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 6

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

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 JOHN LUCAS III

I, John Lucas III, declare as follows:

1. I was born on September 2, 1966. I testified for the State against Dale Flanagan at the Preliminary Hearing in February 1985, a hearing in September 1985, the 1985 trial, 1989 trial, and the 1995 trial.

2. I met Roy McDowell a few years prior to November 1985. At that time I was also friends with Robert Morrison, Robert Ramirez, and Cory Brock. It was sometime in 1983 or 1984 that we met Randy Moore and his friends.

3. A few days after the Gordon's bodies were found, the police searched Randy's 13th Street apartment. I was at the apartment at the time, along with some of our friends. Two detectives -- Geary and his partner -- and numerous uniformed officers came to the apartment and said that they wanted to conduct a search. They brought us all -- Mike Walsh, Randy Moore, James Boshard (phonetic) and me -- into the living room where we were told to remain. For the next hour, the police searched every room in the apartment. They found a few guns and knives, including a gun stuffed in the couch where I was sitting. No one was taken with the police.

4. Approximately one week later, the police returned to Randy's apartment. I was the only one in the house at the time. I was taken to the police station and placed in a small room, where I was interrogated by Detective Geary and his partner (Levos). They tape-recorded most of the interview. At that time the only thing I told them was that we had all been at a party on the night of November 5 and then I passed out. The interview lasted for about half an hour. Before I left, I signed a typed transcript of our interview. The detectives drove me back to Randy's apartment and told me to contact them if I thought of anything else.

JL

5. During my first interview with police they told me that if my friend, Roy McDowell, came in to talk with them they would offer him a deal. Following my interview, I talk to McDowell and my family about the case. I told McDowell what the police had told me and he said that he was not interested in any deal.

6. I met with detectives again one or two weeks later. They picked me up at my mother's house and brought me to a room similar to the one that I was in during the previous interview. As with the previous interview, portions of this interrogation were tape-recorded. They told me about Angela Saldana's statement and also threatened me with charges – gun possession and/or knowledge before and after the fact. This interview lasted over an hour and a half. I told the detectives what I knew about the night of November 5, 1984, and the killing of Mr. and Mrs. Gordon – with slight changes so as to protect my friends that were still in town . At the time, I thought that Randy Moore, Mike Walsh, and Dale Flanagan had already left town at this point, but Johnny Ray Luckett and Roy McDowell were still around. I told the detectives what I heard had happened at the house, revised to protect McDowell and Luckett. I said Walsh was one of the shooters but in fact it was Luckett, not Walsh who was the third shooter, and that McDowell had not gone in the house, but in fact he had.

7. Before the second interview began, Detective Geary told me about a $2,000 reward that was being made available from Secret Witness for information and/or valuable leads in this case.

8. I subsequently had a meeting with Dan Seaton and he told me that I would be testifying. I called Dan Seaton and went down to his office (my mother was not present for the interview). On his desk there was a miniature noose, guillotine, and electric chair. We talked for a few minutes, then he gave me a copy of my police statement and put me in a room by myself.

JC

He told me to read the statement over and over again until I knew it completely. I felt like I was studying for a test.

9. Sometime after my meeting with Seaton, I received a subpoena informing me of the date and time that I had to appear in court. I returned to Seaton's office to rehearse my testimony. It was prior to testifying that I received the first $1000 from secret witness – ten one-hundred dollar bills, which I spent on clothes and music. They told me that I would get the remainder of the reward money after I testified and the defendants were convicted. I got the second $1000 after I testified. I used that money to go visit my aunt in Texas after the trial was over.

10. Before and during the trial, I was in close contact with Detective Geary and prosecutor Dan Seaton. Geary called my house almost daily to check in with me, make sure I was still around, and to see how I was doing. I was also working intensely with Seaton preparing for trial. During this time I was under a lot of stress and my mom could see it was wearing me out. She suggested that I go to Florida to visit my kids who live in Sarasota. She bought me a round trip ticket, with a return flight two months later. I would be back in Las Vegas in time for the trial. I told Geary and Seaton that I would be going away and was instructed to call and check in with Geary once a week.

11. After being in Florida for nearly six weeks, I was ready to come home. My mom was unable to reschedule my return ticket, so I called Detective Geary. As ordered, I had maintained contact with him during my vacation. I told him that I was ready to leave Florida. He said that if I waited a few days he could get a better price on a new ticket. I told him I wanted to leave immediately. The following day there was a ticket waiting for me at the airport.

12. Detective Geary and I spoke once a week while I was in Florida. I called when I was supposed to; I did not want to find out what might have happened if I did not. But I had the

JC

need to contact Geary for his assistance in clearing up some trouble that I got into in Florida. At one point during my vacation I got into a bar fight and was arrested on a drunk and disorderly charge. I called Detective Geary from the police station, who said he would take care of it. True to his word, the police let me go after I sobered up, and no charges were ever filed against me.

13. When I was back in Las Vegas Detective Geary helped me again. There were a few incidences at the Circus Circus Casino when some friends and I were hanging out and smoking some pot. We were approached by security who searched us and found more pot in my pocket. Even though it was often very late at night each time we were picked up, I called Geary at his home. Geary told me that he would talk to who ever was in charge. Soon thereafter, my friends and I were free to leave.

14. Prior to and during the trial I was not in contact with any of the defendants in this case except for Roy McDowell. McDowell was being held at the Clark County Detention Center in downtown Las Vegas. I did not go to visit him but I spoke to him almost every day. We never discussed the case but instead talked about day to day stuff – life on the streets. I would have liked to have been able to visit him but I was afraid that Dan Seaton would not approve. Mr. Seaton did not know that I was still in contact with my friend, and I did not think he would have liked to have known that I was visiting him.

15. I was very nervous about having to go to court and testify. I was so nervous in fact that I smoked two marijuana cigarettes prior to testifying in court.

16. In Las Vegas during the 1980s there was not too much for young people to do. Drinking was an almost daily event. We would get together four to five nights a week and drink beer. On the weekend, or when we really wanted to get drunk, we would drink whisky or some other harder liquor – doing shots and/or playing drinking games like "Quarters." We would continue to drink and do drugs until we were so intoxicated and high that we passed out.

JC

17. Speed and uppers were the favorite drugs among the boys, including Dale. Pink Hearts and Black Beauties (types of uppers) were the pills of choice. We took pills to be able to stay awake, to feel better and to stay awake so we could drink more. It was a terrible cycle, but we did not understand why we were doing it.

18. While I did have family that lived in Las Vegas, I spent most of my time, when I was not working with my friends. Most of the time we hung out at Randy's apartment. Randy had his own apartment and because most of us did not have homes that we wanted to spend time at we hung out and often spent the night at Randy's apartment. Randy's mom paid most of the bills but day to day expenses we had to cover. I had dropped out of school at the time, as had most of my friends.

19. During this time I had a steady job working construction. Most of my other friends did not work, or at least they did not have steady jobs. The way we got the money we needed was doing house burglaries. Dale never joined us in these burglaries. A few of us would select a house we wanted to get into. We would knock on the door and look to see if there were any lights on in the house. We usually selected a house that was out in the middle of the desert – somewhere desolate like Dale's grandparents. If no one responded to the knocks we would hop the fence and go in. While this was something that we did multiple times, we were always scared. Once we were inside we would take anything we thought we could sell or that we wanted to keep for ourselves.

20. We were young boys who did not think about the consequences of what might happen. We were young immature kids who desperately needed each other. We were the only family we could depend on. We had to support one another, and at the time we thought that that meant following one another blindly. We also thought it meant standing for one another. We could never show doubt or fear. And so, during these burglaries while we were all very scared as

JC

soon as one person said "come on lets do it" there was no way any of the others could decline. We could not look unsupportive. Saying that you did not want to participate in a burglary, or did not think it was a good idea just was not an option.

21. Before we all got involved in the Gordon burglary, there were two groups of boys. I was friends with Roy McDowell, Robert Morrison, Robert Ramirez, John Ray Luckett, and others. Roy was very respected among our group. People looked up to him. He had a lot of influence. Randy Moore had his own group of friends. Among his friends Randy had a lot of influence too. Once Randy and Roy became friends and the two groups of boys became one Roy maintained his influential role. Randy still had a lot of respect and influence among his friends but he too became greatly influenced by Roy.

22. While I was not with my friends at the Gordon's house the night of November 5, 1984, I do know that my friends were not murderers. We did a lot of stupid things in our time but planned, premeditated, intentional murder was not one of them. I was at Randy's apartment before they all left. We had been drinking a lot all weekend. There were people coming in and out of Randy's all weekend. It was late at night, the others had left and it was the six of us -- me, Roy McDowell, Randy Moore, John Ray Luckett, Michael Walsh, Dale Flanagan and Tom Akers -- at the apartment. I do not know at what point in the night the conversation began. But I do know that once the idea to burglarize the Gordon's was on the table there was no choice but for everyone to support the idea.

23. While the "plan" was to bring guns, I do not believe that any of these boys believed that they would really kill anyone. There is a line between burglary and murder and while many of us had burglarized homes before we had never killed anyone. I was not there that night but I believe that something went wrong and that the shooting happened with out any plan for it.

JC

24. During the 1985 trial, I was called to testify by the prosecution. None of the defense attorneys came to talk with me that I know of. It was not until the penalty phase retrials that I was interviewed and it was only in my earlier statements that the attorneys seemed to be interested. They never asked me, anything about Dale Flanagan as an individual – his personality and characteristics, his relationship with his friends and family, his drug and alcohol use or his relationship with Randy.

25. Dale Flanagan was a friend of Randy Moore and it was only because of their relationship that Dale ever hung out with us. Dale did not come over to Randy's very often during the time that I was at Randy's. He worked a lot and had another group of friends that he mostly hung out with. When he did come to Randy's apartment he rarely said more than a few words. He kept mostly to himself. Dale did not have any close friendships with any of my friends. Dale was extremely close with Randy Moore, but he was not close with the rest of us.

26. Dale never participated in any of the burglaries that we did. He never showed any interest or desire in participating plus we did not know him well enough to invite him along, or assume (like we would with our other friends) that he would join us.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of Nevada on this 11 day of May, 2000.

JOHN LUCAS III

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 ROBERT PEOPLES

I, Robert Peoples, declare that;

1. In 1984 my niece, Angela Saldana, was living with my wife Wendy and me. I met Dale Flanagan a few times. I thought he was a nice kid.

2. I moved to Las Vegas as a young boy sometime in 1961. As I grew up, I became increasingly involved in the legal and political systems in Las Vegas. I became very good friends with Beecher Avants, chief investigator for the Clark County District Attorney's office, and Al Levitt also an investigator. In the 1970s, I worked as an investigator for the Clark County Public Defender's office and when Avants ran for Chief of Police I helped his campaign.

3. In the late 1970s, several murders occurred in Las Vegas, and in 1977 Al Bramlett was murdered. The police had their suspects – Tom Hanley and his son, Andy Gramby Hanley – and they had a lot of circumstantial evidence, but they needed to tie their case together. Because I knew those involved, and had access to their defense team, the investigators at the LVMPD used me as a double agent. I knew what information they needed and I agreed to help them get it.

4. There was important evidence hidden in Parhump, Nevada, which the district attorney needed to help support their murder indictment of the Hanleys. After finding out from the Hanleys where the evidence was and telling the police where I would be going, I drove, with Wendy Hanley, the wife of Tom, to find the hidden evidence. On the pretence of a driving violation I was pulled over by a police officer, and my car was searched. Every thing went according to plan. During the search of my car the hidden evidence – jewelry that linked the Hanleys to Al Bramlett – was found, and removed by the police officer.

5. Because of my role as a police agent, and because I had found the hidden evidence and helped to link the suspects to the victim I was called as a witness at the trial. I was

R. P.

a key witness and I helped to secure the murder indictments and the eventual convictions of both Tom and Andy Hanley.

6. At the time that the bodies of Dale Flanagan's grandparents were found, I knew how the legal system worked, particularly how police run homicide investigations. I realized that Angela knew the main suspects and could get information on the deaths of the Gordons. I also worried that the police and investigators would start to hassle, and possibly charge, my niece. I had learned long ago that when the police want information they will hold, charge, or threaten a potential witness. Thus, I encouraged Angela to assist the police in their efforts to obtain incriminating evidence against Dale Flanagan

7. Angela agreed to help in the investigation. She knew that it was important for the police to find the murder weapons, so she set out to find that information and other information about the crime. Although I was concerned for her safety, I also knew that the LVMPD would protect her, including keeping her under surveillance. I also believed that her phone, and those of some of our family members phones had been tapped so that the police would also have a record of where she was.

8. Angela kept me posted on all that she was doing. She quickly absorbed what the police were looking for, and she set about getting the needed information. Angela took to her assignment well. I was proud of her for staying strong through out the investigation and trial. I had been through a similar experience, but I knew that what she was doing – helping the police in their investigation, and the district attorney at trial – would keep her safe, and free of criminal charges, and the State would be able to secure the murder charges they were looking for.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of Nevada on this 9th day of May, 2000.

ROBERT PEOPLES

R.P.

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 DEBORA L. SAMPLES SMITH

I, Debora L. Samples Smith, declare the following:

1. In 1984, I resided at 2851 S. Decatur, Apartment 86, Las Vegas, Nevada.

2. During this time, I lived with Blake Watson. At times, Angela Saldana lived with us. Angela Saldana and I operated a prostitution business out of our apartment.

3. In 1984, Blake Watson and I sold drugs to Dale Flanagan, Randy Moore, and Tom Akers. We sold Dale Flanagan marijuana, cocaine, LSD, crystal methamphetamine, Quaaludes, and other drugs on a regular basis, often weekly.

4. Dale was always very helpful, considerate, and respectful of others. Dale is the type of person I would least expect to be involved in killing anyone.

5. A day or two after Dale Flanagan's grandparents were killed, Angela Saldana told me that she had talked to the police about the crime. According to Angela, the police told her they wanted her help and needed details about the crimes, including the location of the guns and information about Dale's knife and whether he was trying to get another one.

6. Angela Saldana said she agreed to assist the police in their investigation of Dale and that she intended to start living with Dale in order to get the information the police wanted. Prior to this time, Angela and Dale had not had a romantic or sexual relationship. Angela, however, was expert at using sex to get what she wanted, and I know that Dale quickly would fall victim to her advances. Angela said that she would tell Dale that she loved him and that she could get Dale to fall in love with her even though she did not love him.

7. Before she moved in with Dale, Angela told me also that the police told her she would need to wear a wire to record her conversations with Dale. She moved in with Dale at his trailer within a few days after the murders.

8. After she moved in with Dale, Angela called or saw me almost every day. She told me that she was getting Dale to fall in love with her and that he was starting to tell her more about what happened. She told me she had Dale wrapped around her little finger. Finally after several weeks, Saldana told me that Dale had confessed and had told her the whole story. After Dale was arrested, Saldana moved back in with Blake Watson and me.

9. Angela Saldana wanted to be an investigator and solve crimes. She thought of herself as James Bond sometimes and wanted to work with law enforcement. She was very determined to move in with Dale because it was her chance to work with the police.

10. I was aware that Angela Saldana was having sexual relationships with officers of the Las Vegas Metropolitan Police Department (LVMPD). She was having sex with an officer Berni and other officers at the LVMPD. Angela told me that she had contacted Berni about working on the investigation.

11. Angela Saldana met Officer Berni when she was very young and had gotten into trouble. She started having sex with Officer Berni at that time and he helped her with her legal trouble. I can recall at least one other time when she had some legal problem and she said she could call Berni for help. Berni always seemed to help her when she had legal problems.

12. Angela Saldana was very manipulative, and she was used to getting what she wanted. Angela was very attractive to men and she used that fact to her advantage. She also had no problem lying if it served her interest.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of Wisconsin on this 22 day of April, 2000.

DEBORA L. SAMPLES SMITH

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 MICHELLE GRAY THAYER

I, Michelle Gray Thayer, declare the following:

1. In 1984, I resided at 2851 S. Decatur, Apartment 86, Las Vegas, Nevada. At the time, I lived with Blake Watson and my sister Debora Samples.

2. I met Dale Flanagan in early 1984 and saw him on numerous occasions either at my apartment or his trailer. We had a sexual relationship during the time I knew him.

3. Dale Flanagan did not seem to have a lot of friends, and he did not talk much. He wanted very much to fit in. He tried to be very helpful to others. He was not the type of person to hurt anyone, and if he did then either something else made him snap or he was influenced or persuaded by others.

4. Dale drank a lot of alcohol and took a lot of drugs. He smoked marijuana, took acid, cocaine, PCP (angel dust), and crystal meth. Sometimes Dale would smoke the cocaine after he would cook it up on the stove. He took a lot of acid, sometimes 3 or 4 hits at a time. He also took different drugs at the same time. Dale sometimes would sprinkle PCP on marijuana joints when he smoked them. He also put cocaine in the joints when he smoked them. Dale drank beer but more often he drank hard liquor. He wanted to try everything. We sometimes partied at the Decatur Street apartment, but usually we went to Dale's trailer. When we went to party at the trailer, it was usually Dale, Tom Akers, Angela Paez Saldana, my sister Debbie Samples, and me. The parties at Randy's apartment frightened me because of the vast drug use.

5. During these parties, Dale frequently ended up passed out on the floor, a couch, or a bed, particularly when Dale mixed drugs. These occasions were frightening because Dale would simply stop responding to us. We would pull out the dining table and lay him down on it. His eyes would be open like he was awake, but it was like he was not there. He would not

Michelle G. Thayer
aka Gray

respond when we talked to him or waved a hand in front of his eyes. Eventually, Dale would snap out of it and come to.

6. Dale told me that he was living with his grandparents because of abuse by his parents. I believe that Dale was emotionally disturbed from his parents. He did not have a lot of stability.

7. If Dale was involved with the death of his grandparents, I believe that others persuaded him to participate. He would not have done something like that on his own.

8. Tom Akers was a good-looking guy. He was very dominant and persuasive, and he had a strong influence over Dale. Tom was a smooth talker and more outgoing and a party animal than Dale. Tom was not as level headed as Dale, but Tom is the one that would make the plans of what to do. On numerous occasions, Dale and I would plan to do something and then Tom would come over and propose something for him and Dale to do and Dale would follow Tom.

9. Angie Paez Saldana did not appear to be worried or scared about being at the trailer or with Dale after the crime. Saldana told me that she was working with the police regarding the murders. I recall Saldana would get into trouble with the police, but then nothing would ever happen to her.

