OF COURT

By:_____
DEPUTY CLERK DATE

Issued at the request of:

Dale Edward Flanagan, Petitioner

EXHIBIT 3
PAGE 1 OF 2

F:\99\99-81680\REPLY\SUBPOENA - CLARK CORONER'S OFC.DOC
Portland

EXHIBIT 3 – Clark County Coroner's Office

1. All records, including but not limited to notes, memoranda, lab/forensic tests and test results, photographs, correspondence, and electronic communications, relating to the autopsy of Carl Gordon.

2. All records, including but not limited to notes, memoranda, photographs or negatives, lab/forensic tests and test results, photographs, correspondence, and electronic communications, relating to the autopsy of Colleen Gordon.

3. All records, including but not limited to notes, memoranda, photographs and correspondence, concerning physical evidence in any way related to the murders of Carl and Colleen Gordon.

4. All records, including but not limited to notes, logs, and electronic communications, of any communication between the Clark County Coroner's Office and the Office of the District Attorney for Clark County, the Las Vegas Metropolitan Police Department, and the Clark County Jail relating in any way to the murders of Carl and Colleen Gordon.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

SUBPOENA
Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Clark County Jury Commissioner's Office
200 South Third Street
Las Vegas, Nevada 89155

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the ____ day of May, 2000, at the hour of ____M. in Department No. _____of the District Court, Clark County, Nevada. The address where you are required to appear is the Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

SHIRLEY PARRAGUIRRE, CLERK OF COURT

By:_____
DEPUTY CLERK DATE

Issued at the request of:

Dale Edward Flanagan, Petitioner

EXHIBIT 4
PAGE 1 OF 2

F:\99\99-81680\REPLY\SUBPOENA - CLARK JURY COMM OFC.DOC
Portland

EXHIBIT 4 – Clark County Jury Commissioner's Office

1. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to the policies and procedures for jury selection in Clark County from 1980 through 1995.

2. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to studies of the Clark County jury selection process.

3. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to the policies and procedures for jury selection in Nevada generally from 1980 through 1995.

4. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to or mentioning discrimination or allegations of discrimination in the Clark County jury selection process.

5. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to or mentioning discrimination or allegations of discrimination in the jury selection process in Nevada generally.

6. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to the demographics of Clark County jury pools from 1980 through 1995.

7. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to the demographics of Clark County juries from 1980 through 1995.

8. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, relating to the demographics of Clark County from 1980 through 1995.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

SUBPOENA
Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Nevada Department of Corrections
c/o Department of Prisons
550 Snyder Avenue
Carson City, Nevada 89702
775-887-3285

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the ____ day of May, 2000, at the hour of ____M. in Department No. _____of the District Court, Clark County, Nevada. The address where you are required to appear is the Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

SHIRLEY PARRAGUIRRE, CLERK OF COURT

By:_____
DEPUTY CLERK DATE

Issued at the request of:

Dale Edward Flanagan, Petitioner

EXHIBIT 5
PAGE 1 OF 2

F:\99\99-81680\REPLY\SUBPOENA - NEVADA DEPT CORRECTIONS.DOC
Portland

EXHIBIT 5 – Nevada Department of Corrections

1. A list of all inmates convicted of first-degree murder between 1980 and 1995.

2. A list of all inmates sentenced to death between 1980 and 1995.

3. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to state or federal habeas proceedings initiated by inmates convicted of first-degree murder between 1980 and 1995.

4. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to the direct appeals of inmates convicted of first-degree murder between 1980 and 1995.

5. All intake records, including but not limited to memoranda and reports, of all inmates convicted of first-degree murder between 1980 and 1995 but **not including** medical, disciplinary, visitation, and other records not related to the inmate's conviction or sentence.

6. All records, including but not limited to notes, internal memoranda, statements of policy and procedure, and medical records, relating to Dale Edward Flanagan's incarceration in any of the penal institutions controlled by the Nevada Department of Corrections.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

SUBPOENA
Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Nevada Judicial Disciplinary Commission
1050 East William
Carson City, Nevada 89702
775-687-4017

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the ____ day of May, 2000, at the hour of ____M. in Department No. _____of the District Court, Clark County, Nevada. The address where you are required to appear is the Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

SHIRLEY PARRAGUIRRE, CLERK OF COURT

By:_____
DEPUTY CLERK DATE

Issued at the request of:

Dale Edward Flanagan, Petitioner

EXHIBIT 6
PAGE 1 OF 2

F:\99\99-81680\REPLY\SUBPOENA - NEV JUDICIAL DISC COMM.DOC
Portland

EXHIBIT 6 – Nevada Judicial Disciplinary Commission

1. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to complaints against Judge Donald Mosley.

2. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to any investigation of Judge Mosley.

3. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to the status or fitness of Judge Mosley.

4. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to Judge Mosley's performance as a judge.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

SUBPOENA
Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Nevada Pardons Board
c/o Department of Prisons
550 Snyder Avenue
Carson City, Nevada 89702
775-887-3285

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the ____ day of May, 2000, at the hour of ____M. in Department No. _____of the District Court, Clark County, Nevada. The address where you are required to appear is the Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

SHIRLEY PARRAGUIRRE, CLERK OF COURT

By:_____
DEPUTY CLERK DATE

Issued at the request of:

Dale Edward Flanagan, Petitioner

EXHIBIT 7
PAGE 1 OF 2

F:\99\99-81680\REPLY\SUBPOENA - NEV PARDONS BOARD.DOC
Portland

EXHIBIT 7 – Nevada Pardons Board

1. All records, including but not limited to notes, memoranda, correspondence, electronic communications, files, transcripts, and applications, relating to inmates convicted of first-degree murder who have filed for a pardon since 1977.

2. All records, including but not limited to notes, memoranda, correspondence, electronic communications, files, transcripts, and applications, relating to inmates convicted of first-degree murder who have filed for clemency since 1977.

3. All records, including but not limited to notes, memoranda, correspondence, and electronic communications, of the Nevada Pardons Board policies and procedures for addressing pardon and clemency applications from 1977 to the present.

4. All records, including but not limited to notes, logs, and electronic communications, of any communication between the Nevada Pardons Board and the Office of the District Attorney for Clark County, the Nevada Department of Justice, and the Governor of Nevada relating to pardon and clemency applications where the defendant was convicted of first-degree murder from 1977 to the present.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

SUBPOENA
Duces Tecum

THE STATE OF NEVADA SENDS GREETINGS TO:

Nevada State Bar
600 E. Charleston
Reno, Nevada 89104
775-329-4100

YOU ARE HEREBY COMMANDED, that all and Singular, business and excuses set aside, you appear and attend on the ____ day of May, 2000, at the hour of ____M. in Department No. _____of the District Court, Clark County, Nevada. The address where you are required to appear is the Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada. You are required to bring with you at the time of your appearance any items set forth on the reverse side of this subpoena. If you fail to attend, you will be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear and in addition forfeit One Hundred ($100.00).

SHIRLEY PARRAGUIRRE, CLERK OF COURT

By:_____
DEPUTY CLERK DATE

Issued at the request of:

Dale Edward Flanagan, Petitioner

EXHIBIT 8
PAGE 1 OF 2

F:\99\99-81680\REPLY\SUBPOENA - NEVADA STATE BAR.DOC
Portland

EXHIBIT 8 – Nevada State Bar

1. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to complaints against Dan Seaton.

2. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to complaints against Melvyn Harmon.

3. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to any investigation of Dan Seaton.

4. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to any investigation of Melvyn Harmon.

5. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to the status or fitness of Dan Seaton.

6. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to the status or fitness of Melvyn Harmon.

7. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to any disciplinary or remedial action taken as to Dan Seaton.

8. All records, including but not limited to notes, memoranda, correspondence, electronic communications, and court filings, relating to any disciplinary or remedial action taken as to Melvyn Harmon.

ORIGINAL

FILED

MAY 17 2 19 PM '00

CLERK

0001

CAL J. POTTER III
Nevada Bar No. 001988
POTTER LAW OFFICES
1125 Shadow Lane
Las Vegas, Nevada 89102
Telephone (702) 385-1954

ROBERT D. NEWELL
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201
Telephone (503) 241-2300

Attorney for Petitioner
Dale Edward Flanagan

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA; and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

DATE: May 31, 2000
TIME: 9:00 a.m.

PETITIONER'S MOTION FOR EVIDENTIARY HEARING

COMES NOW, Petitioner, DALE EDWARD FLANAGAN, by and through his attorneys, CAL J. POTTER, III of POTTER LAW OFFICES, and ROBERT D. NEWELL of DAVIS WRIGHT TREMAINE LLP, and moves this Honorable Court for an Order granting Petitioner an Evidentiary Hearing.

///

///

RECEIVED
MAY 26 2000
COUNTY CLERK

CE42

CE31

DAVIS WRIGHT TREMAINE LLP
1300 S W Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

F:\99\99-81680\REPLY\MOT - EVIDENTIARY HRG-F.DOC
Portland

This Motion is made and based upon all the papers and pleadings on file herein, as well as the declarations, affidavits and exhibits filed herewith.

DATED this 16th day of May, 2000.

Respectfully Submitted,

DAVIS WRIGHT TREMAINE LLP

By _____
ROBERT D. NEWELL
Of Attorneys for Petitioner Dale Edward Flanagan

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the attached Motion for Evidentiary Hearing on for hearing before the above-entitled Court on the 31st day of May, 2000, at the hour of 9:00 a.m. or as soon thereafter as can be heard, in Department XI, at the Clark County Courthouse.

DATED this 16th day of May, 2000.

DAVIS WRIGHT TREMAINE LLP

By _____
ROBERT D. NEWELL
Of Attorneys for Petitioner Dale Edward Flanagan

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Although the scope of an evidentiary hearing ultimately may be narrowed by further fact development – including discovery,[1] investigation, and the parties' stipulation to uncontested factual issues – the claims particularized in the Petition constitute prima facie showings of colorable claims that, if proved, will entitled Petitioner to habeas corpus relief. Given the State's response to Petitioner's detailed allegations and the possession by State agencies and employees of much of the evidence which will support those claims, Petitioner must be afforded the opportunity before the State may enforce its death sentence to develop and prove the facts in support of his serious constitutional claims. See, e.g., Caro v. Vasquez, 165 F.3d 1223, 1226, 1228 (9th Cir. 1999) (holding that death-sentenced petitioner entitled to evidentiary hearing to determine whether he suffered brain damage as a result of his exposure to neurotoxicants and his personal background thereby to establish ineffective assistance of counsel for failure to investigate and present this evidence at the penalty phase), cert. denied, 490 U.S. 1040 (1999); Siripongs v. Calderon, 35 F.3d 1308, 1314 (9th Cir. 1994) (holding that district court erred in denying "colorable" ineffectiveness claim without affording death-sentenced petitioner discovery or an evidentiary hearing), cert. denied, 513 U.S. 1183 (1995).

[1] See NRS 34.780 (discovery may be had by leave of court); see also Bracy v. Gramley, 520 U.S. 899, 908-09, 117 S.Ct. 1793, 1799 (1997) (court has duty to provide procedures sufficient for an adequate inquiry where specific allegations show "reason to believe" petitioner is entitled to relief). Contemporaneous with this Motion, petitioner is filing a Motion for Discovery, which requests permission to issue subpoenas for documents and depositions relevant to the claims in the Petition.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

I.

THE LAW GOVERNING THE PROPRIETY OF AN EVIDENTIARY HEARING ON PETITIONER'S LEGAL CLAIMS

The United States Supreme Court has recognized that there "is no higher duty of a court . . . than the careful processing and adjudication of petitions for writs of habeas corpus." Harris v. Nelson, 394 U.S. at 292, 89 S.Ct. at 1086-87. In furtherance of this solemn duty, courts have "the power to receive evidence and try the facts anew" whenever a petitioner "alleges facts which, if proved, would entitled him to relief," Townsend v. Sain, 372 U.S. 293, 312, 83 S.Ct. 745, 757 (1963), overruled in part on other grounds; Keeney v. Tamayo-Reyes, 504 U.S. 1, 112, S.Ct. 1715 (1992); see also Rhoden v. Rowland, 10 F.3d 1457, 1460 (9th Cir. 1993) (reversing grant of summary judgment and remanding to permit petitioner to "develop the factual record"). The exercise of this power is a corollary to the concomitant "duty of the courts to provide the necessary facilities and procedures for an adequate inquiry" into the existence of potentially meritorious claims. Harris v. Nelson, 394 U.S. at 300, 89 S.Ct. at 1091.

The necessary fact-development procedures include all discovery mechanisms provided by the Nevada Rules of Civil Procedure (NRS § 34.780), expansion of the record (NRS § 34.790) and evidentiary hearing (NRS § 34.770). See, e.g., Bracey v. Gramley, 520 U.S. at 909, 117 S.Ct. at 1799 (error to dismiss petition without ordering discovery where allegations and record rebutted presumption that state officials acted lawfully); McCleskey v. Zant, 499 U.S. 467, 498-99, 111 S.Ct. 1454, 1472 (1991) (noting that petitioner who pleads potentially meritorious claim may "pursue the matter through the habeas process" and citing 28 U.S.C. § 2254, Rules 6-8); Townsend v. Sain, 372 U.S. at 312-13, 83 S.Ct. at 757 (evidentiary hearing required where necessary to a reliable determination of the facts). The Nevada statutory scheme requires an evidentiary hearing in this case. NRS § 34.820.