10. Saldana started dating and partying with Officer Berni of the Las Vegas Metropolitan Police Department when she was very young. Whenever any legal problem came up she would always say Berni would help her. Saldana would very often shoplift when she was with my sister Debbie Samples and myself. We asked her if she was scared about getting caught and she said nothing would happen to her. She was not scared of getting caught because of her relationship with Officer Berni.

Michelle Thayer (AKA) Thayer

11. During the trial, a woman from the prosecutor's office asked me to go into the courtroom to listen to the other testimony and she also asked me to read other's testimony in order to refresh my own memory. I told her I did not want to do either. I told her that when it was my turn I would go in to testify and then I wanted to leave. I did not want to lie or get Dale in more trouble than he already was.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of Wisconsin on this 24 day of April, 2000.

Michelle P. Thayer (nka) Gray
MICHELLE GRAY THAYER

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 WAYNE ERIC ALAN WITTIG

I, Wayne Eric Alan Wittig, declare that,

1. I was born in Las Vegas, Nevada, on July 20, 1966. I met Dale Flanagan sometime into 1981 or 1982. We attended the Vocational Technical High School in Las Vegas, Nevada. At the time, several of us -- Dale Flanagan, Randy Moore, Sharleen Duncan, Kim Fox, Sheri Shea, Chris Ballenger, and others -- hung out as a group.

2. I currently live with my wife and three children, ages 2, 5 and 13 years old. We live in North Myrtle Beach, South Carolina. I have worked for a local contracting company, Buildstar Corporation, for two years. Prior to that I lived with my family in Oahu, HI, where I was stationed in the United States Army. I was honorably discharged in 1994 after an injury to my arm.

3. Almost immediately after we met Dale and I became very close. We spent a lot of time together and Dale often came over to my apartment where he would eat dinner and spend time with my mother and me. Dale was considered part of our family. When things were tense between Dale and his own family, Dale would often sleep at my house. I felt bad for Dale. He had no supportive family and seemed to struggle with life.

4. I knew that Dale and Randy Moore had been friends for a long time. I did not really like Randy Moore, but we were a group of friends, and we all stuck together. I believed that Randy Moore was a bad influence on Dale. Randy was a hothead and he was mean-spirited. Randy was manipulative and calculated. Randy Moore did not seem to care about anybody other than himself.

5. Dale's and Randy's relationship worried me. I often thought that the dynamic between Randy and Dale resembled that of an abusive or battered spouse. I

WW

knew that Dale's and Randy's friendship had a long history, which I attributed to Dale's lack of a supportive family. Given Dale's hard life, I am not surprised that someone like Randy was able to take advantage of, and exert such a strong influence, on Dale. The only reason that I associated with Randy was because he seemed to have some control over Dale which Dale would not, or could not break away from, and I wanted to spend time with Dale.

6. Soon after I met Randy, Randy started talking about witchcraft and forming a coven. He read books, and watched movies, and he seemed to know about and be interested in it. He and Kim Fox were the main initiators of the coven.

7. Both Dale and I worked a lot. When we were not working we spent our time fixing cars, starting a shed business, listening to music or going to concerts, talking, and hanging out. We supported each other and cared about the well being of one another. Dale Flanagan was one of the closest friends I have ever had. Over the three or four years that Dale and I were friends, we spent more and more time together. And consequently Dale spent less and less time with Randy. I noticed during that time that Dale began to take responsibility for his life, and he began thinking about his future. Dale had dropped out of school, but during this time he went back to get his General Equivalency Diploma (GED). Dale also got a job working at McDonald's as a busboy. During the few months that he worked there, he was eventually promoted to Assistant Manager. Prior to this the jobs that Dale had rarely lasted a month and there were never opportunities for promotion. Dale felt great about his achievements. While I will never know if it was my encouragement and support that got Dale thinking about and moving forward in this direction, I was very proud of him when he told me of his successes.

ww

8. Randy Moore had a violent temper and on numerous occasions I had the unfortunate experience to see his rage. On one occasion, Randy called me over to his house, where he accused me of having an affair with his wife and held a loaded rifle to my head. I genuinely feared for my life, but I was fortunate enough to talk Randy out of pulling the trigger.

9. Randy was also abusive towards his sister, Leah Moore and his wife, Sheri Shea. Because we lived in the same housing complex I was around for Randy's numerous fits. He would lash out, often when he had had too much to drink. There were a few occasions when Sheri came over to my apartment shaking and crying. She had a black eye and she told me that she and Randy had had I fight. On these occasions, Sheri would stay at my apartment until she had calmed down and was feeling better, and until Randy had sobered up. There was also a time when I was driving my scooter out of our complex when Leah ran out of Randy's apartment and directly in front of my scooter. She was screaming and crying and said that Randy was going crazy. When I shut off the engine of my scooter, I heard Randy screaming in the apartment. Leah said that he had a baseball bat and was running through the apartment hitting appliances and walls and pulling doors off their hinges. Leah was terrified. The next day I went over to Randy's apartment, the place was a wreck. Randy was an extremely possessive and manipulative person and had a very violent streak. These qualities added up to a very explosive and abusive personality.

10. When I told Dale about Randy threatening my life, Dale was visibly shaken and got very uncomfortable. After I finished, Dale admitted that Randy had done the same thing to him. Dale said that they were talking outside of the house Randy's

lived in in East Las Vegas, when Randy suddenly grabbed his rifle and held it to Dale's head. Dale said that he was terrified during the nearly twenty minutes that Randy threatened to kill him. The incident ended when Randy became distracted when someone came out of the house. Dale said that he thought Randy was eventually going to kill him.

11. I knew that Dale did not get the support, nurturing, or guidance that he really needed from his family or other friends. I tried to provide that to him. I taught him a lot when it came to fixing cars, and Dale was eager to learn. Dale would tell me about the promotions he got at work; I was happy from him.

12. Dale supported me too. There was a time when I was on my way to pick up Dale from work when I got into a terrible car accident. I was driving a small Toyota pick-up truck that was crushed by an on coming car entering a parking lot. The rescue crew had to cut me out of my truck. Dale happened to see the rescue in action and followed me to the hospital. Dale met me at the hospital and stayed by my side for the duration of my recovery.

13. I was accepted to the Universal Technical Institute (UTI) in Phoenix, AZ. In the summer of 1984, after graduating high school, I left for Phoenix. As a result of my earlier car accident I missed many days of school and consequently I lost my valedictorian position at graduation. Without that title I was denied the scholarship that I was supposed to win to go to UTI. I was still determined to leave Las Vegas and so I scraped together as much money as I could and I left for Phoenix. I felt bad leaving Dale in Las Vegas, but I was sure that going to school was my only opportunity to better my life.

ωω

14. In late October 1984 my mother was struggling in her own affairs and needed me back in Las Vegas. I dropped out, and move back to Las Vegas. I returned home the first weekend in November 1984.

15. During the four months that I was away I pretty much lost contact with Dale. During the few long-weekend trips that I made back to Las Vegas we saw each other among large group events. But distance had an affect on our relationship. I understood that I had been away and out of his life for a long time and that his day to day schedule and way of life had probably changed. I regret that we never had a chance to talk about what he was doing or whom he was hanging out with. I am certain that had I stayed in Las Vegas or had been able to reconnect with him, Dale would have been able to make something of his life.

16. The night that I got home from Phoenix I heard on the late night news that Dale's grandparents had been murdered. The news of the Gordons' death raised mixed emotions. While I never wished death on anyone, the memories I had of the Gordons were not good ones. I had an encounter with Mr. Gordon one evening when I had driven over to see Dale. As I was driving towards the house, Mr. Gordon came running out of his house with a rifle in his hand ranting and raving for me to get off his property. I had not known Dale for too long at the time and I did not know his grandparents. I was confused and scared, I had never met Mr. Gordon before and I did not understand his behavior. I quickly put my truck in reverse and sped off.

17. The following day, I told Dale what had happened. He was embarrassed and he apologized for his grandfather's behavior. Dale told me that his grandfather did

WW

not like for Dale's friends to come to the house. I was so shaken by what had happened that it was a while before I thought about going out to Dale's place again.

18. During the course of our friendship there were other incidences between Dale and his grandparents that caused me to worry about my friend. While the Gordons let Dale live on their property they also used that fact as leverage and power over Dale. They required him to clean and maintain the yard, clean up after the dogs, repair broken appliances, and countless other chores. Dale constantly faced the very real threat of being thrown onto the street if he displeased his grandparents.

19. I am a parent now, and I know and understand the importance of giving kids chores and responsibilities around the house, but this was something else. The Gordons were extremely mean and hostile to Dale. Their intentions in giving Dale this work was not out of concern for teaching responsibility. Instead, their actions were threatening and punishing. If Dale did not fulfill the requirements and tasks that Mr. and Mrs. Gordon set out for him it was clear that Dale would no longer have a place to live on their property.

20. Although some of the tasks and responsibilities that Dale had were directed at maintaining the house and property, more often the tasks were simply "make work" chores. I remember a time when Dale and I had plans one Saturday afternoon. I went over to pick him up and saw him in the yard racking up rocks. He told me that he was not allowed to leave until this job – racking up all of the rocks and pebbles from the property around the house and putting them into piles – had been finished. There was no reason Mr. Gordon needed these rocks removed. Indeed, I would not be surprised if the piles we made were still there years later when they died. But Dale knew this job had to

WW

be completed before he could leave with me otherwise he would have had even bigger problems to face with his grandfather.

21. I picked up a rake and Dale and I stayed out there for over two hours racking up every last rock and pebble. If I had not helped Dale he would have spent his entire Saturday focused on senseless tasks laid out by Mr. Gordon.

22. While Dale appreciated the Gordons for allowing him to live on their property, it was hard for him to accept their hostility towards him and his friends. The Gordons did not like Dale's friends and they were very critical of the lifestyle that he led. But the truth is that they did not attempt to know Dale or his friends. The Gordons saw the way he and his friends dressed, and the music they listened to, and from that they developed their own judgments. This hurt Dale a lot, he wanted to be accepted and loved by his family.

23. Dale tried to please his grandparents and fulfill the tasks and responsibilities that they burdened him with. But there were some times that I often believed that they were not satisfied with his action and they let him know. I remember one night when Dale and I had stayed out very late at a friend's house, I did not drop Dale off at his trailer until nearly 2:00a.m.. Dale and I had plans to meet the following morning as we had a scheduled appointment to put up a shed. That morning Dale uncharacteristically showed up over an hour late. He had a black eye, which I believe resulted from an argument with his grandfather.

24. There was another occasion when I had gone over to see Dale. He was in the middle of getting the lawnmower out from the shed. Because it was in a precarious position, it was taking Dale a minute to get it out. Mr. Gordon became outraged that Dale

ww

was taking too long to remove the lawnmower. Mr. Gordon violently grabbed Dale's arm and pushed him aside, shouting that he would just do it himself. Mr. Gordon went in and grabbed the lawnmower – the sparkplug was caught on something and it snapped off. At that point it was clear that the lawnmower was broken, and the lawn would not get mowed that day. Mr. Gordon became uncontrollably angry and shouted and blamed Dale for the mishap. All Dale could do was stand aside hoping that he would not be struck again. Dale was very troubled by this incident.

25. There were other times when I saw bruises and marks on Dale that indicated abuse. Dale often appeared with bruises and marks on his arms and body.

26. After hearing the news reports of the Gordons' death, I immediately set out to find my friend, Dale. I called him at his trailer, there was no answer. I spent the next two days looking for Dale. Eventually I got a phone call from Dale telling me that the police had released his trailer back to him and he said he needed to talk. Dale came over to my apartment. This was the first time since I left for Phoenix that I had seen Dale alone.

27. Over the next two or three weeks, I saw Dale maybe six or seven times. This was a big change in our friendship as compared to before I left for Phoenix. I assumed at the time that our lives had taken different paths and he was in the middle of a disturbing situation with his family and with time our lives would connect again. But our closeness was gone. Dale was a different person. He was paler and more distant. His behavior and reactions were no longer that of the Dale Flanagan I had known before I left. But I still cared about my friend and wanted to support him through this difficult time.

wa

28. After the police had released the Gordons' home to Dale, I went over to see him one night. Dale and I talked for a little while and at some point we walked over to the staircase in the house and he showed me where Mr. Gordon's body had been found. He said that Randy Moore had broken the window with the head of the rifle and then had climbed inside the house. Dale said that after climbing inside, Randy shot Mr. Gordon while he walked down the stairs. Then Dale pointed into the bedroom on the ground floor and said that that was where his grandmother had been found. Dale never told me that he shot Mrs. Gordon or anyone else.

29. Dale never discussed with me who, if anyone other than Randy Moore, was at the house that night. Nor did he tell me anything about what happened prior to Randy breaking the window, or even about them removing anything from the Gordons' home or their intentions of making it look like a robbery occurred.

30. Within a day or two of going to the Gordons house with Dale, the police and detectives came to my house and brought me to the police station for questioning. During this interview Detectives Levos and Geary wanted to know how I knew Dale and Randy, what my relationship with them was like, and who else I knew. I did not want to get involved in this investigation and so I answered their questions with basic one and two word answers. They let me leave, and I returned home. When I got home my mother told me that while I was at the police station other police officers came to my house and searched my room.

31. A few days later, I was again brought down to the police station for questioning. Detectives Levos and Geary picked me up at my house and drove me down to the police station. During this drive the detectives filled me in on how their

WW

investigation was going. It was during this conversation that I learned that detectives believed that there were more people, other than Dale Flanagan and Randy Moore who were involved in the death of the Gordons.

32. Once we got to the police station and were settled in the interrogation room the detectives told me that they knew that I had more information ~~then~~ than I was telling them. They threatened to arrest and hold me on charges of contempt and withholding information if I decided not to participate and help them in their investigation.

33. During my move back to Las Vegas I had to make a few trips between Phoenix and Las Vegas over the two day period that the Gordons were killed and their bodies were found. Detectives Levos and Geary insinuated that maybe the timing of my trips and the death of the Gordons was not simply coincidental. They insinuated that maybe I was some how involved in the crime, or may have helped to destroy evidence.

34. At the time I was eighteen years old. I was alone, and I was terribly frightened of the threats and accusations being made by the detectives. I was very afraid by the detectives' threats. I was certain that if I did not provide them with what they wanted, I would be thrown in jail or worse. It was clear that the detectives were interested in confining their questions and my answers to their version of the crime. They were not interested in me providing any information about who Dale was or the life that he had. They were only interested in asking specific questions which elicited the answers that they were looking for. I knew that if I tried to provide a complete picture of the Dale Flanagan I knew, or if I strayed from their version of events I was going to be in trouble. I became upset and angry at the questions they were asking and the fact that I was not being allowed to express my feelings and observations about my friend. The detectives

had been tape recording my interrogation, at the point that I became upset the detectives turned off the tape recorder and told me that I had to get my composure back and stick to answering the questions before me. Then they turned the tape recorder back on. Following the interview, I returned to the station to sign my statement. Noticeably absent from the statement is my assessment of Dale Flanagan's good character and the threats that the detectives used to obtain my statement.

35. When I spoke with Dan Seaton, one of the prosecutors in the case, he told that Dale was the one who shot Mrs. Gordon. I remember so vividly how Mr. Seaton told me that "Dale wrestled his grandmother to the bed, an old woman who could not even make it up stairs because of her poor health. He put the gun to her head, and he shot her." I told the police and the prosecutors that I could not believe that Dale was responsible for the death of his grandmother. Dale never talked about killing his grandparents, or the money he would get if and when they died.

36. Dan Seaton and Mel Harmon told me that this crime had been motivated by an expectation of money and inheritance. I told them that their explanation did not make any sense to me. Dale was not a person who was concerned with money. He worked hard, and just wanted enough to get by on. For as long as I knew Dale he was not somebody who was concerned with money or material possessions.

37. After the Gordons bodies had been found, there were a few occasions when I heard Angela Saldana and Randy Moore talking about money that they would be coming into. I remember once I went over to the trailer to see Dale. Dale was not there, but Angela was. We talked a little, I wanted to know how Dale was doing. At some

ww

point in the conversation she said that it would not be long until Dale could take care of her the way she was supposed to be.

38. It made me so mad to hear her talk like this, but I knew Angela and I knew that she was a self-centered person who would do anything, hurt anybody, as long as she was taken care of. She was greedy and self-centered.

39. I also heard Randy talk about how his problems would be taken care of. That with the money he would be getting he would be able to settle his debts and pay his bills. I never trusted Randy Moore. I always believed that he was a bad influence on Dale. Dale was a hard worker who cared about maintaining his dignity and honesty. Randy on the other hand wanted things to be given to him. He never had a steady job and he was not concerned with working for the things he needed or wanted. He was a schemer. He would do just about anything to get the things he wanted without having to work for it.

40. Over the next fifteen years, I have continually been called to court for this case. Each time I have met with the prosecutor to rehearse my testimony. At the time of the original trial I was told that in exchange for my help and testimony the district attorney's office would "take care of" of some driving citations that I had. During the rehearsal sessions, I was told the prosecution's version of the crime and how I was supposed to answer the questions they asked. In particular, Dan Seaton insisted that robbery was the motive for the crime, something that I tried to tell him I did not have any knowledge of. I was also told topics that I should avoid bringing up in answering questions on the stand. I am sick to my stomach about the whole affair.

ww

41. At the time of the original trial when I met with Dan Seaton I was given a copy of my police statement. He told me to read, and re-read the statement. I was told that I had to know everything that was in that statement because that is what I would be testifying to at the time of trial.

42. At the time of the original trial, and in subsequent trial appearances I was always struck by how Angela Saldana carried herself. It was as if she enjoyed the process -- as if she liked testifying, and the attention that she was receiving from the media, the police, and the district attorney's office. This upset me because she was supposed to be a friend of Dale's. I cared deeply for Dale and felt as though I had been forced into a position wherein I had to betray my friend, she on the other hand seemed pleased by her involvement.

43. In 1995 when I was called back to court I had the misfortune of running into Saldana. We talked outside of the courthouse and then went out to dinner. She told me that the State had given her money to spend on dinner. I was not in this for the money -- in fact my absence from work created a large financial burden for me and my family -- but I had not been allocated the same amount of money as Saldana had. After dinner I walked her back to the Golden Nugget, where the State had booked her a room. I had been put up in the Four Queens hotel – easily two steps down in class from the Golden Nugget.