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

The Court should order an evidentiary hearing before adjudicating the merits of Petitioner's claims for two reasons. First, the statutory scheme does not permit the Court to grant the State's request for summary denial of review of Petitioner's claims:

> NRS 34.770, 34.800, and 34.810 provide for the manner in which the district court decides a post-conviction petition for a writ of habeas corpus. These statutes do not provide for summary judgment as a method of determining the merits of a post-conviction petition for a writ of habeas corpus.

Beets v. State, 110 Nev. 339, 341, 871 P.2d 357 (1994).

Second, the Court should proceed to the merits of Petitioner's claims because the State's response was untimely. The Petition was filed on November 29, 1999. The State's response was due on March 17, 2000. The State filed its response 11 days late, on March 28, 2000, without filing a timely motion for extension of time to respond or addressing in its response the reasons for untimeliness.

Several courts have construed the remedies for untimely response to petitions for habeas relief. In United States v. Scott, 507 F.2d 919, 924 (7th Cir. 1974), the Seventh Circuit Court of Appeals proceeded to the merits of Petitioner's petition sua sponte when the State both filed an untimely response and had failed to seek an extension of time in which to file. The Court suggested that other potential solutions included refusing to consider a tardy return or censoring the State's representative. Id.

Similarly, in Lemons v. O'Sullivan, 54 F.3d 357 (7th Cir. 1995), the State missed its deadline to respond without filing a motion for an extension of time. Id. at 364 n.7. The State subsequently filed its response 45 days later. While the Court declined to enter a default judgment in favor of Petitioner, it proceeded to review the merits of his petition.

Finally, in Bleitner v. Welborn, 15 F.3d 652 (7th Cir. 1994), the State filed a motion for extension of time in which to respond 18 days after its response was due. Upon review, the Court refused to grant Petitioner a default judgment as a disproportionate sanction for the State's untimely response; instead, it stated that where the State's response is untimely, the

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Court should proceed to the merits of the petition. Id. at 653; accord, Warner v. Parke, 96 F.3d 1450 (7th Cir. 1996, unpublished, copy attached); White v. Klitzkie, 1998 WL 964596 (Guam Dec. 16, 1998, unpublished, copy attached). "Thereafter, if the petition has no merit, the delay will have caused no prejudice to the petitioner." Bleitner, 15 F.3d at 653.

II.

THIS COURT SHOULD CONDUCT AN EVIDENTIARY HEARING ON NINETEEN CLAIMS

Petitioner is entitled to an evidentiary hearing on 19 of his 36 claims. Claims One and Four which will require substantive evidentiary development, and to some extent, some of the other claims subsumed within those broad categories. Claim One alleges a variety of instances of prosecutorial misconduct. Claim Two alleges payment of money to witnesses, which is closely related to and a part of the prosecutorial misconduct.

Claim Four alleges a host of acts and omissions which constitute ineffective assistance of counsel, including an extensive social history of Petitioner which was never developed or presented to any court. Separate ineffective assistance issues are raised in Claims Five (incompetence to stand trial), Six (change of venue), Ten (ineffective assistance on appeal) and Thirty-Three (failure to challenge jurors).

Each of these claims requires full factual development through discovery and an evidentiary hearing in order to effectively demonstrate to the Court the extensive violations of Petitioner's constitutional rights throughout this case.

Several of the other claims implicate issues of the constitutionality of court or justice system procedures such as Claim Seven (racial makeup of the jury), Eight (forced agreement on preemptory challenges), Eleven (adequacy of appellate review), Twenty (bias of the judge), Twenty-Five (cumulative error), Twenty-Nine (failure to sever), Thirty (unconstitutionality of Nevada clemency procedure), Thirty-One (defendant in shackles), and Thirty-Two (administration of death penalty by elected judges).

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Finally, several claims address the unconstitutionality of Nevada's death penalty scheme itself such as Twenty-One (death penalty administered in arbitrary and capricious fashion), Twenty-Six (death by lethal injection is cruel and unusual) and Thirty-Six (15 years on death rule is cruel and unusual).

In each and every one of these claims, it is essential that Petitioner have an evidentiary hearing in order to fully develop all of the facts that will demonstrate the unconstitutionality of the imposition of the death penalty in his case.

CONCLUSION

For the forgoing reasons, this Court should order an evidentiary hearing on Claims 1, 2, 4, 5, 6, 7, 8, 10, 11, 20, 21, 25, 26, 29, 30, 31, 32, 33 and 36 of the Petition.

Dated this 16th day of May, 2000.

Respectfully Submitted,

DAVIS WRIGHT TREMAINE LLP

By _____
ROBERT D. NEWELL
Of Attorneys for Petitioner Dale Edward Flanagan

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA7 Rule 53 for rules regarding the publication and citation of unpublished opinions.)

Roman E. WARNER, Petitioner-Appellant,
v.
Al C. PARKE, Superintendent, Respondent-Appellee, [FN]**

FN** Pursuant to Federal Rule of Appellate Procedure 43(c)(1), we substitute Warner's current custodian, Al C. Parke, Superintendent of the Indiana State Prison, for Robert A. Farley, former superintendent of that institution. The district court properly dismissed G. Michael Broglin, former Superintendent of the Reception Diagnostic Center, who no longer had custody of Warner.

No. 94-1726.

United States Court of Appeals, Seventh Circuit.

Submitted Aug. 29, 1996. [FN*]

FN* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed.R.App.P. 34(a); Cir.R. 34(f) (1995). No such statement having been filed, the appeal is submitted upon the briefs and record.

Decided Aug. 29, 1996.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division, No. 93 C 319; Allen Sharp, Chief Judge.

N.D.Ind.

AFFIRMED.

Before CUMMINGS, PELL and FLAUM, Circuit Judges.