44. Until now I was never contacted or interviewed by anyone on Dale's behalf. I am glad to know that Dale now has an attorney who is interested in uncovering the truth as to what happened during the investigation and trial. It is important to me that before a man is executed, the truth is reveled. I feel as though I was coerced and

manipulated by the detectives of the Las Vegas Metropolitan Police Department and by the Clark County District Attorney's office. Over the last 15 years I have felt that my participation and testimony in this investigation was one sided. I have never felt, until now, like I was given the chance to tell my full and truthful recollections and beliefs regarding issues relating to Dale Flanagan and the death of Carl and Colleen Gordon. Had a representative from Dale's legal team ever asked me about the matters in this Declaration I would have told them the truth and would have testified on behalf of Dale Flanagan.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of South Carolina on this 18 day of April, 2000.

WAYNE ERIC ALAN WITTIG

WW

19

480

ORIGINAL FILED

JAN 29 10 40 AM '01

Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DALE EDWARD FLANAGAN, #0737065 Defendant.	)	Case No. C069269 Dept. No. VII Docket No. P

Before the Honorable Mark Gibbons

Wednesday, August 16, 2000, 9:00 a.m.

Reporter's Transcript of Proceedings

MOTIONS HEARING

APPEARANCES:

(See separate page)

REPORTED BY: Renee Silvaggio, C.C.R. No. 122

GE31

A P P E A R A N C E

For the Plaintiff:

LEON SIMON, ESQ.
Deputy District Attorney
CINDY HERON, Law Clerk
200 South Third Street
Las Vegas, Nevada 89155

For the Defendant:

CAL POTTER, ESQ.
Attorney at Law
1125 Shadow Lane
Las Vegas, Nevada 89102

and

DAVIS WRIGHT TREMAINE, LLP
Attorneys at Law
BY: ROBERT NEWELL, ESQ.
Suite 2300
1300 S.W. Fifth Avenue
Portland, OR 97201-5682

-o0o-

Las Vegas, Nevada, Wednesday, August 16, 2000, 9:00 a.m.

* * * * *

THE COURT: Let's go to page four, Case Number C069269, the State of Nevada versus Dale Flanagan.

I will have counsel state their appearances. We'll start with the District Attorney's Office.

MR. SIMON: The State is represented by deputy District Attorney Leon Simon and deputized law clerk, Cindy Heron.(ph)

THE COURT: Thank you very much.

Mr. Potter.

MR. POTTER: Your Honor, Cal Potter, appearing with Bob Newell, who is from Portland, Oregon.

And I wanted to introduce him to the Court.

THE COURT: Okay. Thank you very much.

Okay. On calendar, we have a number of motions.

We have the argument on Mr. Flanagan's petition for writ of habeas corpus; the defendant's motion for discovery; the defendant's motion for an evidentiary hearing; and the State's motion for waiver of the

attorney/client privilege.

There was some discussion, if there was some sort of motion to disqualify, was it either going to be filed or may have been filed. I couldn't locate it.

But I'll ask Mr. Simon if he could fill me in on that.

MR. SIMON: Yes, Your Honor.

I don't think any formal motion has been filed, but the question has come up as to whether our office should be disqualified due to a conflict of interest.

I'll just very briefly state the facts to the Court.

THE COURT: This is Mr. Wall's issue?

MR. SIMON: Yes. Mr. Wall was one of the attorneys assigned to represent the defendant at his third penalty hearing, which is before the Court today.

He, as the Court knows, has since come to work for the District Attorney's Office. His office is on the same floor as mine. It's not right next to mine.

The only discussions I've had with Mr. Wall regarding this case is I informed him that I was handling it and that I would not be able to discuss it with him.

I did give him a copy of Rebecca Blaskey's affidavit, which is attached as an exhibit by the defense.

She was co-counsel with him on the third penalty phase and has made various allegations tending to indicate that he did not receive effective assistance of counsel.

I think the leading case in Nevada on the issue of whether or not we should be disqualified under these circumstances is Collier v. Lee Gates, which is reported at 98 Nevada 307.

It's a 1982 case of our Supreme Court. Basically, it says that, under these circumstances, it's at the discretion of the Court, considering the full circumstances of the case before it, and I would submit that to the Court for a ruling as to whether or not our office should be disqualified.

THE COURT: Okay. And I'll just add, Mr. Potter -- and Mr. Simon, I know is aware of this other case -- and see if there is some impact -- there was another case that was a murder case, a death penalty case, that I had that Mr. Wall was prosecuting.

And it turned out the case originated in the Public Defender's Office while he was still there. I denied a motion to disqualify the D.A.'s Office. They filed a writ on it.

The writ was granted, to the extent that Mr.

Wall was told that -- or the District Attorney's Office was told that deputies that had nothing to do with the case previously had to take it over.

And I think Mr. Simon, in fact, was given the case to take it over, and it was eventually negotiated.

And so the Supreme Court, I know, has -- that's an unpublished -- I believe it was an unpublished opinion when the writ was granted.

So I know they have looked at that issue before, even though -- I will be happy to dig it out and get you a copy of it, because I think they went through an analysis probably similar to what Mr. Simon is talking about.

So if either one of you want to do that, I will find it and get you a copy of it so can you look at that opinion by the Supreme Court.

MR. NEWELL: Your Honor, I don't think that's necessary.

Part of the reason for our concern -- and I don't have my whole file with me, so I'm not sure exactly what we said in the motion; and it's possible that we didn't file a formal motion -- but the basis for it was Mr. Simon's -- commented at the last hearing that he was not sure that they could screen off Mr. wall.

And I'm familiar with the Collier case that gives the Court the discretion to that says that steps can be taken, that that's acceptable.

And Mr. Simon has recently proposed to me that, rather than discussing the case with Mr. Wall, as he would any normal witness, we need to depose him in a formal setting.

So I think the Court has discretion, but I think, obviously, from our standpoint, it raises a concern.

THE COURT: Well, there is a motion before me, so I'm not going to interject myself into it. But I think the parties probably have some sensible solutions that they're discussing on how to deal with it.

So I'll let the parties -- if either party isn't satisfied with the resolution, they can feel free to file the appropriate motion.

Okay. As far as the -- why don't we go ahead with the writ issues. I think we need to deal with that first.

And, again, I have read everything filed by the parties. I am familiar with the issues. I wasn't familiar with the case, frankly, until I got it, but I went through all of this, and I realized there is a long tortured history to it, but I am familiar with the issues that are

before us today.

So, Mr. Newell, if you want to argue it -- you don't have to repeat what's in your briefs. I've read it. I've analyzed all the arguments; made extensive notes from what both sides have said. But I would certainly like you to address points that you feel may not be addressed thoroughly in writing.

MR. NEWELL: Sure. Thank you, Your Honor.

I'm not -- I've thought quite a bit about this, as you might expect, but it seems to me that, given the state of the case right now, with the petition having been filed and the motions before the Court, that it would be appropriate to talk about discovery.

There is one exception to that --

THE COURT: Well, let's see -- let's just, before we do that -- maybe I'm getting things out of sequence here.

MR. NEWELL: Okay.

THE COURT: On the motion for discovery, Mr. Simon's position then is that I can only do this -- if I grant the writ, then we can go into discovery.

I do think that issues regarding Mr. -- Miss Blaskey and Mr. Wall probably deserve an evidentiary hearing in some format to deal with that, and we'll discuss that.

That's just my reaction to reading everything.

The other issues, I'm open minded on it, but don't we need to really address the writ before we start jumping into the discovery, other than that?

And I'm thinking more of your motion for evidentiary hearing, which I was going to grant as to the issues there with the attorneys and all.

MR. NEWELL: Well, I can certainly do that, Your Honor.

I have -- I will confess to you, my background is in civil litigation, and so I've had a very steep learning curve on this.

THE COURT: Well, so is mine, so we're equal on this.

MR. NEWELL: Okay. I can't find any -- anything, either in Nevada or any other state, that says how you go about this.

And I understand, in a lot of instances, with writs, you grant the writ, and then the case goes forward.

If that's what you are talking about, I agree with you. In --

THE COURT: Well, I mean, under N.R.S. -- I mean, I think I can grant an evidentiary hearing, which is

one of your requests, and we can talk about what's in there.

But as far as discovery, I don't think, under N.R.S. 34.780, I can just open up discovery at this stage here, because we're in post-conviction relief.

And I really think if the writs were granted, then we certainly would have that option to go in that direction.

But I really think, at this stage here, you could have an evidentiary hearing; you would have subpoena power; you would have different things.

So you are probably going to get what you are looking for, solutions as to the issues as to the evidentiary hearing anyway, so it's kind of form over substance right now.

MR. NEWELL: Okay. Well, maybe it would help me to know what the Court has in mind when you say granting the writ.

THE COURT: Well, no, I didn't say granting the writ. I said granting the evidentiary hearing --

MR. NEWELL: I see.

THE COURT: -- allowing the hearing as to the Wall/Blaskey issues here.

I realize there is many other issues the defense wants an evidentiary hearing on. I'm not inclined

to do that as of now, but we're having argument here today and you can tell me why you think I should. And then I will hear from the State as well.

But I am inclined to give it to you at least on those issues.

MR. POTTER: Your Honor, I don't want to jump in, but my experience is -- I've done a lot of these cases over the years, and my experience has been that if we could make a prima facie showing, we're entitled to do discovery in the case.

Historically, writs of habeas corpus in civil cases -- we all come from civil backgrounds in dealing with that.

What's important is that many of the arguments that we've put forward, and there has been a lot of investigation done, but without the formal discovery available to the defendant in this action, we're really not in a position to flesh out our allegations and most of the allegations of the writ.

And so what I think is important is if we make the prima facie showing, and that's really been the custom and practice within this district, then we're allowed to go into formal discovery.

THE COURT: So the question is: Have you

made a prima facie showing?

MR. POTTER: Correct.

THE COURT: I guess that's really the -- because Mr. Simon is saying no, and I guess that's really the issue we need to address.

If I find that you have, then --

MR. POTTER: Right.

THE COURT: Okay. Why don't we focus on that. That may be the best way to deal with that on the writ.

Again, I'm kind of jumping all over the place here, but I'm trying to see if we can do this in a systematic manner.

MR. NEWELL: Well, Your Honor, there are two primary areas. I mean, there is a lot subsumed within that, but there are two primary areas that I think we have more than made a prima facie showing. One is ineffective assistance of counsel.

And if you look at Mr. Pike's affidavit, essentially, he didn't do anything in the trial of this case. He didn't do any investigation, other than talking to the defendant's father.

He didn't hire the experts. He didn't even ask for investigative funds. He didn't hire -- he didn't

ask for a continuance.

He was appointed in early August. His appointment was confirmed on August 7th, and the evidentiary hearing commenced shortly thereafter and continued for about three to four weeks, as I recall, and then trial commenced immediately.

And the four defendants were tried together; motion to sever was denied.

We contend, quite improperly, given the evidence that came in --

THE COURT: Hasn't the Supreme Court really dealt with all that previously?

MR. NEWELL: Not in any significant way, no.

THE COURT: Well, I mean, they've affirmed the Judgment of Conviction. They allowed, what, I guess the third -- up to three penalty phases, and then that's been affirmed.

So I mean, that's the law of the case certainly, as is Mr. Simon's primary argument, and it's generally -- I can't relitigate stuff that the Nevada Supreme Court has ruled upon.

MR. NEWELL: Well, but our point is that they haven't ruled on it because of the ineffective assistance of counsel.

For example -- and I will give you the most dramatic one we have.

THE COURT: Okay.

MR. NEWELL: The affidavit of Robert Ramirez says that Mr. Flanagan wasn't even involved in the crime. That was available at the time of the first trial. It was never discovered. Nobody ever talked to him.

And that -- he has said that Mr. Flanagan was present in the house, but trying to stop it.

Now, that's pretty dramatic evidence that would give rise to -- I think in most people's minds -- a reasonable doubt. Nobody heard about it.

We don't know whether -- we know that Mr. Ramirez talked to the police. None of that material was turned over to the defense.

So we've got a prima facie showing, both from Mr. Ramirez, Miss Saldano -- let's see -- Mr. Lucas, of things that were done and evidence that was withheld -- and Mr. Whitaker as well -- was withheld from the defense.

So we have clear Brady violations by the State.

But we also submitted extensive material in our exhibits, from discovery taken in another case, showing how the police department and the D.A.'s Office fragment

their records in lots of different places.

So until we get discovery on it, we don't know the extent to which there were Brady violations committed.

That's just one example on the -- that ties ineffective assistance and the prosecutorial misconduct together.

And I'm not going to repeat everything in the petition, but those are the primary areas where we think discovery is not only appropriate, but crucial, to the presentation of our case, because we don't -- I've talked to some people who do this kind of thing on a regular basis, and they've told me that it's very, very common for there to be Brady violations that you don't find out about until post-conviction.

I mean, we think we've got prima facie evidence of that here that entitles us to full-blown discovery that accompanies a civil case.

Mr. Pike talks about some other issues, that Mr. Potter is going to discuss, regarding Judge Mosley's refusal to allow the defense to object in open court and not ruling on those objections.

He -- I mean, there is just a litany of things that he didn't do in that first trial that goes not

only to the penalty phase, but to the guilt phase as well.

THE COURT: But hasn't that been litigated through appeals to the Supreme Court?

MR. NEWELL: No. This is the first time ineffective assistance has been raised.

And what the Supreme Court has said each time is: Well, the evidence of guilt is overwhelming.

Well, sure it is if you only pick certain parts of the evidence that is available. It's when you get the whole picture together to show ineffective assistance that the previous rulings of the Supreme Court become irrelevant, because they're based on a different record than we would be able to present.

THE COURT: I see. Okay.

MR. NEWELL: So that's -- that's the first issue.

There are some legal issues that I think the Court could address as well; and the first one that I will point out is the so-called Caslin(ph) instruction, which is addressed on pages 19 through 21 of our reply.

As you probably know, the Nevada Supreme Court on the Byford case recently held that the Caslin instruction is improper.

THE COURT: They didn't rule it was

retroactive.

MR. NEWELL: They said this has always been the law; and we quoted the specific language in there that said: This is not new law. This is the way it's always been. It's been incorrectly applied.

So we think that alone gives this Court the authority to grant our relief that we're seeking.

And, you know, I mean --

THE COURT: Well, Mr. Newell, I can tell you this: I understand your argument. Believe me, it's come up in every murder case I've had since Byford came down. Everybody wants a new trial on it.

And I've ruled on those motions that it's -- it's -- that the Supreme Court hasn't said it's retroactive, so -- if they do, we're going to have God knows how many new murder cases to retry, but that -- I know that issue is up before the Nevada Supreme Court right now, so we'll look to see what they do. So I'm not inclined to say it's retroactive.

MR. NEWELL: Okay.

As you know, the -- focusing on the prosecutorial misconduct issue, the Nevada Supreme Court cited Mr. Seaton for misconduct in this case and others.

It seems to me that we're entitled to

discovery from the D.A.'s Office on the issues of training and what their instructions are in cases like this.

Because what happens is a vicious cycle, as near as I can tell: This misconduct occurs; the Nevada Supreme Court reviews it and says: Yes, it's misconduct, but it's harmless error.

And so no defendant can get a fair trial against Mr. Seaton and Mr. Harmon, but they can't get a reversal either.

And so until somebody takes a stand and says, wait a minute, you can't do that, there is no sanction for their continuing it.

And our position is that we're entitled to discovery on those issues so that we can present a full evidentiary record to the Court on the extensive misconduct that occurred here.

We think that there are not only Brady violations, but Giglio violations, that were not addressed, either on the ineffective assistance side or on the misconduct side. And until we get that discovery, we can't present a full evidentiary record on it.

I can go through each one individually if you'd like, but that's sort of overall --

THE COURT: Well, that's not -- I've read

everything that you filed, so I understand the various points like that.

MR. NEWELL: Okay. In the -- I guess what I would call attention to -- attention to, Your Honor, is the motion for discovery where we lay out specifically what we're after there.

THE COURT: Okay. Thank you.

Mr. Potter.

MR. POTTER: Your Honor, I wanted to focus on the argument dealing with Judge Mosley.

As local counsel, in signing these pleadings and being a part of it, I don't take the job lightly; and what is really egregious here and I think really important to focus upon is that when the Nevada Supreme Court looked at this case, they weren't looking at the constitutional arguments. Clearly, direct appeal did not raise issues dealing with constitutional issues.

They're all intertwined with the right to effective assistance of counsel.

The procedure that Judge Mosley adopted here is wholly irregular; acknowledged by the Court to be wholly irregular.

But where it comes into play now is based upon an actual innocence argument or an actual withdrawal of

a conspiracy. The Ramirez affidavit speaks volumes in terms of law of the case in this particular manner.

I have not found anyone, in looking at this case and going over this case, attorney, judge, anywhere, that can cite me to anything similar to what Judge Mosley did in this case.

And we all know that Judge Mosley is now an experienced judge, but going back in time to the time of this trial, I suspect, if given the opportunity, he would not have handled a trial like this, civil or criminal, where you do not do objections contemporaneous to the trial.

What essentially is occurring is he's saying: I'm not going to give this individual a fair trial. I've already made my mind up. I've had evidentiary hearings in the past and whatever you say and whatever you do has no force or effect on me as the judge.

The triers of fact, the jury, the ones who are going to make this determination, aren't given the opportunity to see what the true evidence should have been under our rules of law.

And because of that -- Mr. Pike, being a very young attorney at that point in time, acquiesced to the actions of the Court, when, in fact, he should have stood up and objected, irregardless of what this judge was going to

do, because his duties were to the client, to protect his rights, and he certainly did not do that.

Those comments that are made by Judge Mosley, when they're off the record, to the attorneys back in chambers, are certainly not that of an experienced jurist: Let's get back out there and get these guys executed.

Those are strong allegations and those are allegations that I think we're entitled to investigate. We should be given the opportunity to take the deposition of this judge. He did remove himself from the case at a future point in time.

But I think what's really important here is he did not get a fair trial based upon this judge's procedure that is totally irregular, not -- not followed by any other judge that I'm aware of anywhere in the United States, nor would it be because it's -- it's -- it belies any type of criminal procedure.

And when he did this, I think what also comes into play and what -- we've literally had people calling us up, because of the other things that are going on in this community, in this judicial community, concerning allegations of Judge Mosley, volunteering to give us information concerning his prejudice as to criminal

defendants and, specifically, as to this case.