ORDER

**1 The district court dismissed this case for failure to exhaust state court remedies and, in the alternative, for lack of merit. Warner claims that the State's delay in responding to the order to show cause entitles him to either waiver of the exhaustion requirement or a default judgment. In United States ex rel. Mattox v. Scott, 507 F.2d 919, 924 (7th Cir.1974) (per curiam), we recommended the former solution in cases of excessive delay. Thomas Quigley, the Deputy Attorney General who appeared for the State in both the district court and on appeal, frankly admits that the delays were extensive and without legal excuse. He also correctly points out that even now, Warner has an available state remedy to pursue. See Ind.P.C.R. 1, § 1(a)(5). We do not fault the district court for declining to grant a default judgment. However, as we will explain further, exhaustion will not bar review of the merits in this case. Since the petition is meritless, as the district court found, the judgment is affirmed. [FN1]

FN1. Although the petition is denied for lack of merit, it is a dismissal without prejudice. The State has not filed a cross-appeal, and therefore we will not modify the district court's judgment to expand the State's rights. Tredway v. Farley, 35 F.3d 288, 296 (7th Cir.1994), cert. denied, 115 S.Ct. 941 (1995).

I. Delay in the District Court.

Warner filed his federal petition on May 18, 1993. Two days later, the district court ordered the State to show cause by June 21, 1993 why the relief requested in the petition should not be granted. Over the course of the next nine months, the district court extended the deadline to respond five times. First, it extended the deadline sua sponte with a warning that a failure to timely respond would leave the court no choice but to grant the petition. Then Quigley filed a timely

motion to extend the time to respond due to the absence of the state court record and his upcoming vacation in July 1993. The court granted him an extension until August 23, 1993. Thereafter, it twice granted untimely motions for an extension of time, both of which were supported with affidavits detailing Quigley's heavy case load. One of these affidavits also mentioned another vacation in September 1993. Warner submitted a motion to deny each of the untimely motions by the State, and he requested either a default judgment or a ruling on his petition without the benefit of the State's response. The court declined to rule on the petition. After another failure by the State to respond, the court sua sponte granted another extension until February 11, 1994. Eventually, on February 22, 1994, a new Deputy Attorney General filed an appearance and a motion to file instanter the State's answer. On the same day, Warner filed a motion asking the court to grant the writ of habeas corpus because of the delay. The court granted the State's motion, and the State filed its answer on February 24, 1994. The court also referred the case to a magistrate judge to assess the need for sanctions against the State, but subsequently vacated the order without explanation. It then dismissed the petition. [FN2]

FN2. On its own motion, the district court improperly entered judgment on March 11, 1994, three days before the deadline for to Warner to respond. The court later denied his post-judgment request for a chance to respond, which it treated as a motion to reconsider. In addition, the State may have failed to comply with Lewis v. Faulkner, 689 F.2d 100 (7th Cir.1982). See Bryan v. Duckworth, 88 F.3d 431, 434 (7th Cir.1996). However, in light of Warner's allegations and arguments on appeal, these omissions are harmless. A remand is unnecessary.

Under Federal Rule of Civil Procedure 81(a)(2), the State must comply with the court's order to respond to a petition for habeas corpus relief "within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days...." However, two years after this provision was passed, Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts was adopted. Habeas Rule 4, which has the force of a superseding statute, "loosened up the deadline for responding." Bleitner v. Welborn, 15 F.3d 652, 653-54 (7th Cir.1993). The exercise of this additional discretion, which was instituted in view of the widespread overload of work in prosecutors' offices, is guided by the Federal Rules of Civil Procedure to the extent that they are not in conflict with the rules governing § 2254 cases. "[Federal Rule of Civil Procedure] 6(b)(2) allows a district judge (with inapplicable exceptions) to grant an untimely motion to extend a deadline, provided that the failure to file a timely motion was due to excusable neglect." Bleitner, 15 F.3d at 654.

**2 In Bleitner, the district court had found excusable neglect, and the petitioner failed to argue that it was inexcusable. Id. In contrast, in this case, the district court made no express finding at all with respect to the first untimely motion and incorrectly applied the lower "good cause" standard to the second untimely motion. Warner, convinced that Rule 81 entitles him to relief, protests the extensions without directly addressing the applicability of these varying standards. However, the State candidly admits that there is no legally recognized excuse for the delay. (Appellee's Br. at 10, 12.) Therefore, given the delay in this case, at least six months of which is completely unexcused (beginning with the deadline set when the court granted the first and only timely motion for an extension of time), we find that the broader time constraints created by Habeas Rule 4 were violated. The question remains one of deciding an appropriate remedy. We review the district court's denial of a motion for default judgment for an abuse of discretion. [FN3] Lemons v. O'Sullivan, 54 F.3d 357, 365 (7th Cir.), cert. denied, 116 S.Ct. 528 (1995).

FN3. On appeal, although Warner mentions in his lengthy summary of the district court proceedings that he had asserted a violation of due process in some of his motions, he frames his argument in terms of Fed.R.Civ.P. 81, and not as a due process claim. This court has said that "at some point

delay in the disposition of a petition for habeas corpus caused by the government's willfully refusing to file a response might infringe the petitioner's right to due process of law." Bleitner, 15 F.3d at 653; Ruiz v. Cady, 660 F.2d 337, 340-41 (7th Cir.1981) (dictum). By way of comparison, we recently held that due process does not require prompt resolution of state collateral attacks on convictions and that "[d]elay in processing that collateral claim does not make the continued imprisonment of the defendant unlawful, and hence, does not warrant federal habeas corpus relief." Montgomery v. Meloy, 1996 WL 392233, slip op. at *5-*6 (7th Cir. July 15, 1996). However, we need not address the due process dimension to the district court's delay.

Default judgment is an extreme sanction that is disfavored in habeas corpus cases. Id. at 364-65. In Scott, 507 F.2d at 924, we suggested that a district court encountering long delays by the respondent should ignore exhaustion and address the merits of the petition sua sponte rather than grant a default judgment. Other potential solutions include refusing to consider a tardy return or censuring the State's representative. Id. However, default judgment in a habeas corpus case is an extreme response, and other circuits have sharply curtailed its availability or even refused to contemplate it altogether. [FN4] In this circuit, such a default judgment remains an alternative in theory. The court did not abuse its discretion by refusing to grant one. In comparison, Warner's proposed alternative solution of waiving exhaustion strikes us as a viable means of remedying the error in this case, and we adopt it. Cf. Hale v. Lockhart, 903 F.2d 545, 547-48 (8th Cir.1990) (holding that seven month delay attributable to overworked state attorney general and recalcitrant court reporter did not suffice to violate due process and to merit default judgment, and distinguishing Jones v. Shell, 572 F.2d 1278, 1279-80 (8th Cir.1978), in which court ordered State to show cause why merits should not be reviewed in light of failure to raise exhaustion until after seven months of inexcusable delay).

FN4. Aziz v. LeFevre, 830 F.2d 184, 187 (11th Cir.1987); Bermudez v. Reid, 733 F.2d 18, 21-22 (2d Cir.), cert. denied, 469 U.S. 874 (1984); Allen v. Perini, 424 F.2d 134, 138 (6th Cir.1970), cert. denied, 400 U.S. 906 (1970); cf. also Broussard v. Lippman, 643 F.2d 1131, 1134 (5th Cir.), cert. denied, 452 U.S. 920 (1981).

A recent amendment to the habeas corpus statute, 28 U.S.C. § 2254(b)(3) (1996), states that a court may not deem a State to have waived exhaustion without the State's express consent. However, since Warner's petition lacks merit anyway and the State has not raised the issue, we need not decide whether subsection (b)(3) applies to Warner's pending appeal and, if so, whether it prohibits waiving the exhaustion requirement as a sanction. The amended statute states that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies in the courts of the State." 28 U.S.C. § 2254(b)(2) (1996). Thus, due to the petition's lack of merit, we may address the merits whether or not § 2254(b)(3) would ordinarily bar such a remedy.

II. The Merits.

**3 In 1974, an Indiana trial judge sentenced Warner to concurrent sentences of life imprisonment for kidnaping, two to twenty-one years for rape, and two to fourteen years for assault and battery with intent to kill. In 1991, he was paroled and received permission to move to Kentucky to find work. From Kentucky, he commenced the process to relocate to Tennessee. While on a two week travel permit to Tennessee, he forced a woman into her pick-up truck at gun point in a parking lot. Tennessee police arrested him on June 18, 1991. Within a day, Indiana authorities issued a parole violation warrant and sent it to the Tennessee authorities. A Tennessee grand jury later indicted him on various charges, and on March 6, 1992, he was convicted of aggravated assault and especially aggravated kidnaping. The Tennessee trial court sentenced him to respective terms of fifteen and sixty years to be served consecutively with each other and with his prior Indiana sentence.

Warner alleges that on March 17, 1992, he was forcibly taken by Indiana Department of Correction ("DOC") employees to Indiana's Reception Diagnostic Center without a warrant. He believes that he was transferred in order to prevent him from testifying at a hearing in a civil rights suit against a sheriff in Tennessee. The record contains a copy of a parole violation warrant dated June 18, 1991, which belies his assertion that no warrant ever existed. The summary of the preliminary hearing, which was held on March 26, 1992, also indicates that a parole violation warrant was "filed" on March 17, 1992. Although the summary states that Warner refused the assistance of a lay advocate, Warner contends that he was denied the assistance of counsel against his wishes. On May 5, 1992, the parole revocation hearing was held. Warner claims that he was denied counsel at this hearing as well. The parole board revoked his parole for a minimum of one year. When his case was reviewed the following year, the parole board denied his request for parole and declined to turn him over to Tennessee.

Warner objects to being returned to Indiana without a warrant or any compliance with extradition procedures. In particular, he relies on Indiana's Uniform Criminal Extradition Act ("UCEA"), Ind.Code § 35-33-10-3, and Indiana's Interstate Compact for Out-Of-State Probationers or Parolees, Ind.Code § 11-13-4-1. The former is merely a state statute, and federal habeas corpus relief "is not a remedy for errors of state law." [FN5] Montgomery, 1996 WL 392233, slip op. at *5. The latter, an interstate compact approved by Congress, operates as both state and federal law for the purposes of federal habeas corpus relief. 28 U.S.C. § 2254(a); see Reed v. Farley, 114 S.Ct. 2291, 2296 (1994). In order to obtain habeas corpus relief for a violation of the compact, Warner must show that the violation resulted in a complete miscarriage of justice. Reed, 114 S.Ct. at 2298 (noting prior rejection of collateral attack that "did not resul[t] in a complete miscarriage of justice or in a proceeding inconsistent with the rudimentary demands of fair procedure.") (citations and internal quotation marks omitted).

FN5. In Cuyler v. Adams, 449 U.S. 433, 449-50 (1981), the Supreme Court found that the Interstate Agreement on Detainers (IAD), another compact, implicitly incorporated the UCEA's pre-transfer hearing requirement as a matter of federal law. The IAD itself does not apply to transfers on the basis of parole violations. Carchman v. Nash, 473 U.S. 716 (1985). Warner does not argue that additional safeguards under the UCEA are incorporated by the compact for out-of-state parolees, and the language of that compact, see Ind.Code § 11-13-4-1(3), indicates that other extradition formalities would not apply.

**4 The compact states in pertinent part that

> duly accredited officers of a sending state may enter a receiving state and there apprehend and retake any person on probation or parole. Unless otherwise required by law, no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense. [FN6]

FN6. We assume, without deciding, that Tennessee qualifies as a "receiving state" within the meaning of the statute even though Kentucky had been formally designated as the receiving state. Cf. Louisiana v. Aronson, 252 A.2d 733, 734 (N.J.Ct.App.) (holding that New Jersey qualified as receiving state, even though New York was the intended receiving state), aff'd, 254 A.2d 786 (N.J.1969). When arrested, Warner had been in the process of transferring his parole to Tennessee, and, according to a letter from a parole board

assistant to the Indiana Parole Board, that state had already accepted supervision of him. (R. 31, Ex. 7 at 1.)

Ind.Code § 11-13-4-1(3). Despite Warner's assertions to the contrary, § 11-13-4-1(3) does not require Tennessee to hold him until his conviction is overturned or he has served his sentence in that state. There is nothing to suggest that Tennessee refused its consent (indeed the Tennessee trial court ordered Warner's return to Indiana), and Warner cannot assert Tennessee's privilege for his own purposes.

The nub of Warner's objection is the alleged failure of the Indiana DOC employees to identify themselves and to inform him of the basis for their authority to take him. Assuming that their actions violated the compact's proof of authority requirement, his return to Indiana did not constitute a fundamental miscarriage of justice. Before he was even sent to Kentucky, Warner agreed as a condition of his parole to waive any extradition proceedings. [FN7] As soon as Indiana officials learned of the arrest, they supplied the Tennessee officials with a parole violation warrant for retaking Warner. His convictions in Tennessee clearly provided probable cause for retaking him, and the compact itself barred any attacks in the Tennessee courts on Indiana's decision. Moreover, the Tennessee court expressly ordered that Warner would be returned to Indiana before serving his Tennessee sentence. Warner concedes that the individuals to whom he was turned over were Indiana DOC employees. He contends that the parole violation warrant was not executed by service upon him. Cf. Moody v. Daggett, 429 U.S. 78, 79, 81 (1976). However, neither this omission, to the extent that he claims a lack of jurisdiction or a violation of the Fourth Amendment, nor the alleged violation of the compact undermines the validity of the subsequent parole revocation. Cf. United States v. Crews, 445 U.S. 463, 474 (1980); Frisbie v. Collins, 342 U.S. 519, 522 (1952)

FN7. The agreement stated that he would "waive extradition to the state of Indiana from any jurisdiction in or outside of the United States where I may be found and also agree that I will not contest any effort by any jurisdiction to return me to the state of Indiana." (R 31, Ex. 3 at 1.) Neither side raised this point in the district court, and we need not decide whether the waiver provision itself provides independent grounds to justify the alleged manner of Warner's transfer.