I've never had that ever happen before.

So I think we should be entitled to use the discovery process to try and find out, one, because we -- we can make the prima facie showing based upon the fact that he allowed the State to make objections and make objections on the record in front of the jury, but denied the defense to do that; but, more importantly, denied the defendant the right to be present when the objections were being made; wholly irregular, wholly violating his constitutional rights, as well as the statutory authority of this state.

So what I'm asking for is the same opportunity to do the deposition process, the discovery process, on Judge Mosley.

THE COURT: Thank you.

Mr. Simon.

MR. SIMON: Thank you, Your Honor.

THE COURT: If you want to sit down, you may feel free to do so.

MR. SIMON: Well, actually, it's good for me to stand and walk as much as I can, but thank you.

THE COURT: Okay.

MR. SIMON: Both counsel have made references to this Ramirez statement, which is attached as

an exhibit in Volume VII.

I would -- it's Robert Ramirez.

I would certainly invite the Court to read Mr. Ramirez' statement. He wasn't present at the scene of the murder.

He was associated with several of these people that were involved. In his statement, he claims that he had discussions with them after the fact. He claims that somebody else told him that Dale didn't do the murder.

This is hearsay at best. It's directly contradictory to the testimony of John Lucas, Rusty Havens and Angela Saldano, all of whom testified at trial as to incriminating admissions that Dale Flanagan made.

Dale Flanagan, according to Miss Saldano, confessed the murder of his grandmother in the involvement and the episode which also led to the murder of his grandfather by one of his co-defendants.

Now, counsel has also obtained statements by these three people, all of which they've included in the same volume, but when you read their statements, neither Lucas, Havens, nor Saldano retracts the testimony they gave at trial.

None of them say they committed perjury; none of them say they gave false evidence.

They all try to gloss this over saying: Well, Dale was really a pretty nice guy. He worked. He wasn't as bad as the other guys. He took a lot of alcohol; he took a lot of drugs.

But none of these contradict the sworn testimony they gave at trial: That Dale Flanagan made admissions, including outright confessions to Saldano, that:

Yes, he did murder his grandmother. He did participate in the crime in which his grandfather was murdered by one of his co-defendants.

As Your Honor observed, our Supreme Court has repeatedly, strongly affirmed the conviction as to the guilt phase.

The first time it came before our Supreme Court, in 1988, which was reported at 104 Nevada, page 105 -- I'm going to read to the Court from page 107 of that opinion.

The Court states: When a guilty verdict is free from doubt, even aggravated prosecutorial remarks will not justify reversal.

They give a couple citations and go on to say:

Here, there was overwhelming evidence of Flanagan's involvement in the planning and

execution of the murder.

The last time our Supreme Court considered this case, which was in 1996, reported at 112 Nevada, beginning at page 1409, they similarly reaffirmed that finding at page 1420 of that opinion, where they state -- and I read to the Court:

> We characterize the evidence against Flanagan and more as overwhelming in our first opinion in this case. There is no reason to change that characterization now.

Under Strickland, which is the landmark case considering effectiveness of counsel and post-conviction relief, there are two problems they must meet in order to obtain a reversal of a conviction:

They must not only show that counsel was ineffective, they must also meet the second prong, which is prejudice.

And in the Strickland case, the Supreme Court of the United States holds that the Court may address either of those two issues first; and if it finds that they have failed to meet either of those, that's all the further the Court has to go; no relief is warranted.

In this case, as far as the finding of guilt goes, our Supreme Court has consistently and repeatedly

upheld the finding of guilt, in spite of the prosecutorial misconduct by Mr. Seaton, which Mr. Potter has addressed.

Our Supreme Court is well aware that, in various cases, Mr. Seaton has been accused of and found to have committed prosecutorial misconduct, as he did in this case. That's the reason that the death penalty was reversed in the first case.

However, our Supreme Court very clearly said: Overwhelming evidence of guilt; no reversal of guilt.

And they reaffirmed that the last time they heard this case. This case has been before them several times. They are very consistent -- been very consistent as this Court observes. That's the law of the case.

There is no reason to revisit the guilt case -- I'm sorry -- the guilt phase of this case at this time. Indeed, I believe it would be improper to do so.

We seem to be trying to attack Judge Mosley here, but I don't think that's appropriate or in order; and along -- in conjunction with that, I would like to make reference to their motion for discovery.

Aside from the fact that it's premature at this point in time, it is very overbroad. Counsel and the Court are very experienced in civil law. I have some experience in civil law, but in order to obtain discovery,

not only does it have to be timely, but there has to be good cause.

This is one of the most overbroad requests for discovery I have ever seen. And as an example of that, I would like to call the Court's attention, just as one example, to Item Number 11.

They want to take depositions of the present and past justices of the Supreme Court of Nevada and its staff. That's ridiculous, Your Honor.

If the time comes when Your Honor feels that discovery is appropriate, I would ask the Court to go through it item by item and only order discovery on those specific issues where they have made a showing of good cause.

This is just a blatent fishing expedition.

And that's -- that's all I have to submit to the Court at this time, Your Honor.

As Your Honor indicated, I agree that I think an evidentiary hearing into the effectiveness of counsel at the third penalty phase would be called for at this time. I think we have to have that because of the allegations they've set forth.

THE COURT: What about the State's motion for waiver of the attorney/client privilege, tying into

that?

MR. SIMON: Yes, Your Honor.

I would like to simply cite to the statute, which I cited in my Points and Authorities.

Nevada Revised Statute 34.735, subsection (6) reads, in part -- and this is addressed to a person filing a post-conviction relief petition:

> If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney/client privilege for the proceedings in which you claim your counsel was ineffective.

Very clear, very straightforward: They have alleged ineffectiveness of counsel; pursuant to the statute they have waived the privilege and I would ask the Court to so find.

THE COURT: Thank you.

Mr. Newell.

MR. NEWELL: Thank you, Your Honor.

Let me take these in order.

The problem with Mr. Simon's argument that the Ramirez affidavit is hearsay is that this was a conspiracy case and what he heard was directly from one of the defendants, one of the co-conspirators.

And, repeatedly, throughout the trial, those kind of statements were admitted as --

THE COURT: Well, it depends who offers them though like that.

MR. NEWELL: Well --

THE COURT: Doesn't it?

MR. NEWELL: No, not in this context, it doesn't. I mean, not if it's exculpatory evidence.

And it comes from a co-conspirator. I mean, it comes in to convict or defend either way. What's good for the goose is good for the gander.

And it came from Roy McDowell and it came from Randy Moore. So they were both being tried at the same trial and they were to defend against it.

One of the things that I didn't mention at the outset about Angela Saldano is that we've presented prima facie evidence that she was acting as a police agent throughout this investigation. That was never revealed to the defense.

And those kinds of violations don't require a showing of prejudice. Those are per se violations that -- that require a new trial, reversal.

So, you know, the level of misconduct here is hard to comprehend until you get into the details and it

just is pervasive.

On the Strickland issue, again, the Ramirez affidavit alone -- I mean, there were many, many examples of this, but the Ramirez affidavit alone provides the satisfaction of the second prong that Mr. Simon talks about.

There is no question, I think, that Mr. Pike was ineffective. He admits it. The facts that he lays out make it very clear, under prevailing law: Failure to do investigation, failure to talk to the State's witnesses, on and on and on and on, constitutes, in case after case, ineffective assistance.

And the fact that he didn't talk to Mr. Ramirez, who was readily available at the time, shows -- meets that second prong of the Strickland test, to show that it would have made a difference in the trial and it makes the verdict unreliable.

So we've made the prima facie showing that is necessary under Strickland, and I think the Court should so order.

The -- on the waiver of attorney/client privilege, I trust the Court has read our memorandum in opposition to that.

THE COURT: Yes.

MR. NEWELL: I think the problem with the

State's position on that is that there has been nothing submitted to this Court that constitutes a confidential communication between attorneys and the client.

What it talks about -- what the Blaskey affidavit talks about is the conduct of the Public Defender's Office, lack of resources, conduct of counsel, what they did, what they didn't do.

All of that can be addressed without any waiver of the privilege.

The problem with the State's position is that the statement about waiver is contained in the instructions for a form that's printed in the statute for a pro se defendant to file a writ -- a petition for writ of habeas corpus.

To my knowledge, that issue has not been litigated. I -- I couldn't find any case law on it in Nevada.

The -- there is case law though that says if you waive your privilege, it's waived for all purposes.

And when you start down that road, you can see that if you had a situation, like we contend this case is, where there was clearly an unconstitutional trial conducted, where there be no question the defendant would be entitled to a new trial, the State comes in in

post-conviction and says: You've waived the privilege. We get to go in and ask you everything you told your -- your lawyer -- he's, in effect, lost his right to counsel; he's lost his right to -- his Fifth Amendment right of self incrimination, against self-incrimination; and all the constitutional protections that he might have are gone in a subsequent trial.

So, logically and constitutionally, it simply doesn't make sense.

I think, again, addressing this on a practical basis, by having Mr. Wall provide a deposition, we can address all of the issues that are raised.

Number one: When was he appointed? How much time did he put in on the case? Did he ever go to the prison to speak with the client? What did he turn over to the psychologist to examine Mr. Flanagan? Did he overrule Miss Blaskey's request for a motion for continuance?

On and on and on.

None of those have to do with communication with Mr. Flanagan.

So, in that sense, we're not opposing the -- the thrust of what Mr. Simon is asking for. We think that can be done.

But we are asking that it be done in a very

controlled fashion, so that communications with Mr. -- between Mr. Flanagan and his counsel are not invaded.

THE COURT: Okay. Thank you.

Okay. Well, here's -- I'll go through these -- I'll kind of jump around. I'm not trying to do them in order -- so that we have some sort of logical sequence on what we're going to do.

I'm going to start with the State's motion for waiver of attorney/client privilege: That motion is denied without prejudice, in that I'm going to allow, as Mr. Newell has said, that perhaps that information can be inquired and tailored in such a way at the hearing that it would not require the attorney/client privilege to be invaded.

However, Mr. Newell, I'm going to advise you and Mr. Potter that it's without prejudice because if I find that it does and then the defense puts that at issue, then Mr. Simon, I believe, is correct under N.R.S. 34.735, subsection (6), we will need to go into it.

It's one of those open the door issues, so you can decide if you want to tailor it to your argument -- I think I know where you are going with your argument, but I think there is a way you can present it without putting that at issue.

So, for that reason, the motion is denied without prejudice.

Okay. The defendant's motion for evidentiary hearing is granted, as to the issue of Miss Blaskey's affidavit, that she has raised the conduct of Mr. Wall and those particular issues here. We'll have an evidentiary hearing on that.

As to the remaining issues, it's denied.

As to the motion for discovery, it's denied without prejudice at this time. I want to have the evidentiary hearing first.

I agree with Mr. Simon: It is -- it's overbroad. I certainly -- I think with -- it's so broad -- I never heard of anything about deposing people from the Supreme Court and these other issues here.

So that, I'm not going to go into that.

As the issue with Judge Mosley, I don't believe I'm going to go into that.

But, again, let's see what happens with the -- with the evidentiary hearing with Miss Blaskey and see whether that leads us in any other directions. I don't think it will. But, at this time, it is overbroad.

Also, as far as the petition for writ of habeas corpus, again, as far as the issues relating to what

Miss Blaskey has raised -- and I don't remember, Mr. Newell -- there is 30 some odd claims. I don't remember which claim that is with Mr. Wall and Miss Blaskey.

Do you remember which one that was?

MR. NEWELL: Well, it's covered in the fourth claim.

THE COURT: Okay. I want to make sure any claims that that's -- it's covered in, that I'm going to -- I'm going to defer ruling on that until we have the evidentiary hearing and all.

So I'll say any claims, rather than -- rather than -- paraphrasing it by way of claims, you've identified them -- any claims asserted by Miss Blaskey regarding the conduct of the case and involving Mr. Wall and all, I'm not going to rule on that.

That will be part of the evidentiary hearing; and we'll hear the evidence, and then we'll make a determination on that as to the defendant's petition for writ of habeas corpus.

As to the remaining issues here, that is, issues -- and, again, I'm going to try -- I know there is a lot of material covered here.

The ineffective assistance of counsel argument as to Mr. Pike, that is denied, in that under

Strickland versus Washington, 466 United States 668, although Mr. Potter, perhaps, as trial counsel would have a different strategy than Mr. Pike employed, the Court finds that his representation was not ineffective, and based upon the subsequent case law, it's been developed after the Strickland case.

Secondly, as far as the issue, the Court finds that there is just bare allegations as far as the failure to disclose exculpatory evidence; and for that reason, the motion is denied.

Also, as to prosecutorial misconduct, I mean, that issue was addressed by the Supreme Court as part of the law of the case as to Mr. Seaton's actions here.

Again, since the Court has ordered -- the Supreme Court has ordered previous penalty phases, in this case, three penalty phases, I think that moots many of these issues.

The Court finds the remaining allegations in the petition are bare allegations made by the defendant and are barred by the law of the case of the previous direct appeals to the Nevada Supreme Court.

So we'll just go ahead with the issues then as to Miss Blaskey and Mr. Wall and deal with that in an evidentiary hearing.

Mr. Newell, I know you are coming in from out state, so I will try to schedule that in such a way that it's convenient for you as well.

Maybe we can go off the record and kind of discuss that and then go back on the record.

MR. SIMON: I think we ought to put it out far enough, Your Honor --

THE COURT: You want to go off, Mr. Simon?

MR. SIMON: Yeah, please.

THE COURT: We'll make a record -- because of the -- it's a death penalty case, we will make a record afterwards, so there is a complete record for appellate purposes.

Okay. Let's go off the record.

(Off the record discussion.)

THE COURT: We are back on the record.

There has been a discussion off the record regarding scheduling a status check regarding discovery that has to be done pertaining to the evidentiary hearing; and that we'll waive Mr. Newell's appearance at that status check. Mr. Potter will make the appearance as local counsel.

We'll set that for status check in approximately one month, Cheryl.

THE CLERK: September 13th at nine a.m.

THE COURT: Okay. So that will be a status check.

And then we'll go ahead -- at that time, Mr. Simon, we'll find out where we're at with discovery and perhaps see if we could arrange a date for the evidentiary hearing.

Again, I've advised counsel I would probably like to do it on a Friday. I will try and do it to accommodate Mr. Newell's schedule.

Do we need Mr. Flanagan transported for this? Is this a right of confrontation issue here?

MR. SIMON: Yeah. Normally, we would for an evidentiary hearing, Your Honor.

THE COURT: Okay.

MR. SIMON: And the State will certainly be happy to prepare an order to transport once we have a date.

THE COURT: Once we set the date, the Court will order Mr. Flanagan to be transported -- is he in Carson City then right now?

MR. NEWELL: Ely.

THE COURT: Ely. Okay.

We'll order him transported so he can be present at the hearing.

Also, if you want to have him transported several days before, so he can meet with defense counsel to help prepare for the hearing, I will be willing to do that as well, to assist counsel geographically.

Especially Mr. Potter and Mr. Newell, going to Ely isn't the easiest thing to do. So we'll make those arrangements also.

Okay. Mr. Simon, anything else you want to put on the record?

MR. SIMON: Not at this time, Your Honor.

THE COURT: Mr. Newell.

MR. NEWELL: Yeah. The issue that came up while we were off the record was the deposition of Miss Blaskey.

I mean, you indicated that Mr. Wall would be deposed, and I think Mr. Simon and I are in agreement on that.

Neither he nor I see any need to depose Miss Blaskey, but --

THE COURT: Okay. Then you don't have to depose her.

MR. NEWELL: Okay.

THE COURT: I mean, I'm just -- if it's not necessary, no reason to do it.

MR. SIMON: Your Honor -- I assume they would call her as a witness at the evidentiary hearing, Your Honor, and I will ask her any questions that I have at that time.

THE COURT: Fine. That takes care of that.

MR. SIMON: Okay.

THE COURT: Okay. Anything else we need to do on the record?

MR. NEWELL: The only other point I was going to raise, Your Honor: You indicated that you didn't think you would get to the issue about Judge Mosley.

Just so that it's clear, Judge Mosley did not try the third penalty trial.

THE COURT: I understand.

I realize that, after the fact, that we had a change of judges and all on it. So as to the allegations on Judge Mosley, that's denied, in that I feel those are issues to be the subject of direct appeal.

And I realize that Mr. Newell is saying it's now an ineffective assistance argument. I appreciate that, but I still feel that has to be raised on direct appeal, and if not, it's the law of the case.

Okay. Anything else?

MR. POTTER: Your Honor, just for the record, I mean, we're entitled to ineffective assistance of counsel in the appellate stage.

It's the Evits versus Lucey is the case that talks about that. And if Mr. Pike or the counsel at the time of the direct appeal doesn't raise that, then that becomes an ineffective assistance issue that can't be raised and never could it ever be addressed, and what we're doing here is closing this off and sweeping it under the rug.

I mean, if it couldn't be raised and wasn't raised on direct appeal, then it becomes an issue of ineffective assistance.

THE COURT: I understand, Mr. Potter.

I appreciate that. And I think that's covered by the ruling that I don't feel Mr. Pike was ineffective.

MR. SIMON: Nothing further, Your Honor.

THE COURT: Okay. Thank you very much.

MR. SIMON: Thank you, Your Honor.

ATTEST: Full, true and accurate transcript of proceedings.

RENEE SILVAGGIO, C.C.R. NO. 122
OFFICIAL COURT REPORTER

ORIGINAL

3

FILED

AUG 9 7 58 AM '02

CLERK

ORDR
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

DALE EDWARD FLANAGAN,
#0737065

Petitioner,

-vs-

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

Defendant.

Case No.. C69269
Dept. No. VII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 2-14-02
TIME OF HEARING: 9:30 A.M.

THIS CAUSE having come on for hearing before the Honorable Mark Gibbons, District Judge, on the 14th day of February, 2002, the Petitioner not being present, represented by ROBERT NEWELL, ESQ. & CAL J. POTTER, III, ESQ., the Respondent being represented by STEWART L. BELL, District Attorney, by and through H. LEON SIMON, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Dale Flanagan, hereinafter Defendant, was charged by Information with two counts of First Degree Murder With Use of a Deadly Weapon; two counts of Conspiracy to Commit Murder; one count of Burglary; one count of Conspiracy to Commit Burglary; one count of Robbery With Use of a Deadly Weapon; and one count of Conspiracy to Commit Robbery.