Of course, the parole revocation in Indiana must comply with due process. Assuming that the parole violation warrant was never formally executed, Warner's due process right to revocation proceedings did not accrue until he was taken into Indiana's custody on March 17, 1992. Moody, 429 U.S. at 86-87. Although Warner received a preliminary hearing, he contends that it violated due process because it was neither promptly held at or near the place of his parole violation, nor conducted with counsel to assist him. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Morrissey v. Brewer, 408 U.S. 471, 485 (1972); cf. also Ind.Code § 11-13-5-4 (authorizing--but not requiring--other compact member states to hold parole violation hearings for Indiana parolees). The purpose of a preliminary hearing is to establish probable cause that the parolee has violated a condition of his parole. As Warner himself admitted at the preliminary hearing, he had been convicted of aggravated assault and kidnaping. These new convictions obviated the need to comply with Morrissey 's preliminary hearing requirement altogether. E.g. Moody, 429 U.S. at 86 n. 7; Sneed v. Donahue, 993 F.2d 1239, 1241 (6th Cir.1993); D'Amato v. United States Parole Comm'n, 837 F.2d 72, 75-76 (2d Cir.1988) (applying principle in case in which warrant was lodged but never executed); see also Thompson v. Duke, 882 F.2d 1180, 1185 n. 6 (7th Cir.1989), cert. denied, 495 U.S. 929 (1990). With no due process right to a preliminary hearing in the first place, the alleged violations of Morrissey 's subsidiary rules for that hearing do not provide the basis for habeas corpus relief.

**5 Warner also claims that he was denied the assistance of counsel at the final parole revocation hearing. There is no indication in the record as to whether he had the assistance

of counsel at the revocation hearing or, if not, whether he waived any such right. The district court held as a matter of law that Warner was not entitled to the assistance of counsel under the Sixth Amendment. However, "[a]lthough the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings," fundamental fairness may require the assistance of counsel at such hearings under certain circumstances. Gagnon, 411 U.S. at 790.

> Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and the reasons are complex or otherwise difficult to develop or present.

Id. Warner makes vague assertions that a sheriff in Tennessee "railroaded" him, but he has not demonstrated either in the district court or on appeal that he had a "timely and colorable" claim that he did not commit the Tennessee offenses. Nor has he alleged that complicated justifying or mitigating factors existed that would make counsel necessary. Therefore, we find that he has not established a right to counsel at the parole revocation hearing.

AFFIRMED.

END OF DOCUMENT

Jackery B. WHITE, Petitioner-Appellant,
v.
Robert KLITZKIE, et al., Respondent-Appellee.

No. CVA 97-020, SPO 216-94.

Supreme Court of the Territory of Guam.

Dec. 16, 1998.

Appeal from the Superior Court of Guam

D. Paul Vernier, Jr., Esq., Vernier Law Office, Hagatna, Guam, Counsel for Appellant.

David M. Moore, Assistant Attorney General, Office of the Attorney General Prosecution Division, Hagatna, Guam, Counsel for Appellee.

Before SIGUENZA, C.J., ARRIOLA, and CALVO, A.JJ.

OPINION

SIGUENZA.

*1 [1] Jackery B. White appeals the denial of habeas relief by the Superior Court. He asserts that his right to effective assistance of counsel was violated due to his attorneys' conflicts of interest. Although we have no jurisdiction to hear an appeal from the denial of his petition for habeas relief, we elect to treat his appeal as an original petition for relief. However, based on our review of the record and the applicable law, we deny his petition for a Writ of Habeas Corpus.

PROCEDURAL AND FACTUAL BACKGROUND

[2] Jackery B. White was arrested and incarcerated in 1986 for the crimes of robbery and burglary. As a result, the court appointed attorney Peter F. Perez to represent him in numerous criminal cases encompassing the charges. While incarcerated, White apparently heard the admissions of another inmate and became an informant for the government in a murder case. After cooperating with the government, he was released from custody pending resolution of the cases.

[3] In March of 1993, White was again charged with robbery. Again, attorney Peter F. Perez was appointed to represent him. However, Peter F. Perez successfully moved to withdraw from the more recent cases because he was related to the owner of IT & E, a company that had recently been robbed by White. Another attorney, Vicente Perez was appointed to represent the defendant on these later charges. Peter F. Perez continued his representation of White on the previous charges originating in 1986.

[4] On April 20, 1993, White entered a plea agreement in the 1986 cases while represented by attorney Peter F. Perez. He pleaded guilty to four counts of burglary in four different cases. For each count, he received a 3 year sentence, running concurrently. Testimony indicates that in exchange for his guilty pleas, charges in two other cases were dropped. In addition, the prosecutor agreed not to charge ten pending felony matters. Another term of the agreement was that the government would not mention White's prior conviction during the sentencing. These outside terms were not mentioned in the plea agreement but were testified to at the hearings.

[5] On August 13, 1993, while represented by attorney Vicente Perez, White pleaded guilty to robbery. He also admitted to the special allegation of committing a felony while on release. Sentencing was left to the discretion of the trial judge. Consequently, he was given a 30 year sentence, 10 years for the robbery and an additional 20 years imprisonment for the special allegation.

[6] In August 1994, White filed both a Writ of Habeas Corpus and later, an Amended Writ of Habeas Corpus in the Superior Court. Attorney Mark Beggs was subsequently appointed to represent him.

[7] At a hearing on February 2, 1995, the

parties were notified that the writ would issue. The court also ordered that the return of the writ be filed within seven days of the writ's issuance. The court subsequently issued the writ on February 6, 1995. However, the return was not filed within seven days of its issuance.

*2 [8] At the February 2, 1995 hearing, it was also agreed that an evidentiary hearing would take place on February 22, 1995. However, the hearing was not conducted due to a conflict of interest and the resulting withdrawal of attorney Beggs. At that time, attorney D. Paul Vernier was appointed to represent White in this matter.

[9] A hearing on the writ was eventually conducted on September 13, 1995. On this date, the Return was also filed. This was seven months after the Writ had issued. A supplemental return was later filed on October 20, 1995.

[10] At the hearing, Petitioner initially argued a return of the writ was mandatory under Guam law and the government failed to file as required. The assertions contained in the petition, White maintained, were not opposed and should be taken as admitted by the government to be true. Consequently, White asserted discharge was the appropriate remedy in the matter. The court took the issues surrounding the return under advisement and subsequently issued a Decision and Order on September 18, 1996 denying White's request for relief on these procedural grounds.

[11] Testimony was also received at the September 13, 1995 hearing. Peter F. Perez, petitioner's former attorney, was called as a witness. His testimony later concluded on September 20, 1995. Testimony was again taken at an evidentiary hearing held on January 6, 1997 during which several witnesses were called. At the conclusion of the hearing, the court again took the matter under advisement and later, in a Decision and Order filed on May 12, 1997, denied petitioner's relief.

[12] Petitioner timely filed a Notice of Appeal of the trial court's order denying relief.

ANALYSIS

[13] Although this matter was filed as an appeal of an order denying habeas relief, we elect to treat this matter as an original petition for a writ of habeas corpus. As we decided in Borja v. Bitanga, et al., 1998 Guam 29, this court has no jurisdiction to hear an appeal of a trial court's decision denying a writ of habeas corpus. Id. at ¶ 12. However, using our discretion, we may treat this matter as an original petition for a writ of habeas corpus and address the merits of the arguments. Id. at ¶ 14. Relying upon the record generated by the trial court, we review the issues de novo. United States v. Span, 75 F.3d 1383 (9th Cir.1996).

[14] Appellant first argues he was not properly represented by either counsel because of conflicts of interest. Specifically, both attorneys were related to Joe Perez, the majority shareholder of a company victimized by Petitioner. The company, IT & E, was robbed in March of 1993. These conflicts, White asserts, denied him effective assistance of counsel.

[15] Both parties cite to Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The United States Supreme Court opined "[i]n order to establish a violation of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. at 348, 100 S.Ct. at 1718. Two elements must thus be shown by a petitioner proceeding on an ineffective assistance claim based on attorney conflicts. First, the petitioner must prove the existence of "an actual conflict of interest." Stoia v. United States, 22 F.3d 766, 770 (7th Cir.1994)(discussing the requirements set out in Cuyler). An actual conflict of interest occurs if "the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests." Id. at 771 (citations omitted). The petitioner must also make a showing that the actual conflict

had "an adverse effect on the lawyer's performance." Id. at 770 (citations omitted). An adverse effect results when the actual conflict causes an actual lapse in an attorney's representation. Id.

*3 [16] In this matter, White cannot identify an actual conflict adversely affecting either lawyer's performance. He writes:

> Such adverse affect should be assumed in this case by the fact that the appellant received thirty (30) years imprisonment--with absolutely no plea agreement or sentence "cap"--and by the fact the [sic] Peter F. Perez, implicitly acknowledged the adverse affect such a conflict would create by moving to withdraw from representing the appellant.

Appellant's Opening Brief, Pg. 7 (emphasis added). Likewise, the court, based on a review of the record, cannot find or identify circumstances that show either attorneys' performance was actually adversely affected by the conflict.

[17] As to attorney Peter F. Perez, the testimony is clear that he negotiated a plea agreement enabling his client to receive minimal sentences on some charges and complete discharge of other crimes. This was accomplished notwithstanding numerous pending criminal allegations, both charged and uncharged. Moreover, Peter F. Perez was able to enter into an agreement whereby the government attorney would not raise the issue of White's prior conviction of a serious felony, thus avoiding enhancement of the sentence.

[18] As to attorney Vincente Perez, his testimony indicates that he did not know of his relationship to the majority shareholder of the victimized company. Thus, without this knowledge of the relationship, he would not and could not have made legal decisions that would have advanced his or his relative's interest. There is no basis to assert that a conflict influenced his representation. Even if a conflict existed, Petitioner again has not made a showing that the performance of attorney Vicente Perez was adversely affected by such conflict. Contrary to Petitioner's contention, the failure to obtain a plea agreement is not indicative of a conflict affecting representation, primarily because a defendant has no right to receive such a plea agreement. Additionally, Vincente Perez testified that he attempted to obtain a plea agreement but the prosecutor was "hard" on his client and declined to enter into a plea. Equally important, the decision to plead "straight up" was discussed between attorney and client several times before proceeding on this course of action.

[19] White also contends that the government failed to timely return the writ as required under Guam law. As a result, he asserts the allegations in the petition were admitted by the government.

[20] A petitioner initiates habeas relief by filing a petition with the Superior Court. 8 GCA § 135.12 (1993). If it appears that the writ should issue, a judge should grant it without delay and direct the writ to the person having custody of the petitioner. 8 GCA §§ 135.16 and 135.18 (1993). If the writ is not returned, then Guam law provides a remedy. 8 GCA § 135.22 (1993) reads as follows:

> Consequences of Failure to Honor Writ. If the person to whom the writ is directed refuses, after service, to obey the same, the court or judge, upon affidavit, shall issue an attachment against such person, directed to the Chief of Police, commanding him forthwith to apprehend such person and bring him immediately before such court or judge; and upon being so brought, he must be committed to the jail until he makes due return to such writ, or is otherwise legally discharged.

*4 This provision appears to be the only statutory remedy available for the failure of a person to return the writ. It places the burden on the petitioner to file an affidavit with the court so that a warrant may be issued for the person required to file the return. The person is then brought before the court, and upon imprisonment or threat of imprisonment, he is forced to file the return.

[21] In this matter, the affidavit was not filed and the respondent never brought before the court as contemplated by 8 GCA § 135.22.

This statutory remedy was available to the petitioner but was not utilized. It is clear that this was never done because the parties understood that the issues were disputed and an evidentiary hearing would occur. In fact, the evidentiary hearing was scheduled but later taken off calendar due to the conflict of Petitioner's previous counsel. Consequently, we do not agree with Petitioner that the failure to file the Return in a timely manner is equivalent to admitting the allegations of the petition. Similarly, we disagree that dismissal is an appropriate remedy. In order to ensure a response, 8 GCA § 135.22 is the statutory mechanism for compliance.

[22] Appellant argues that 8 GCA § 135.24 (1993) requires the return to be filed. [FN1] Although the statute contemplates the filing of a return, the only mandate of this section refers to the content of the actual return. The statute, by using the term "shall" requires the return to state plainly and unequivocally certain factual conditions. This particular statute does not require the writ's return. As discussed earlier, the honoring of the writ by return is addressed in 8 GCA § 135.22.