RECEIVED
AUG 09 2002
COUNTY CLERK

2. In September, 1985, Defendant's jury trial began before the Honorable Donald M. Mosley, District Judge in the Eight Judicial District Court of the State of Nevada. At the conclusion of the trial, the jury found Defendant guilty on all counts.

3. Following a penalty hearing, the jury returned a sentence of death against Defendant for each of the two convictions for murder.

4. Defendant was sentenced on November 27, 1985 to:

Count I (Conspiracy to Commit Burglary) - one (1) year in the Clark County Jail;

Count II (Conspiracy to Commit Robbery)- six (6) years in the Nevada State Prison;

Count III (Conspiracy to Commit Murder)- six (6) years in the Nevada State Prison;

Count IV (Burglary)- ten (10) years in the Nevada State Prison;

Count V (Robbery)- fifteen (15) years in the Nevada State Prison and an equal and consecutive sentence of fifteen (15) years for the deadly weapon enhancement;

Count VI (First Degree Murder)- death by lethal injection and an equal and consecutive sentence of death for the deadly weapon enhancement;

Count VII (First Degree Murder)- death by lethal injection and an equal and consecutive sentence of death for the deadly weapon enhancement.

The District Court ordered Counts II through VII to be served consecutively to one another and to Count I. Defendant was given three hundred and one (301) days credit for time served.

5. Defendant filed a timely Notice of Appeal on December 19, 1985.

6. On May 18, 1988, the Nevada Supreme Court affirmed Defendant's conviction but reversed the sentence of death and remanded the case to the District Court based on prosecutorial misconduct during the penalty hearing. See Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988) (Flanagan I).

7. Upon remand, a second penalty hearing was conducted and Defendant was once again sentenced to death by a jury. Defendant timely appealed his second death sentence to the Nevada Supreme Court.

8. The Nevada Supreme Court affirmed the death sentence imposed in the second penalty hearing. See Flanagan v. State, 107 Nev. 243, 810 P.2d 759 (1991) (Flanagan II).

9. Defendant petitioned the United States Supreme Court with a writ of certiorari which the Supreme Court granted. The Supreme Court vacated Defendant's death sentence and remanded the case to the Nevada Supreme Court for further consideration in light of Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093 (1992).

10. On remand, the Nevada Supreme Court held that the State had impermissibly offered evidence of Defendant's involvement in satanic worship during his second penalty hearing in violation the First Amendment. See Flanagan v. State, 109 Nev. 50, 846 P.2d 1053 (1993) (Flanagan III). The Nevada Supreme Court remanded the case for a third penalty hearing.

11. After the third penalty hearing, a jury once again sentenced Defendant to death.

12. Defendant file a timely Notice of Appeal from the third death sentence.

13. On appeal, the Nevada Supreme Court affirmed the death sentence. See Flanagan v. State, 112 Nev. 1409, 930 P.2d 691 (1996) (Flanagan IV).

14. Defendant filed a Petition for a writ of certiorari to the United State's Supreme Court which was denied. See Flanagan v. State, 523 U.S. 1083, 118 S.Ct. 1534 (1998).

15. On May 28, 1998, Defendant filed the instant Petition for Writ of Habeas Corpus (Post-conviction).

16. In his petition, Defendant made thirty-six claims in support of his request for relief from his conviction and sentence.

17. The following claims raised in Defendant's petition were previously addressed by the Nevada Supreme Court in one of Defendant's direct appeals and are barred by the law of the case: 1) Claim I (a) - allegation that the State coached its witnesses, 2) Claim I (d) - the alleged prosecutorial misconduct during trial, 3) Claim III- the introduction of witchcraft evidence during trial, 4) Claim IV (a)[1] the court-designed exercise of peremptory challenges, 5) Claim IV (a) the adequateness of the jury instruction regarding greater risk, 6) Claim IV (a) the necessity of jury instruction requiring a nexus between robbery and burglary, 7) Claim XII - the validity of the jury instructions dealing with "equal and exact justice" and "guilt or innocence of another

[1] Defendant sets forth several claims each within IV (a) and IV (c).

person", 8)Claim XIII- the lack of evidence to find Defendant guilty of the aggravator "creating a greater risk of death", 9) Claim XV- that there was insufficient evidence to support the aggravator "murder in the commission of robbery", 10) Claim XVII- that the District Court improperly gave the anti-sympathy jury instruction, 11) Claim XXIX- the District Court's joinder of Defendant's case with his co-defendants, and 12) Claim XXXVI- that Defendant's lengthy confinement prior to the imposition of the death penalty constituted cruel and unusual punishment.

18. The following claims raised in Defendant's petition are naked allegations unsubstantiated by facts: 1) Claim II - the allegation that the State shaped witnesses' testimony with offers of leniency, 2) Claim IV (a) the allegation that Defendant's attorney failed to investigate, the allegation that Defendant had diminished capacity at the time of the crime, the allegation that Defendant was incompetent to stand trial due to his medication, the allegation that Defendant's attorney should have requested investigative funds, the allegation that Defendant's attorney did not cross-examine Wittig effectively, 3) Claim IV (c) the allegation that the Public Defender's office lacked the resources to prepare for the third penalty hearing, 4) Claim VII - the allegation that the jury selection process in Clark County is prejudicial, 5) Claim IX - the allegation that bench conferences impaired Defendant's ability to prepare a defense, 6) Claim XI - the allegation that the Nevada Supreme Court's decisions on death penalty cases are arbitrary, 7) Claim XX - the allegation that the judges who presided over Defendant's trial and three penalty hearings were not impartial, 8) Claim XXIII - the allegation that Defendant was not present during important court appearances, and 9) Claim XXXI - the allegation that jurors saw Defendant in shackles.

19. The following claims raised by Defendant are belied by the record: 1) Claim IV (a) - the allegation that Defendant's attorney did not thoroughly cross-examine the witnesses, 2) Claim V - the allegation that Defendant was incompetent to stand trial due to his medication 3) Claim VI - the allegation that Defendant's attorney failed to request a change of venue, 4) Claim XXII - the allegation that the Information did not appraise Defendant of the charges against him, and 5) Claim XXIV - the allegation that no record was made of any of the conferences at the bench.

20. The following claims raised by Defendant are moot because Defendant received a third penalty hearing: 1) Claim I (c) - the allegation that the State exercised its peremptory challenges in a discriminatory manner during the second penalty hearing, 2) Claim IV (a) the allegation that Defendant's attorney did not conduct an adequate investigation of mitigation evidence for the second penalty hearing, 3) Claim IV (b) - the allegations that Defendant's attorney was ineffective during the second penalty hearing, 4) Claim XVIII - the allegation that the District Court forced Defendant to use a peremptory challenge during the second penalty hearing, 5) Claim XIX - the allegation that the District Court improperly removed a juror during the second penalty hearing, and 6) Claim XXXIII - the allegation that Defendant's attorney failed to challenge some jurors for cause during the second penalty hearing.

21. Defendant failed to demonstrate how the following claims prejudiced him as required by Strickland: 1) Claim IV (c) the fact that Defendant's attorney's turned over raw data from Defendant's mental health examination, the consolidation of Defendant's case with his co-defendant's case, 2) Claim VIII- the allegation that Defendant was forced to exercise peremptory challenges in conjunction with his co-defendants, 3) Claim X - the allegation that Defendant's appellate attorney did not raise every issue in Defendant's petition on direct appeal, and 4) Claim XXXIII- the allegation that Defendant's attorney did not challenge certain jurors for cause.

22. The following claims made by Defendant in his petition are contrary to established Nevada law: 1) Claim XII - that the jury instructions dealing with premeditation/deliberation and reasonable doubt were improper, 2) Claim XIV - that there was insufficient evidence to support the jury's finding of the aggravator "murder in commission of burglary", 3) Claim XVI - that the State improperly used the same facts to convict Defendant of felony murder and an aggravator, 4) Claim XVII - that the anti-sympathy instruction was improperly given, that the State improperly failed to instruct the jury on unanimity of aggravators, that the State improperly failed to instruct the jury there is no requirement to impose the death penalty, and that the commutation instruction was improper, 5) Claim XXI - that the death penalty in Nevada is arbitrary, 6) Claims XXVI & XXVII- that the death penalty statute in Nevada violates the Eighth Amendment, and 7) Claim XXX - that the death penalty statute in Nevada does not provide for

clemency.

23. The following claims raised by Defendant are inappropriate for a petition and should have been raised on direct appeal: 1) Claims XIV & XV - that the aggravators were applied incorrectly in Defendant's case, 2) Claim XVI - that the State improperly used the same facts to convict Defendant of felony murder and prove an aggravator, 3) Claim XVII - that the jury instructions regarding anti-sympathy, unanimity of aggravators, commutation and no requirement to impose the death penalty were not correctly given, 4) Claim XXI - that the death penalty in Nevada is arbitrary, 5) Claims XXVI & XXVII - that the death penalty violates the Eighth Amendment, 6) Claim XXX - that the Nevada death penalty statute does not provide for clemency, and 7) Claim XXXII - that because Nevada judges are elected they are not impartial.

24. Defendant's allegation that the State withheld exculpatory evidence including Defendant's will and his involvement in a group to discourage youth from participation in witchcraft does not amount to a Brady v. Maryland violation as both pieces of evidence were known to Defendant. (Claim I (b))

25. Since none of Defendant's individual claims have merit, all of them taken together do not warrant relief.(Claim XXV)

26. Defendant's claim (Claim XXVIII) in his petition that he may become incompetent to be executed is prematurely raised.

27. The Supreme Court of Nevada has rejected the contention set forth in Defendant's claims XXXIV and XXXV that Nevada's death penalty is unlawful because of International law.

28. On August 16, 2000, this Court denied Defendant's petition as to all of the issues except for those relating to ineffectiveness of counsel arising from lack of communication between Rebecca Blaskey and David Wall, Defendant's attorneys during his third penalty hearing. (Claim IV (c)).

29. This Court held an evidentiary hearing on February 14, 2002, to address Defendant's one remaining claim of ineffective assistance of counsel caused by lack of communication between Rebecca Blaskey and David Wall. On June 19, 2002, this Court issued an order denying Defendant's remaining claim. This Court ruled that Defendant had failed to demonstrate that the

personality conflict and lack of communication between Rebecca Blaskey and David Wall rose to the level of ineffective assistance of counsel as required by Strickland; that ruling is incorporated herein. (See Exhibit One).

30. Defendant received effective assistance of trial counsel and appellate counsel.

CONCLUSIONS OF LAW

1. The Supreme Court has clearly established the appropriate test for determining whether a defendant received constitutionally defective counsel. To demonstrate ineffective assistance of counsel, a convicted defendant must show both that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

2. The Nevada Supreme Court has adopted this test articulated by the Supreme Court. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995).

3. Counsel's performance is deficient where counsel made errors so serious that the adversarial process cannot be relied on as having produced a just result. Strickland, at 686. The proper standard for evaluating an attorney's performance is that of "reasonable effective assistance." Strickland, at 687. This evaluation is to be done in light of all the circumstances surrounding the trial. Id.

4. The Supreme Court has created a strong presumption that defense counsel's actions are reasonably effective:

> Every effort [must be made] to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . .A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, at 689-690.

5. "[S]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

6. Reasonable assistance of counsel does not require that defense counsel make every conceivable motion no matter how remote the possibilities are of success in order to protect

himself against allegations of inadequacy. Donovan, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

7. The Nevada Supreme Court has held that it is presumed counsel fully discharged his duties, and said presumption can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)

8. It is not enough for a defendant to show deficient performance on the part of counsel, a defendant must also demonstrate that the deficient performance prejudiced the outcome of his case. Strickland v. Washington, 566 U.S. 668, 686, 104 S.Ct. 2052, 2065 (1984).

9. In meeting the prejudice requirement of an ineffective assistance of counsel claim, a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 401, 990 P.2d 1263, 1268 (1999); *citing* Strickland, 566 U.S. 668, 687, 104 S.Ct. 2052, 2066 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. *citing* Strickland, 466 U.S. at 687-89, 694.

10. This same standard of review applies to claims of ineffective assistance of appellate counsel. *See* Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

11. The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994).

12. In order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

13. Counsel is not required to assert frivolous claims on appeal. A defendant does not have the constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id.

14. The Supreme Court has recognized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most, on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying the good arguments ... in a verbal mound made up of strong and weak contentions." Id. at 753, 3313. The Court has, therefore, held that for judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. Id. at 754, 3314.

15. The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Defendant's assertion that the State committed prosecutorial misconduct when it coached, coerced and intimidated various witnesses while also proffering false and prejudicial testimony before the District Court is barred by the law of the case doctrine. Upon review of Defendant's trial and initial penalty hearing, the Nevada Supreme Court ruled that, based on overwhelming evidence, the prosecutor's conduct did not render Defendant's trial fundamentally unfair. Flanagan I, 104 Nev. at 107. Subsequent appeals regarding further alleged prosecutorial misconduct were summarily rejected by the Nevada Supreme Court under the "law of the case" doctrine as set forth in Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797 (1975). See Flanagan IV, 112 Nev. at 1422. Thus, Defendant is barred from raising these issues.

16. Defendant's claim that the State withheld substantial amounts of exculpatory, impeachment and mitigation evidence including Defendant's will and his planned involvement in a group to discourage youth from participation in witchcraft is not a Brady violation because both were known to Defendant. Brady v. Maryland, 373 U.S. 220, 83 S.Ct. 1194 (1963).

17. The Supreme Court has ruled that the use of peremptory challenges is limited by the Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719 (1985). A potential juror may not be removed solely on the basis of race or gender. See Libby v. State, 115 Nev. 45, 49, 975 P.2d 833, 835 (1999); King v. State, 116 Nev. Adv. Op. No. 38, 998 P.2d 1172, 1175 (2000).

18. As long as a peremptory challenge complies with the requirements of the Equal Protection Clause, "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case." Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719 (1985). Defendant's contention that the State utilized their peremptory challenges in a racially discriminatory manner during the second penalty hearing is a naked allegation unsupported by any specific facts. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

19. Defendant's claim that the State sought to introduce evidence at trial of Defendant's involvement in witchcraft and satanic worship is belied by the record. Hargrove, at 503. The record of Nevada Supreme Court decisions in Defendant's case shows that a co-defendant actually introduced said satanic evidence. The Nevada Supreme Court found that counsel for co-defendant, Johnny Ray Luckett, called a witness in Luckett's defense to testify regarding Defendant's involvement in witchcraft/satanic worship. Flanagan IV, 112 Nev. at 1412.

20. The Nevada Supreme Court addressed the State's use of evidence regarding satanic worship during the penalty hearings. See Flanagan II, Flanagan III; Flanagan IV. Therefore, the law of the case doctrine would necessarily preclude any further review. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797 (1975).

21. A defendant seeking post-conviction relief is not entitled to an evidentiary hearing based on naked allegations. Hargrove, at 503. Defendant's allegation that the State unlawfully induced witnesses to testify and fashioned their testimony by offering leniency is a naked allegation. Id. Defendant fails to offer any specific facts to support such allegations other than information that was presented to the jury during the trial. Each witness was thoroughly questioned about the inducements they received or were to receive upon completion of their testimony. (31 Record on Appeal (RA) 944, 948; 33 RA 1242, 1256, 1258, 1275, 1280, 1287, 1289, 1366; 34 RA 1400, 1405, 1411).[1]

---

[1]RA refers to Record on Appeal from Defendant's last filed appeal to the Nevada Supreme Court docketed S.C. Case #27320 in which the Court considered Defendant's appeal with that of co-defendant Randolph Moore.

22. In Sheriff v. Humbolt County, 107 Nev. 664, 819 P.2d 197 (1991), the Nevada Supreme Court plainly ruled that any inducement for testimony merely affects the weight of that testimony, but does not preclude its introduction in evidence. See also Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998). It is the jury's function, not the reviewing court, to assess the weight of the evidence and determine the credibility of witnesses. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975).

23. Defendant's assertion that the State impermissibly used evidence of his affiliation with witchcraft and satanic worship in violation of his Constitutional rights disregards the doctrine of "law of the case" as this issue has already been reviewed and decided by the Nevada Supreme Court. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). After the United States Supreme Court reviewed and remanded his case, the Nevada Supreme Court also remanded Defendant's case for a new penalty hearing because the State had improperly argued evidence of Defendant's religious beliefs in satanic worship during the second penalty hearing. Flanagan III, 109 Nev. at 55-57. Further, the Court ruled, in Flanagan IV, that a harmless error analysis was appropriate when considering the admission of such evidence during the trial because of the overwhelming evidence against Defendant. Flanagan IV, at 1418-1421. Thus, Defendant is precluded from raising this issue based on the law of the case.

24. Defendant's allegation that his attorney was ineffective during trial because he failed to conduct any investigation to prepare for trial is a naked allegation and is belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). During cross-examination, Defendant's attorney competently highlighted the inconsistencies surrounding the testimony of State witnesses. (33 RA 1121, 1249-50, 1255; 34 RA 1399-1400, 1403-1404, 1407-1410).

25. Defendant's allegations surrounding his attorney's preparation for the first penalty hearing are moot as Defendant was granted a new penalty hearing by the Nevada Supreme Court. See Flanagan I.

26. Defendant's contention that his attorney was ineffective for not investigating or presenting a defense based on diminished capacity is without merit. Defendant's claim that he participated in a three-day drug and alcohol binge immediately preceding the crimes is a naked

allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Without an affidavit or any other specific offer of proof, this allegation does not demonstrate that Defendant's attorney was ineffective.

27. Defendant's allegation that his attorney neglected to conduct any investigation into the details of the crime itself is a naked allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Defendant fails to indicate what inconsistencies existed between the testimony and physical evidence. Further, as the Nevada Supreme Court found the evidence against Defendant was overwhelming, he fails to demonstrate that these inconsistences prejudiced him as required by Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). See Flanagan IV, 112 Nev. at 1420.

28. Defendant's assertion that his attorney was ineffective for not determining that Defendant was incompetent to stand trial due to the psychotropic medication he was taking is belied by the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Defendant appeared competent during his appearances in court. Specifically, during the Petrocelli hearing conducted by the District Court, Defendant clearly and coherently answered the required series of questions illustrating his mentally clarity. (35 RA 1637-1640).

29. Defendant's claim that his attorney was ineffective for not moving to continue the case in order to better prepare for trial is belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). The record indicates that Defendant's attorney conducted a thorough cross-examination of the State's witnesses indicating he was prepared for trial. (33 RA 1121, 1249-50, 1255; 34 RA 1399-1400, 1403-1404, 1407-1410). As such, Defendant's attorney was not ineffective in not moving to continue.

30. Defendant's claims that his attorney was ineffective for failing to challenge the complaint, for failing to file a motion *in limine* to preclude any witchcraft evidence and for failing to object to the court-designed exercise of peremptory challenges are without merit. A simple check of the record of the case shows that the Complaint, Amended Complaint and Information all charged Defendant with two (2) counts of murder putting him on notice of the charges against him and making a challenge by his attorney unnecessary. (1 RA 138-146; 181-185).

Furthermore, pursuant to Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), the doctrine of law of the case governs Defendant's claim regarding the witchcraft evidence and Defendant's objection to the court-designed exercise of peremptory challenges as the Nevada Supreme Court has already addressed these issues. See Flanagan I

31. Defendant's argument that his attorney was ineffective because he failed to request investigative funds from the court is a naked allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Further, Defendant has not demonstrated that this failure prejudiced him as required by Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)[2].

32. Defendant's assertion that his attorney was ineffective because he failed to press the District Court for a change of venue is belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) Defendant's attorney filed a Motion for Change of Venue (2 RA 482-485). Moreover, Defendant's attorney argued before the District Court that a change of venue would be necessary if the jury pool was too small after the jury *voir dire*. (29 RA 81-82). Defendant's attorney acted in compliance with Nevada law that requires such a motion to be made after *voir dire*. Ford v. State, 102 Nev. 126, 717 P.2d 27 (1986); Cutler v. State, 93 Nev. 329, 566 P.2d 809 (1977). Thus, Defendant's assertion is belied and repelled by the record.

33. Defendant's argument that his attorney was ineffective for failing to effectively cross-examine the State's witnesses regarding inconsistencies in their testimony is belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). During cross-examination, Defendant's attorney highlighted the inconsistencies of several of the State's witnesses. (See 33 RA 1121, 1249-50, 1255; 34 RA 1399-1400, 1403-1404, 1407-1410).

34. Defendant fails to demonstrate that his attorney was ineffective for not examining witnesses on key factual issues such as why there were no glass shards found where the defendants broke into the victims' home. Defendant fails to indicate how this failure prejudiced his case. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). In light of

---

[2] Defendant was represented by the Clark County Public Defender which has a staff of investigators and is funded to defend such cases. Defendant has not shown that additional funds were needed to adequately prepare his defense.

the substantial evidence against Defendant, it is unlikely that this alleged failure affected the outcome of Defendant's case. See Flanagan I.

35. Defendant's contention that his attorney was ineffective for not sufficiently cross-examining Wayne Wittig ("Wittig") to portray Wittig's lack of personal knowledge concerning the facts to which he testified is without merit. Defendant's claim that Wittig gleaned his testimony from the newspapers is a naked allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Defendant provides no affidavits or offers of proof to support this claim. As such, Defendant cannot demonstrate that his attorney was ineffective.

36. Defendant fails to demonstrate that his attorney was ineffective for not investigating Angela Saldana's ("Saldana") criminal record for cross examination purposes. See Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Defendant's attorney thoroughly covered inconsistencies in Saldana's testimony during cross examination and elicited testimony regarding Saldana's potential receipt of $2,000 for the information she provided to police. (See 34 RA 1399-1400, 1403-04, 1407-1410). The record indicates that Defendant's attorney sufficiently cross examined Saldana, therefore, Defendant cannot demonstrate that he was prejudiced by his attorney's failure to investigate Saldana's record.

37. In McKenna v. State, 114 Nev. 1044, 968 P.2d 739, 743 (1998), the Nevada Supreme Court concluded that no actual prejudice to the defendant had been shown by the presence of SWAT officers in the courtroom. As such, Defendant's claim that his attorney's failure to object to the presence of armed guards in the courtroom was ineffective assistance of counsel is without merit.

38. Defendant's allegations that his attorney was ineffective for failing to object to the jury seeing Defendant is shackles is a naked allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Defendant provides no proof that any member of the jury saw him in shackles. As such, Defendant cannot demonstrate his attorney was ineffective. See Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

39. Defendant's claim that his attorney was ineffective for not conducting an adequate mitigation investigation during the first penalty hearing is moot given that Defendant was

granted two other penalty hearings. See Flanagan I; Flanagan II.

40. Defendant's allegations that his attorney was ineffective for not objecting to and for not offering any jury instructions during the penalty hearing are without merit. Defendant's suggestion that an objection to the "great risk" factor should have been made and an instruction to require a "nexus between the burglary and robbery" should have been requested is contrary to the law of the case. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797 (1975). The Nevada Supreme Court previously held that the great risk factor was appropriate and that sufficient evidence was presented to support that aggravating factor. Flanagan IV, 112 Nev. at 1421. Moreover, in addressing Defendant's assertion that a "nexus" should have been required between the burglary and robbery the Court ruled that "[w]e see no merit to Flanagan's argument anyway." Id. at 1422. Thus the law of the case doctrine nullifies any claim that Defendant's attorney was ineffective for failing to object to or request such jury instructions.

41. All of Defendant's allegations regarding the second penalty hearing are moot as Defendant was granted a third penalty hearing. See Flanagan III

42. Defendant's allegation that the Public Defender's office allotted inadequate resources to the investigation and preparation for the third penalty hearing is a naked allegation unsubstantiated by any specific facts. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

43. Defendant's claim that his attorney was ineffective in the third penalty hearing for turning over raw data from Defendant's mental health evaluation is without merit. Such information is available to the State under NRS 174.234(2)[3], and therefore the production of this

---

[3]NRS 174.234(2) reads in pertinent part:

> If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the state or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his

"raw data" cannot be held to be ineffective.

44. Pursuant to NRS 173. 115, criminal offenses may be joined. NRS 173.115 provides:

> Two or more offenses may be charged in the same indictment of information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
>
> 1. Based on the same act or transaction; or
>
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The Nevada Supreme Court has held that when separate crimes are connected together by a continued course of conduct, joinder is appropriate. Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996). The Nevada Supreme Court has repeatedly held that joinder decisions are within the discretion of the trial court, and will not be reversed absent an abuse of discretion. Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990). Defendant's claim that the public defender's office was ineffective for not severing his third penalty hearing from co-defendant, Randolph Moore is without merit. The District Court has wide discretion in the interests of judicial economy to keep the two hearings together. Furthermore, the Nevada Supreme Court consolidated Defendant's case with co-defendant Moore's case in 1991 for ease of consideration. See Flanagan II.

45. Defendant's claim that his attorney was ineffective for not seeking an evaluation as to Defendant's competency to stand trial because Defendant was under the influence of psychotropic drugs is belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Not only does Defendant fail to offer any affidavit or documents which prove he was under substantial doses of psychotropic medications, but the record also indicates Defendant understood the proceedings by the District Court. During the Petrocelli hearing conducted by the District Court, Defendant was able to coherently answer all of the questions posed to him. (35 RA 1637-40). Such clear communication with the court refutes Defendant's contention that he

---

> testimony;
> (b) A copy of the curriculum vitae of the expert witness; and
> (c) A copy of all reports made by or at the direction of the expert witness.

was unable to fully comprehend the nature of the charges against him and the magnitude of the penalty he faced. (Supplemental Petition, p. 44). As the record indicates Defendant understood the proceedings, his attorney was not ineffective.

46. Defendant's assertion that his attorney was ineffective for failing to force the District Court to allow a change of venue is belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Defendant's attorney did, in fact, file a motion in limine for a change of venue. However, at a pre-trial hearing, Defendant's attorney agreed with the District Court to delay ruling on the motion to determine whether an impartial jury could be attained from the jury venire as required by Nevada case law. (29 RA 81-82). See Ford, 102 Nev. 126, 717 P.2d 27 (1986); Cutler, 93 Nev. 329, 566 P.2d 809 (1977). In doing so, Defendant's attorney gave him a preview of what the prospective jurors were thinking about the case without losing the right to argue for a change of venue. As such, Defendant's attorney was not ineffective.

47. Both the Sixth and the Fourteenth Amendments to the United States Constitution guarantee a defendant the right to a jury selected from a representative cross-section of the community. This right requires that the pools from which juries are drawn do not systematically exclude distinctive groups in the community. Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702 (1975). However, there is no requirement that the jury that is selected actually mirror the population at large. Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990).

48. The defendant bears the burden of establishing a prima facie violation of the fair cross-section requirement. In order to demonstrate a prima facie violation, the defendant must show 1) that the group alleged to be excluded is a distinctive group in the community, 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and 3) that this under representation is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979). This test has been adopted by the Nevada Supreme Court. See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996). Defendant's claim that he received ineffective assistance of counsel because his attorney failed to object to the Clark County jury selection system which systematically excludes African Americans is without

merit. Defendant has failed to meet the test outlined by the Supreme Court. As such, Defendant cannot demonstrate that his attorney's actions were ineffective.

49. Defendant neglects to show how he was prejudiced by his attorney's failure to object to the all White jury that convicted Defendant as Defendant is White. Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

50. The Nevada Supreme Court has upheld joint exercises of peremptory challenges based upon NRS 175.015. NRS 175.015(now 175.041) reads in pertinent part:

> When several defendants are tried together, they cannot sever their peremptory challenges, but must join therein.

See also Doyle v. State, 82 Nev. 242, 415 P.2d 323 (1966); Anderson v. State, 81 Nev. 477, 406 P.2d 532 (1965).

51. Defendant's contention that his conviction is invalid because his attorney was forced to jointly exercise peremptory challenges with counsel for the co-defendants and because the District Court failed to grant him an additional peremptory when there was a disagreement about the last challenge to be used is without merit. In United States v. McClendon, 782 F.2d 785 (9th Cir. 1986), two co-defendants were on trial for a series of bank robberies. The Ninth Circuit Court of Appeals has held:

> there is no "right" to additional peremptory challenges in multiple defendant cases...[and that]...[d]isagreement between co-defendant on the exercise of joint peremptory challenges does not mandate a grant of additional challenges unless defendants demonstrate that the jury ultimately selected is not impartial or representative of the community. Id. at 787-88.

Defendant has failed to show that the jury selected was not impartial or representative of the community. In fact, Defendant points out that seven of eight challenges were agreed upon by counsel for all the defendants. Claiming that the exercise of one challenge creates a non-representative jury is tenuous at best.

52. Defendant fails to demonstrate how his attorney's failure to object to the joinder of peremptory challenges prejudiced him as required by Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

53. Defendant's allegation that his three appellate attorneys were ineffective for not raising issues regarding his First Amendment rights and prosecutorial misconduct is belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). The United States Supreme Court and the Nevada Supreme Court both ruled on Defendant's First Amendment rights in light of the witchcraft evidence introduced at trial and argued during the penalty hearings. See Flanagan v. Nevada, 503 U.S. 931 (1992); Flanagan II; Flanagan III. Further, Defendant's first appellate counsel did raise the issue of prosecutorial misconduct during closing arguments as part of Defendant's first appeal to the Nevada Supreme Court. See Flanagan I.

54. The Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most, on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying the good arguments ... in a verbal mound made up of strong and weak contentions." Id. at 753.

55. The Supreme Court has, therefore, held that for "judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would deserve the very goal of vigorous and effective advocacy." Id. at 754, 3314. Beyond that, appellate counsels' tactical decisions not to raise every possible issue on appeal work to enhance the likelihood of success for those meritorious claims that are appealed. See Hollenback, 987 F.2d 1272, 1275 (7th Cir. 1993); Jones, 463 U.S. 745, 103 S.Ct. 3308 (1983). As such, Defendant's allegation that his appellate attorneys were ineffective for failing to raise on appeal many of the claims that he now makes in this petition is without merit.

56. Defendant's allegation that prior opinions by the Nevada Supreme Court on death penalty cases have been consistently arbitrary, unprincipled and result-oriented is a naked allegation unsubstantiated by facts. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

57. The Eighth Judicial District Court lacks jurisdiction to stand in judgment of decisions issued by the Nevada Supreme Court. See Nev. Const. Article 6 Section 6.

58. Defendant's allegation that his counsel was ineffective in not challenging the jury instruction regarding reasonable doubt is without merit. The Nevada Supreme Court has

consistently held that there is no reasonable likelihood that a jury will apply the instruction defining reasonable doubt[4] in an unconstitutional manner where the instruction is accompanied by other instructions regarding the State's burden of proof and the presumption of the defendant's innocence. Bollinger v. State, 111 Nev. 1110, 1114, 901 P.2d 671, 674 (1995). In this case, the jury was given an additional instruction[5] regarding the State's burden of proof.

59. The Nevada Supreme Court has approved the "weighty affairs" language contained in Nevada's reasonable doubt jury instruction. Bollinger, at 1114. The Nevada Supreme Court has held that although it elected not to scrutinize such language, the "proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it." Id. at 674 (quoting Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239 (1994)). In the case at bar, the instruction defining reasonable doubt was accompanied by an instruction regarding the State's burden of proof and another instruction regarding the presumption of innocence. As such, there is no reasonable probability that the jury believed the instruction allowed the conviction of Defendant based on a lesser quantum of evidence than is required by the Constitution. See Bollinger, at 1114.

60. Defendant's claim that his attorney was ineffective in not objecting to the jury instruction regarding premeditation/deliberation and implied malice is without merit. The instruction given in this case has been upheld by the Nevada Supreme Court. See Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). In Kazalyn, the Court determined that the premeditation instruction was distinct from the malice instruction. In holding that the premeditation instruction was distinct,

---

[4] The jury instruction for reasonable doubt reads, "A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

[5] The instruction reads, "The defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that a defendant is a person who committed the offense."

the Nevada Supreme Court found the same instruction for premeditation[6] used in Defendant's case to be appropriate: Id. at 61. Further, in Kazalyn the Court specifically noted that the murder instructions adequately met the premeditation/deliberation and malice criteria as set forth in Payne v. State, 81 Nev. 503, 508-509, 406 P.2d 922 (1965).

62. Recently, in Byford v. State, 116 Nev. Adv. Op. 23, p. 19-25 (February 28, 2000), the Nevada Supreme Court reviewed the Kazalyn instruction. In that opinion, the Nevada Supreme Court changed the instructions for all cases in the future. However, at the time that the trial court in the instant case gave the murder instructions, the premeditation instruction was clearly good law. Moreover, in Byford, the Court recognized that it had expressly informed the district courts in prior opinions that the Kazalyn instruction was proper and that the new instruction was not retroactive. Byford, 116 Nev. Adv. Op. 22-23 at 22. Therefore, the District Court's reliance on the express holdings of the Nevada Supreme Court cannot be viewed as plain error. Clearly, the giving of the Kazalyn instruction of premeditation and deliberation was not plain error, and neither trial nor appellate counsel can be held to have been ineffective for not challenging an instruction that had been consistently endorsed by the Nevada Supreme Court.

63. The Nevada Supreme Court has held that the "equal and exact justice" instruction used by the District Court in the instant case is valid. In Leonard v. State, 114 Nev. 1196, 969 P.2d 288, 296 (1998), the Nevada Supreme Court ruled on allegations that the instruction denied the defendant his presumption of innocence. See also McKenna v. State, 96 Nev. 811, 618 P.2d 348 (1980). The Court found that instruction does not concern the presumption of innocence. Id. Further, it ruled that based on other instructions given regarding the burden of proof, the defendant was not denied the presumption of innocence. Id. The District Court in Defendant's case also instructed the jury separately on the issues of burden of proof and presumption of

---

[6] Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. If the jury believes from the evidence that the act constituting the killing has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is wilful, deliberate, and premeditated murder. (3 RA 596).

innocence. Therefore, Defendant's assertion that the jury did not give him the benefit of the presumption of innocence or that they convicted him based on a lesser standard of proof is a bare allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

64. The Nevada Supreme Court has concluded that the "guilt or innocence by any other person" instruction given in the instant case is constitutionally sound. See Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992). In Guy, the Court considered the same language used in the instruction in the instant case and rejected the defendant's argument that the instruction confused the jury. Id. at 778. Moreover, the Court went on to find that the challenged instruction sufficiently directed the jury to ignore the co-defendant's culpability when determining whether the defendant was guilty as charged. Id.

65. Defendant's argument that his conviction is invalid because insufficient evidence existed to support the jury's finding of the aggravating factor that the killing was committed by someone who knowingly created a great risk of death to more than one person is precluded by the law of the case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). The Nevada Supreme Court has ruled that substantial evidence existed to support the finding that Defendant knowingly created "a great risk of death to more than one person by means of a weapon and course of action which would normally be hazardous to the lives of more than one person." Flanagan IV, at 1421. Thus, Defendant is precluded from having this court re-hear this same flawed argument under the "law of the case" doctrine. See Hall, at 314.

66. Furthermore, Defendant is precluded from raising his allegation that there was insufficient evidence to convict him of creating a great risk of death as it is the type of claims that should have been raised in any one of Defendant's direct appeals to the Nevada Supreme Court. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994).

67. Defendant's claim that insufficient evidence existed to support the aggravating factor of murder while engaged in the commission of burglary is without merit. In Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990), the Nevada Supreme Court rejected that argument that the aggravating factor of burglary was not supported by the evidence. The Court reasoned that:

///

> NRS 200.033(4) only requires that, for burglary to be an aggravating circumstance, the murder must be committed while the person was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit burglary or robbery. This was clearly the case here. Were it otherwise, burglary could be used as an aggravating circumstance only upon the rare occasion of a killing which occurs while the defendant is entering the building.

Id. 106 Nev. at 142. In the instant case, there was uncontroverted evidence that Defendant killed his grandmother during the commission of the burglary while his co-defendants killed his grandfather and therefore, it was an appropriate aggravator. See Flanagan I.

68. Defendant is precluded from raising the contention that there was insufficient evidence to support the aggravating factor of committing murder while in the commission of robbery by the doctrine of law of the case as the Nevada Supreme Court previously considered the issue in Flanagan IV. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

69. Defendant's claim that his conviction is invalid because the District Court permitted the State to use the same facts to convict him under a felony murder theory and to support one of aggravating factors for the death sentence is meritless. The Nevada Supreme Court has approved the use of the underlying felony in felony murder cases as a valid aggravating circumstance to support the imposition of the death sentence. Atkins v. State, 112 Nev. 1122, 1134, 923 P.2d 1119 (1996) quoting Petrocelli v. State, 101 Nev. 46, 53, 692 P.2d 503 (1985); accord Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985), cert. denied 475 U.S. 1031 (1986); Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985) cert. denied 476 U.S. 1130 (1986).