FN1. 8 GCA § 135.24 reads as follows: The person upon whom the writ is served shall state in his return, plainly and unequivocally: (a) Whether he has or has not the party in his custody, or under his power or restraint; (b) If he has the party in his custody or power, or under his restraint, he shall state the authority and the cause of such imprisonment or restraint; (c) If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return, and the original produced and exhibited to the court on the hearing of such return. (d) If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place; (e) The return shall be signed by the person making the same, and except when such person is a sworn public officer and makes such return in his official capacity, it shall be verified by his oath.

[23] In Bleitner v. Welborn, 15 F.3d 652 (7th Cir.1994), the appellate court discussed whether the district court should have entered a default judgment for an untimely response in a habeas matter. The return was not filed by the deadline and the motion to extend its filing was submitted two weeks after the return's original deadline. Id. at 653. A default is a sanction, and sanctions should be proportionate to the wrong. Id.; see also People v. Tuncap, 1998 Guam 13, ¶¶ 23-29 (stating, in the context of a discovery violation, that a less severe sanction should be imposed if it will accomplish compliance with the court's order). "Releasing a properly convicted prisoner or imposing on the state the costs and uncertainties of retrying him, perhaps many years after the offense, is apt to be a disproportionate sanction for the wrong of failing to file a timely motion for an extension of time." Bleitner, 15 F.3d at 653. Habeas relief is a strong remedy reserved for serious matters rather than merely technical violations of rights. Id. While prompt dispositions of habeas matters are desirable and "at some point delay in the disposition of a petition caused by the government's willfully refusing to file a response might infringe the petitioner's right of due process," the matter should still proceed to the merits of the petition. Id. If the petition had no merit, then the delay will have caused no prejudice to the petitioner. Id.

*5 [24] If this court were to construe the delay in filing the return as significant in this particular instance, the sanction of dismissal would not be appropriate. As discussed earlier, the circumstances of this case indicated all parties understood the assertions contained in the petition were disputed and that an evidentiary hearing was necessary and, therefore, a hearing was scheduled by the trial court before the return. The failure to file the return was a technical violation. Dismissing the matter for such violation would be disproportionate to the offense. Also, because we find no merit in the Petitioner's allegations, we find that no prejudice has been suffered by him.

CONCLUSION

[25] The court hereby DENIES Petitioner's request for habeas relief.

END OF DOCUMENT

CAL J. POTTER III
Nevada Bar No. 001988
POTTER LAW OFFICES
1125 Shadow Lane
Las Vegas, Nevada 89102
Telephone (702) 385-1954

ROBERT D. NEWELL
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201
Telephone (503) 241-2300

Attorney for Petitioner
Dale Edward Flanagan

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA, and E.K. McDANIEL, Warden, Ely State Prison,

Respondents.

DEATH PENALTY CASE
Case No. C69269
Dept. No. XI
Docket "S"

Exhibits in Support of Petitioner's Supplemental Petition, Reply to State's Response to Supplemental Petition, and Petitioner's Motion for Evidentiary Hearing

Volume V

DECLARATION OF ANGELA SALDANA FICKLIN

I, Angela Saldana Ficklin declare:

1. I met Dale Flanagan approximately a few weeks prior to the death of his grandparents.

2. Before the death of his grandparents, Dale Flanagan never told me that he was going to inherit money from his grandparents, that he was named in their will, or that he was a beneficiary of their insurance policy. He never told me that there was a plan to kill his grandparents.

3. After the death of his grandparents, I helped Dale, his mother, and several other people look for a will, coin collection, and insurance policy in the home of the grandparents. I am not aware that any of these items were ever found.

4. Dale's mother was a greedy person and she had cleared everything out of the grandparent's house.

5. After I found out that Dale's grandparents had been murdered, I decided I would try to solve the crime because I wanted to be a police officer, and if I was successful then this would help me accomplish my goal. Shortly after Dale Flanagan and others were arrested a LVMPD officer named Becky and Beecher Avants called my aunt and uncle where I was staying. I spoke with both Becky and Avants on the telephone. They told me if I did well with this case that they would consider putting me into a 21 Jump Street type program where I would go undercover into the schools for the Las Vegas Metropolitan Police Department to fight crime.

6. My uncle and aunt, Robert and Wendy Peoples, helped me prepare for moving in with Dale and attempting to solve the crime. My uncle and aunt both had numerous friends, who were active in Las Vegas law enforcement. One Metro officer was Rebecca or Becky. They had worked on Beecher Avants' campaign for sheriff in the early 1980s, and I had met Avants then.

In 1982 over a seven-month period, I dated Ray Berni, who was an officer with the Las Vegas Metropolitan Police Department (LVMPD). I also had known Bob Hilliard with the LVMPD.

7. As part of my preparation for developing evidence against Dale, my uncle told me that I would have to commit everything to memory, and that I absolutely could not write anything down. My aunt said I had to call her every day.

8. A LVMPD officer arranged for me to call a police officer in the neighborhood near Dale's trailer in case I needed help. He told me to go to the 7-11 store to call him in case of an emergency.

9. During my part of the investigation of Dale, I talked with Officer Berni on numerous occasions. I told him of my efforts to obtain information from Dale. In turn, Berni suggested the type of information that the police need to make their case and possible ways that I could get the information for their case. Berni took notes when I talked to him about Dale.

10. When Dale confessed to me I went to Berni, and he took me to meet with Beecher Avants. The three of us then went to Sgt. Hilliard's house where they questioned me for about one and a half hours during which time they took notes on a yellow pad. Late that night or the next night I went to the police department and gave my statement to Detective Levos.

11. Dale told me that he and the other boys (he said we) were on acid the night his grandparents were killed. Tom Akers also told me that Dale and the other boys, but not himself, were on acid the night Dale's grandparents were killed. Dale often drank alcohol, smoked marijuana, took speed, and acid, and sometimes took mushrooms.

12. Dale was not the ringleader of the boys who killed his grandparents. Randy Moore and Roy McDowell were the dominant ones of the group. If the group was going to do something, they are the ones who would have ordered it done. I asked Dale how he could let this

AF

happen and he said he had been on acid. Dale said he could not believe they wanted to go through with it.

13. I felt bad for Tom Akers and felt protective towards him. I brought him over to my aunt and uncle's house. My uncle gave Tom a job in his construction business. Tom told my aunt and uncle what had happened to Dale's grandparents. My uncle told Tom to turn himself in to the authorities. Tom may have known Beecher Avants.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on this 26 day of April, 2000.

Angela Saldana Ficklin

ANGELA SALDANA FICKLIN