70. Defendant's claim that his conviction is invalid because the District Court improperly instructed the jury during Defendant's three (3) penalty hearings is precluded from review because it is the type of claim that should have been raised in Defendant's direct appeal. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994).

71. The anti-sympathy jury instruction has been endorsed as constitutional by the Nevada Supreme Court. Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998). The Court, in Sherman, decided that as long as the jury is given instruction to consider mitigating circumstances, the anti-sympathy instruction is proper. Id. Therefore, Defendant's contention that the District Court

precluded the jury's consideration of any type of sympathy when it gave the anti-sympathy instruction is without merit. Furthermore, as the Nevada Supreme Court previously considered this issue in Flanagan IV, Defendant is precluded from raising it in his petition by the doctrine of law of the case. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

72. Defendant's assertion that the District Court failed to properly instruct the jury about unanimity regarding their findings of aggravating and mitigating circumstances contravenes existing case law. The Nevada Supreme Court has clearly ruled that during a penalty hearing, the jury instructions do not have to 'instill a unanimity requirement to find mitigating circumstances. Jiminez v. State, 112 Nev. 610, 624, 918 P.2d 687 (1996). The Court in Jiminez held that:

> In the end, each juror must have evaluated the juxtaposition of aggravating circumstances and mitigating circumstances in reaching the conclusion that the latter were not sufficient to outweigh the former. ... There was no constraint on the right of individual jurors to find mitigators, such as a requirement of unanimity or proof by a preponderance of the evidence or any other standard.

Id. See also Geary v. State, 114 Nev. 100, 952 P.2d 431 (1998); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998).

73. In Bennett v. State, 111 Nev. 1099, 1109, 901 P.2d 676 (1995), the Nevada Supreme Court found that a jury instruction nearly identical to the one in the instant case adequately informed the jury that there was no requirement to impose the death penalty.[7] The Court stated:

///

///

///

---

[7]The jury instruction in Bennett read in pertinent part:

> The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
>
> Otherwise, punishment imposed shall be imprisonment in the state prison for life with or without the possibility of parole.

> we conclude that the above jury instruction accurately informed the jury of their statutorily endowed prerogative to decide whether [defendant] would live, regardless of whether aggravating circumstances outweighed mitigating circumstances. "May" is clearly permissive in the context of NRS 175.554(3) and the instruction submitted to the jury.

Id. Thus, the jury instruction adequately instructed the jury in this case.

74. Defendant's challenge to the commutation instruction based on the argument that the jury was too ignorant to understand the plain language of the instruction is a naked allegation unsubstantiated by fact. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

75. Defendant's claim that errors occurred during the jury selection of the second penalty hearing is moot as he was granted a third penalty hearing. See Flanagan III.

76. Defendant's allegations regarding the impartiality of the judges who presided over his trial and penalty hearings are nothing more than a collection of naked allegations for which Defendant fails to provide any proof. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

77. Defendant's allegations regarding the lack of impartiality of the judges who presided over his first and second penalty hearings are moot as Defendant received a third penalty hearing. See Flanagan III

78. Defendant's allegation that Judge Mosley said to counsel "let's get back to work and get these guys executed," is a naked allegation unsubstantiated by any facts or affidavits. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

79. Defendant's allegation that Judge Mosley was ultimately removed from the case because of his bias against Defendant is belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). The record of the case clearly indicates that Judge Mosley was found not to be biased or prejudiced against the defendants. After hearing oral arguments, then Chief District Court Judge Nancy Becker ruled that:

> [r]eview of the transcript of the proceedings of June 24, 1991 and the Affidavit of Judge Mosley shows that there is no actual prejudice or bias against any of the parties to this case. The comments of Judge Mosley only evidenced a dissatisfaction with the overall slowness of the appellate process in capital cases. The challenged comments, while not showing actual prejudice or bias, could be construed to give an appearance of prejudice. While

> appearance of prejudice is usually insufficient to require the disqualification of a District Court Judge, the history of this case and the fact that it is a capital case requires that an abundance of caution be exercised.

(5 RA 1324) (Emphasis added). Thus, Defendant's allegation is clearly belied and repelled by the record. Id.

80. Defendant's claims regarding Judge Mosley are precluded from review in his petition as they are the type that should have been raised on direct appeal. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994).

81. Defendant's claim that Judge Addeliar Guy was somehow biased against Defendant is a naked allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Further, Defendant fails to show how Judge Guy's disposition prejudiced him during the third penalty hearing as required by Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

82. Defendant's claim that his death sentence is invalid because the Nevada capital punishment system operates in an arbitrary and capricious manner is without merit. The Nevada Supreme Court has long held that Nevada's use of the death penalty meets both federal and state constitutional requirements. See Ybarra v. State, 100 Nev. 167, 174, 679 P.2d 797 (1984). In Ybarra, the Court reviewed Nevada's death penalty statutes in light of United States Supreme Court opinions regarding similar statutes from Florida and Georgia and ruled that:

> [s]ince our procedure for weighing aggravating and mitigating circumstances provides the sentencer with adequate information and guidance and the accused with sufficient guarantees that the penalty of death will not be imposed arbitrarily and capriciously, the challenged statute passes constitutional muster.

Id. 100 Nev. at 176. See also Hill v. State, 102 Nev. 377, 724 P.2d 734 (1986); Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998).

83. The District Court lacks jurisdiction to review decisions made by the Nevada Supreme Court. See Nev. Const. Article 6 Section 6.

84. Defendant's contention that the Amended Complaint did not apprise him of the crimes he was charged with is belied by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). The Amended Complaint filed in open court on February 11, 1984 put Defendant on

notice of the charges against him. (1 RA 141-146). Furthermore, at the subsequent preliminary hearing, Defendant heard all the evidence that was used to bind him up to the District Court on the charges in the Amended Complaint.

85. Defendant's claim that his conviction and sentence are defective because he wasn't present during critical court proceedings is a naked allegation unsubstantiated by specific facts. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Defendant fails to provide evidence that he was, in fact, missing during important court proceedings.

86. A defendant's absence from preliminary matters or hearings does not necessarily prejudice him. See Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (1998). Thus, Defendant does not demonstrate how his alleged absence from court proceedings prejudiced him as required by Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

87. Defendant's claim that his conviction and sentence are invalid because the District Court precluded public access to the trial by failing to have all the proceedings recorded or reported is a naked allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Defendant fails to provide any affidavit or offer of proof to support these allegations. Further, the appellate record is replete with instances in which Defendant's attorney and counsel for the co-defendants created a record of bench conferences. (i.e. 32 RA 915, 33 RA 1081).

88. Defendant's allegations that his death sentence is invalid because it violates both the federal and state constitutional guarantees against cruel and unusual punishment are without merit. The Nevada Supreme Court has ruled that the Nevada death penalty statutes are in conformance with other death penalty statutes that had been upheld by the United States Supreme Court. Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273 (1979). The Nevada Supreme Court specifically held that "[t]he imposition of the death penalty...offends neither the United States Constitution nor the Nevada Constitution." Id. at 518. See also Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996); Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990); Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985).

89. Defendant's allegation that his sentence is invalid because he may, at some point in the future, become incompetent to be executed even though he is not presently incompetent is

meritless and improperly raised. In Martinez-Villareal, 118 F.3d 628, 634 (1997), the Ninth Circuit Court of Appeals held that a defendant's competency claims have to be raised in his first federal habeas petition. The Ninth Circuit opined that once the state issues a second warrant of execution, then the state court could consider the ripe competency claim which could be followed by federal review of the same issue and only that issue. Id. As this is not the case with Defendant's claim, it is prematurely raised.

90. Defendant's claim that his conviction and sentence are unreliable because of the District Court's failure to sever Defendant's case from his co-defendants' cases resulting in the admission of witchcraft evidence is without merit. In Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), the Nevada Supreme Court stated that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same". Hall v. State, 91 Nev. 314, 315, 535 P.2d 797 (2000). Defendant's complaint regarding the admission of so-called "witchcraft evidence" introduced by a co-defendant and referenced by the State has already been decided by the Nevada Supreme Court. In Flanagan IV, the Nevada Supreme Court held that a harmless error analysis was appropriate when considering the admission of the so-called "witchcraft evidence" during the trial. Flanagan IV, at 1418-1421. The Court ruled that because there was "overwhelming evidence" against Defendant, any admission of such evidence was harmless at best. Flanagan IV, at 1420.

91. Defendant's contention that his sentence is defective because Nevada has no effective mechanism for clemency in capital cases is without merit. In Colwell v. State, 112 Nev. 807, 812-13, 919 P.2d 403 (1996), the Nevada Supreme Court addressed a related issue when it considered whether NRS 213.085[8] rendered the Nevada death penalty scheme unconstitutional

---

[8]NRS 213.085 reads in pertinent part:

> 1. If a person is convicted of murder of the first-degree before, on or after July 1, 1995, the board shall not commute:
> (a) A sentence of death;
> (b) A sentence of imprisonment in the state prison for life without the possibility of parole, to a sentence that would allow parole.

by denying clemency. Finding that clemency encompassed the powers to commute a sentence or to pardon a defendant, the Court ruled that "NRS 213. 085 does not completely deny the opportunity for 'clemency' ....but rather modifies and limits the power of commutation." Id. Therefore, Defendant's "no mechanism for clemency" argument lacks merit as it did in Colwell.

92. Defendant's allegation regarding clemency is precluded in the instant petition as it is the type of claim that should have been raised in any one of Defendant's direct appeals to the Nevada Supreme Court. Franklin v. State, 110 Nev. 750, 877 P.2d 1088 (1994).

93. Defendant's contention that his conviction and sentence are invalid because jurors allegedly saw him in shackles is a naked allegation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Defendant fails to provide an affidavit or any offer of proof that he was seen by jurors while in shackles. Further, even if Defendant's claims are true, they are without merit. A jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom has not warranted habeas relief. Rhoden v. Rowland, 172 F.3d 633, 636 (1999) citing United States v. Olano, 62 F.3d 1180, 1190 (9th Cir. 1995).

94. Defendant's argument that the presence of armed guards in the courtroom impermissibly influenced the jury is refuted by the holding in McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998). In McKenna, the Nevada Supreme Court concluded that no actual prejudice to the defendant had been shown by the presence of SWAT officers in the courtroom. Id. Similarly, Defendant cannot show he was prejudiced by the mere presence of armed guards as required by Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

95. Defendant's claim that his conviction and sentence are invalid because he was denied an impartial tribunal due to the fact that trial and appellate judges in Nevada are elected and not appointed lacks merit is an inappropriate matter to be raised in a post-conviction petition and should have been raised on direct appeal. See Franklin v. State, 110 Nev. 750, 877 P.2d 1088

---

2. If a person is convicted of any crime other than murder of the first degree on or after July 1, 1995, the board shall not commute:
(a) A sentence of death;
(b) A sentence of imprisonment in the state prison for life without the possibility of parole, to a sentence that would allow parole.

(1994).

96. Defendant's contest of his sentence based on counsel's failure to challenge, for cause, jurors in the second penalty hearing is moot as Defendant was granted a third penalty hearing. See Flanagan III.

97. Defendant fails to prove his attorney was ineffective with regard to his allegations pertaining to jurors in the third penalty hearing. The record indicates that nearly all of the jurors who expressed strong feelings about the death penalty were removed from the jury via peremptory challenges. Defendant has not demonstrated how the exercise of these peremptory challenges to remove biased jurors prejudiced him during the third penalty hearing as required by Strickland v. Washington, 566 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

98. Defendant's allegations in his last three claims that his conviction and sentence are invalid because the State allegedly violated international law are meritless. The treaties cited by Defendant are not controlling authority in Nevada and are therefore irrelevant to a post-conviction petition. Servin v. State, 117 Nev. __, 32 P.3d 1277 (2001) ; Domingues v. State, 114 Nev. 783, 961 P.2d 1279 (1998).

99. A Defendant will not be heard to complain of delays that he has caused. Woods v. State, 94 Nev. 435, 581 P.2d 444 (1978); Williams v. State, 93 Nev. 405, 566 P.2d 417 (1977); Stabile v. Justice Court, 83 Nev. 393, 432 P.2d 670 (1967). Defendant's allegation that the State's pursuit of justice over the past fifteen (15) years, largely because Defendant has sought to exhaust every conceivable remedy under state and federal law, has been cruel and unusual punishment is without merit. Furthermore, Defendant is precluded from raising this issue by the doctrine of the law of the case as the Nevada Supreme Court addressed this issue in Flanagan IV. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

///

///

///

///

///

ORDER

Based upon the Findings of Fact and Conclusions of Law contained herein, it is hereby:

ORDERED, ADJUDGED, and DECREED that Defendant's Petition for Writ of Habeas Corpus (Post-conviction) is denied.

DATED this 8 day of August, 2002.

DISTRICT JUDGE

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY H. Leon Simon
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411

P:\WPDOCS\ORDR\FORDR\404\40468701.WPD\kjk

FILED

Jun 19 9 29 AM '02

Shirley A. Longjima

DISTRICT COURT CLERK

CLARK COUNTY, NEVADA

State of Nevada

Plaintiff,

vs.

Dale Edward Flanagan,
#1013719

Defendant.

Case No. C69269
Dept. No. VII

ORDER

THIS MATTER came before the Court for evidentiary hearing of Defendant's allegation of ineffective assistance of counsel based on the alleged personality conflict between Rebecca Blaskey and David Wall as raised in Defendant's Petition for Writ of Habeas Corpus. The Court, after reviewing all briefs submitted, hearing testimony at the evidentiary hearing on February 14, 2002 and reviewing the file, does not find that Defendant's counsel was ineffective under the test enunciated in Strickland v. Washington, 566 U.S. 668, 687 (1984) which was later adopted by the Nevada Supreme Court in Bennett v. State, 111 Nev. 1099 (1995). The test in Strickland requires a defendant to show that counsel's assistance was "deficient" and that the deficiency prejudiced the defense. Id at 687. There is also

EXHIBIT" 1 "

a strong presumption that defense counsel provided reasonably effective assistance of counsel, which can only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev. 671 (1978).

The Court does not find that Defendant has presented strong and convincing proof that both Rebecca Blaakey and David Wall were ineffective as counsel for Defendant in preparation for and during his third penalty hearing. While there was some evidence of personality conflicts and lack of communication between Defendant's counsel, these incidents did not rise to the level of ineffective assistance of counsel nor did the Defendant demonstrate that the incidents prejudiced him, which is necessary under the Strickland test.

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Petition for Writ of Habeas Corpus is **DENIED**.

Dated this 19 day of June, 2002.

MARK GIBBONS
Chief District Judge

MARK GIBBONS

PROOF OF SERVICE

I hereby certify that on June 19, 2002 I mailed or placed a copy in attorney folder or hand delivered the foregoing Order to the following:

Leon Simon, Esq.
Deputy District Attorney
200 S. Third St.
Las Vegas, NV 89155

Cal Potter, Esq.
1125 Shadow Lane
Las Vegas, NV 89102

Robert D. Newell
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201

Jason Cook
Dept 7, Law Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40232

FILED

FEB 22 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Mark W. Gibbons and Michelle Leavitt, Judges.

FACTUAL AND PROCEDURAL HISTORY

Appellant Dale Flanagan's grandparents, Carl and Colleen Gordon, were found dead on November 6, 1984, Carl having been shot seven times in the back and chest and Colleen having been shot three times in the head. Six young men were involved in the plot to kill the Gordons. Flanagan shot Colleen, and his codefendant Randolph Moore shot Carl. Flanagan and Moore were tried in September and October 1985 along with two other codefendants, Johnny Ray Luckett and Roy McDowell. The four men were convicted, and Flanagan and Moore received death sentences. Tom Akers and Michael Walsh were also charged in the murders and pleaded guilty to manslaughter and two counts of murder, respectively.

On direct appeal, this court characterized as overwhelming the evidence that Flanagan, Moore, Luckett, and McDowell killed the Gordons so that Flanagan could obtain insurance proceeds and an inheritance. Although this court affirmed Flanagan's convictions, it

reversed his and Moore's sentences and remanded the matter for a new penalty hearing due to prosecutorial misconduct.[1] Flanagan and Moore were again sentenced to death, and they appealed. This court affirmed the death sentences.[2] The United States Supreme Court vacated that decision, however, and remanded for reconsideration due to evidence presented at the second penalty hearing regarding Flanagan and Moore's occult beliefs and activities.[3] Upon remand, this court held that use of such evidence had been unconstitutional and remanded the case to the district court for a third penalty hearing.[4] After the third hearing, Flanagan and Moore once again received death sentences, and this court affirmed the sentences on appeal.[5]

Flanagan filed a timely post-conviction petition for a writ of habeas corpus. The district court summarily dismissed all of Flanagan's claims save his claim that personality conflicts between his two penalty hearing counsel deprived him of the effective assistance of counsel. The district court denied this claim as well after an evidentiary hearing. This appeal followed.

DISCUSSION

Flanagan argues on appeal that the district court erred in denying his habeas petition without conducting an evidentiary hearing on

---

[1]Flanagan v. State (Flanagan I), 104 Nev. 105, 754 P.2d 836 (1988).

[2]Flanagan v. State (Flanagan II), 107 Nev. 243, 810 P.2d 759 (1991).

[3]Moore v. Nevada, 503 U.S. 930 (1992).

[4]Flanagan v. State (Flanagan III), 109 Nev. 50, 846 P.2d 1053 (1993).

[5]Flanagan v. State (Flanagan IV), 112 Nev. 1409, 930 P.2d 691 (1996).

all of his claims but one. A post-conviction petitioner cannot rely on conclusory claims for relief.[6] An evidentiary hearing is required only if the claims presented in the petition are supported with specific factual allegations that if true would entitle the petitioner to relief.[7] A petitioner is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record.[8]

Initially, we address a procedural default matter raised by the State. In 1995, approximately one week prior to the commencement of his third penalty hearing, Flanagan filed a post-conviction petition for a writ of habeas corpus. The district court summarily denied the petition without making findings of fact and conclusions of law. Subsequently, the district court held a hearing respecting its denial of the petition. At that hearing, the parties discussed a mandamus petition that Flanagan had filed with this court challenging the district court's denial of his habeas petition. In denying the mandamus petition, this court stated that a denial of a habeas petition was an independently appealable determination and not an appropriate matter for extraordinary relief. After some discussion of the jurisdictional posture of the habeas petition, the district court concluded that its denial of the petition would be appealable only upon the entry of a final judgment in the criminal action. In this case, the district court concluded, the third penalty hearing remained pending and unresolved. Consequently, the district court concluded that Flanagan's notice of appeal did not divest it of jurisdiction

---

[6]Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

[7]Id.; Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

[8]Hargrove, 100 Nev. at 503, 686 P.2d at 225.

to proceed with the third penalty hearing. After the third penalty hearing, this court considered the appeal from the district court's denial of habeas relief, along with Flanagan's appeal from his third penalty hearing.[9]

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

Claims of ineffective assistance of counsel

In his habeas petition, Flanagan raised a host of ineffective assistance of counsel claims relating to both the guilt phase of trial and subsequent penalty hearings. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Flanagan must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.[10] He must demonstrate prejudice by showing a reasonable probability that but for counsel's errors the result of the trial would have been different.[11]

---

[9]Flanagan IV, 112 Nev. 1409, 930 P.2d 691.

[10]See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[11]See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

Guilt phase

Flanagan first argues that the district court erred in dismissing his claim that his counsel was ineffective for failing to adequately investigate, prepare, and present his case. Under the umbrella of this allegation, he asserts the following: counsel should have discovered that Robert Ramirez would have testified that Flanagan did not participate in the murders; counsel should have uncovered evidence demonstrating that Flanagan's character made it unlikely that he would have participated in the crimes; counsel failed to adequately cross-examine Wayne Wittig; counsel failed to investigate Angela Saldana's alleged criminal record; counsel unreasonably failed to examine crime scene evidence, interview potential witnesses, and obtain expert assistance in assessing the State's case against him; and counsel should have requested a continuance to further prepare his case.

We have carefully considered Flanagan's arguments and submissions in support of these claims and conclude that, in light of the overwhelming evidence of guilt presented at trial, they fail to demonstrate that, but for his counsel's allegedly deficient performance, the result of his trial would have been different. Therefore, we conclude that the district court did not err in summarily dismissing these claims.

Flanagan next claims that the district court erred in dismissing his claim that his counsel was ineffective for failing to file a motion in limine to exclude evidence of witchcraft proffered by codefendant Luckett. In Flanagan's appeal after his third penalty hearing, we concluded that the witchcraft evidence presented by Luckett was admissible to support Luckett's defense.[12] Therefore, there is no

[12]Flanagan IV, 112 Nev. at 1417-20, 930 P.2d at 696-98.

reasonable probability a motion in limine would have been successful even had counsel filed one. Moreover, the other evidence presented by the State overwhelmingly proved that Flanagan and his codefendants planned and executed the murder plot for financial gain, not because of the influence of witchcraft. Therefore, the district court did not err in summarily dismissing this claim.

Flanagan argues that the district court erred in dismissing his claim that his counsel was ineffective for failing to object to the presence of armed guards and the jury's observation of him in shackles. Based on our review of the record and Flanagan's submissions in support of this claim, however, we conclude that his claims fail to establish a reasonable probability that the result of his trial would have been different had counsel objected. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan further contends that the district court erred in dismissing his claim that his counsel was ineffective for failing to secure a proper record of several bench conferences. He neglects, however, to explain any prejudice resulting from the absence of a record of these conferences.[13] Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan also complains that the district court erroneously dismissed his claim that counsel was ineffective for failing to challenge the vagueness of the information on the ground that it did not provide him adequate notice respecting the State's theory of liability in Carl Gordon's death. He argues that although the information charged him as an aider and abettor in Carl's murder, the State proceeded to trial on the theory

[13]See Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003).

that he acted as a principal. NRS 195.020 provides, however, that one who aids or abets in the commission of a crime "is a principal and shall be proceeded against and punished as such." Further, the record shows that the State's theory throughout the proceedings was that Flanagan shot Colleen Gordon and that he aided and abetted Moore in Carl's shooting. No evidence was adduced suggesting that Flanagan shot Carl Gordon. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan also asserts that the district court erred in dismissing his claim that his counsel was ineffective for failing to object to the district court's requirement that all defense counsel agree on the exercise of peremptory challenges. NRS 175.041 provides: "When several defendants are tried together, they cannot sever their peremptory challenges, but must join them." As we have long upheld the constitutionality of this mandate,[14] there was no reasonable basis upon which counsel should have objected. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan further contends that the district court erred in dismissing his claim that counsel failed to investigate his mental state and prove that he was under the influence of powerful psychotropic drugs on the night of the crime, which combined with his preexisting mental condition rendered him incapable of formulating any plan or intent to kill. Flanagan also asserts that counsel should have requested a competency hearing and reviewed his jail records.

---

[14]See, e.g., White v. State, 83 Nev. 292, 297, 429 P.2d 55, 58 (1967) (concerning NRS 175.015, the predecessor to NRS 175.041).

To support these claims, Flanagan produced several affidavits and other documentation during post-conviction proceedings. In one affidavit, a psychologist described Flanagan's alleged troubled childhood, abuse by his stepfather and Carl Gordon, and Flanagan's drug abuse. However, the psychologist did not indicate that Flanagan was legally incompetent when he committed the charged crimes or was otherwise unable to form the intent necessary to kill.

Flanagan also produced an affidavit from Angela Saldana, an acquaintance of all the codefendants and Flanagan's former girlfriend, wherein she stated that Flanagan and Akers told her that Flanagan ingested "acid" on the night of the murders. She also averred that Flanagan often drank alcohol, smoked marijuana, "took speed, and acid, and sometimes took mushrooms." However, Flanagan does not allege that he ever advised counsel that he was under the influence of LSD on the night of the murders or at any other time. And trial counsel's affidavit is silent as to whether he was aware of Flanagan's alleged LSD abuse.

Flanagan also included correctional-facility medical records listing the medication he was receiving during 1985. Although these records show that Flanagan was administered a number of drugs prior to trial, none were specifically identified as psychotropic. Further, Flanagan failed to identify which psychotropic drug he was allegedly taking that rendered him incompetent to stand trial. And although Flanagan claims that he was forced to take psychotropic drugs, his documentation does not bear that out. Moreover, nothing in the trial transcripts suggests that Flanagan was incompetent. In addition, a psychiatrist with the Southern Nevada Adult Mental Health Services stated in a psychiatric examination report dated approximately three months before Flanagan's original trial

commenced that Flanagan was "fully competent to stand trial as he understands exactly the court procedures."

Nothing in Flanagan's submissions indicates that counsel had any reason to suspect that Flanagan was under the influence of psychotropic drugs at any time or that he was incompetent. And considering the evidence presented at trial and Flanagan's submissions, we conclude that the record repels his claim that he was legally incompetent or otherwise unable to form the requisite intent to kill. Moreover, even if counsel had discovered and produced at trial Flanagan's desired evidence, he failed to demonstrate that the absence of it prejudiced him in light of the overwhelming evidence that he was instrumental in devising the murder plot and the killings were planned over the course of several weeks. Therefore, we conclude that the district court did not err in summarily dismissing this claim.[15]

Flanagan contends that his trial counsel was ineffective for failing to object to the aiding and abetting instructions on the ground that they failed to inform the jury of the specific intent necessary to hold him liable as an aider and abettor in Carl Gordon's murder under Sharma v. State.[16] However, even assuming counsel should have objected to the

---

[15]To the extent Flanagan argues that the district court should have ordered a competency hearing, this claim was appropriate for direct appeal. As he failed to show good cause for failing to raise this claim previously and prejudice, we conclude that the district court did not err in summarily dismissing this claim. See NRS 34.810(b)(2).

[16]118 Nev. 648, 56 P.3d 868 (2002); see Mitchell v. State, 122 Nev. ___, 149 P.3d 33, 38 & n.25 (2006) (holding that Sharma clarified existing law and did not apply retroactively).

challenged instructions, Flanagan cannot demonstrate prejudice here. The State presented overwhelming evidence that Flanagan and his cohorts planned and executed the murders expressly so that Flanagan would receive life insurance and inheritance proceeds. Murdering both Carl and Colleen was necessary to effectuate this objective. Flanagan, Moore, and the others devised the murderous plot at least one month prior to the killings, discussing in detail who would shoot Carl and Colleen and in what manner, how the men would gain entry into the Gordon residence, and the types of weapons to be used. The men also agreed that the murders would be made to look like a robbery or burglary gone wrong. The evidence overwhelmingly supports a finding that Flanagan had the intent necessary to be held liable for Carl's murder under an aiding or abetting theory of liability. Consequently, we conclude that Flanagan has not demonstrated a reasonable probability that the result of his trial would have been different had counsel objected to the aiding and abetting instructions.[17] Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Finally, Flanagan asserts that the district court erroneously dismissed his claim that the cumulative impact of counsel's deficient performance mandates reversal of his conviction. Based on the foregoing discussion, we conclude that there was no cumulative error and that the district court did not err in summarily dismissing this claim.

---

[17]To the extent Flanagan argues that the district court's instructions respecting aiding or abetting do not comport with Sharma, We conclude that this claim is procedurally barred absent a showing of good cause and actual prejudice, which Flanagan has failed to demonstrate. See NRS 34.810(1)(b), (3).

Penalty hearing

Flanagan argues that the district court erroneously denied his claim that the breakdown in the relationship between his two counsel, as well as institutional decisions made by the Clark County Public Defender's Office, adversely affected his interests. He states generally that the Public Defender's Office was overloaded with cases and was unable to devote necessary resources to his case. As noted above, this was the sole claim upon which the district court granted an evidentiary hearing. Both counsel testified at the evidentiary hearing that their relationship was strained at times. The district court ruled that Flanagan had failed to show that the personality conflict and lack of communication between counsel rose to the level of ineffective assistance under the Strickland standard.

"Generally, this court will defer to the district court's factual findings concerning claims of ineffective assistance of counsel."[18] However, these claims are subject to this court's independent review because they present mixed questions of law and fact.[19] Although the record reveals that tension existed between counsel, we conclude that Flanagan failed to show that the counsel's personal conflicts were so detrimental as to deny him the effective assistance of counsel. Therefore, we conclude that the district court did not err in denying this claim.

Flanagan also contends that counsel inadequately prepared the defense psychologist by failing to provide him with necessary background material and arranging an examination of Flanagan only days

---

[18]McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999).

[19]Id.

before the penalty hearing. He suggests that given sufficient time, the psychologist would have discovered that Flanagan suffered from major mental disorders such as post-traumatic stress disorder and depression; that he was intoxicated at the time of the offense; that he was remorseful; that he was chronically abused by his parents and grandparents; that he acted under the domination of others; and that he lacked the capacity to conform his conduct to the law. The record shows, however, that counsel presented evidence of Flanagan's drug abuse and neglect and abuse by his parents. Flanagan's claims and submissions fail to establish that his counsel were ineffective in their preparation of the psychologist or the presentation of his testimony. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan further contends that counsel were ineffective for failing to move for severance of his penalty hearing from codefendant Moore and that this omission precluded the defense from presenting an individualized mitigation case. However, Flanagan does not adequately explain how he was prejudiced by this omission. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan next contends that his counsel were ineffective for failing to hire a mitigation expert, performing no psychological or psychiatric investigation, and conducting very little investigation of his adaptation to prison life. First, Flanagan fails to explain what a mitigation expert would have contributed to his case had such an expert been secured. Second, counsel retained an expert psychologist; therefore, his claim that counsel conducted no psychological or psychiatric investigation is belied by the record. Finally, counsel called several prison chaplains and a prison guard who testified about Flanagan's conduct in prison. Flanagan fails to identify what additional testimony he desired

counsel to present. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan also argues that his counsel were ineffective for failing to object to several jury instructions, including the antisympathy instruction and an instruction he claims advised the jury that it must return a death sentence if the aggravating circumstances outweighed the mitigating circumstances. We conclude that Flanagan failed to demonstrate that the instructions were improper.[20] Flanagan also contends that his counsel were ineffective for failing to object to an instruction respecting the Pardons Board's power to modify his sentence. However, Flanagan neglects to provide any legal authority supporting his contention that the instruction misled the jury. Therefore, we conclude that counsel were not deficient for failing to object to the challenged instructions. Accordingly, the district court did not err in summarily dismissing this claim.

Flanagan complains that his counsel were ineffective for failing to challenge three jurors for cause. The record reveals, however, that his counsel did successfully challenge one of these jurors for cause. The remaining two jurors were not empanelled, and Flanagan did not argue that any juror actually empanelled was unfair or biased. We conclude that Flanagan failed to adequately explain how his counsel were

---

[20]See Leonard v. State, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001); Geary v. State, 114 Nev. 100, 103-04, 952 P.2d 431, 432-33 (1998).

ineffective in this regard. Thus, the district court did not err in summarily dismissing this claim.[21]

Flanagan also raised a number of claims related to his first and second penalty hearings. We conclude that these claims are moot as Flanagan received a third penalty hearing. Therefore, the district court did not err in summarily dismissing them.

Miscellaneous claims

Flanagan alleges that the district court erred in improperly depriving him of the funds necessary to investigate and present his claims and denying his discovery request. Attorneys Robert D. Newell and Cal J. Potter represented Flanagan in the instant post-conviction proceeding below. They secured two orders from the district court in July 1998 and February 1999 granting investigative fees not to exceed $1,000 and $15,000, respectively. In December 1999, counsel filed a motion in the district court seeking reimbursement for investigative fees in the amount of $128,774.89. Counsel filed another motion on August 3, 2000, seeking reimbursement in the amount of $105,275.38 expended in securing additional investigative services. On August 29, 2000, the district court denied these two motions, concluding that the $234,050.27 requested was excessive. The record also shows that the district court granted counsel's motions for neuropsychological examination funds in the amount of $7,500 and social historian investigation funds in the amount of $17,550.

---

[21]To the extent that Flanagan argued that his appellate counsel was ineffective for failing to raise all the claims he alleged in his petition, we conclude that he did not establish that these claims had a reasonable probability of success on appeal. See Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004). Therefore, we conclude that the district court did not err in summarily dismissing these claims.

We conclude that Flanagan has failed to demonstrate how he was prejudiced by the district court's action on this issue. The record shows that although counsel was not reimbursed for the total amount, Flanagan received the benefit of $275,100.27 in investigative services. He has not sufficiently explained what additional funds were necessary to adequately investigate his claims or how he was prejudiced by the denial of his discovery request.[22] Therefore, we conclude that the district court did not err in this regard.

Flanagan claims that his conviction and sentence were invalid because the trial and appellate judges responsible for the rulings in his case were elected and beholden to the electorate and, therefore, these tribunals could not be impartial. He neglects, however, to substantiate this claim with any specific factual allegations demonstrating actual prejudice. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan next argues that this court failed to conduct fair and adequate appellate review pursuant to NRS 177.055(2)(c)-(e), which requires this court to determine whether sufficient evidence supports any aggravating circumstance, whether the death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor, and whether the death sentence is excessive. The nature of Flanagan's complaint is unclear. To the extent he complains that this court on direct appeal failed to explicitly discuss the three inquiries mandated by NRS 177.055(2)(c)-

---

[22]To the extent that counsel complains that the district court improperly denied their motions for reimbursement, we conclude that such a claim is inappropriately presented in the context of this appeal.

(e), we conclude that Flanagan fails to demonstrate that he was prejudiced. The evidence sufficiently supported the four aggravating circumstances the jury found. There is no indication that the death penalty was imposed under the influence of passion, prejudice, or any arbitrary factor. Finally, this court has stated that the death penalty was not excessive in this case.[23] Consequently, we conclude that the district court did not err in summarily dismissing this claim.

Application of McConnell v. State

Flanagan argues that his death sentence is unconstitutional under McConnell v. State[24] because the State used the same felony to support his conviction on a felony-murder theory and to support one of the aggravating circumstances. In the guilt phase of the trial, the State proceeded on theories of premeditated, deliberate murder and felony murder, alleging that both murders were committed during the perpetration of a robbery and burglary. The jury's guilt phase verdict, however, simply finds Flanagan guilty of first-degree murder, without specifying the theory or theories upon which the jury may have based its verdict.

During the penalty hearing, the jury found four aggravating circumstances: that Flanagan knowingly created a great risk of death to more than one person; that the murders were committed while he was engaged in the commission of a robbery; that the murders were committed while he was engaged in the commission of a burglary; and that the murders were committed to receive money or any other thing of monetary

---

[23]Flanagan IV, 112 Nev. at 1423-24, 930 P.2d at 700.

[24]120 Nev. 1043, 102 P.3d 606 (2004).

value. The jury found three mitigating circumstances: that Flanagan had no significant history of prior criminal activity; his youth at the time of the murders; and "[a]ny other mitigating circumstances."

In McConnell this court deemed "it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."[25] And in Bejarano v. State, this court held that McConnell has retroactive application.[26] Thus, Flanagan can show good cause for failing to raise this claim previously.[27] Pursuant to McConnell, the burglary and robbery aggravating circumstances must be stricken.[28] However, he must still demonstrate actual prejudice resulting from the consideration of the erroneous aggravating circumstances.

After striking the burglary and robbery aggravating circumstances, two remain: Flanagan knowingly created a great risk of death to more than one person, and he committed the murders to receive money or any other thing of monetary value. This court may uphold a death sentence based in part on an invalid aggravator by reweighing the aggravating and mitigating evidence or conducting a harmless-error

---

[25]Id. at 1069, 102 P.3d at 624.

[26]122 Nev. ___, 138 P.3d 265 (2006).

[27]See Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003) (stating that good cause can be shown where the legal basis for the claim was previously unavailable).

[28]Because the robbery and burglary aggravating circumstances must be stricken pursuant to McConnell, Flanagan's challenge to them on other grounds is moot.

review.[29] If we conclude beyond a reasonable doubt that the jury would have found Flanagan death eligible and imposed a sentence of death despite the erroneous aggravating circumstances, then the error was harmless, and his claim is procedurally barred because he has failed to demonstrate actual prejudice.[30] After reweighing here, we conclude beyond a reasonable doubt that absent the erroneous aggravators the jury would have nonetheless found Flanagan death eligible and imposed a death sentence.

After striking the erroneous burglary and robbery aggravating circumstances, two viable ones remain. The receiving-money aggravating circumstance is especially compelling in this case, as it was the impetus for the murders. And the "creating a great risk of death" aggravating circumstance soundly applies to the multiple murders committed in this case in 1984, prior to the adoption of NRS 200.033(12).[31] We conclude beyond a reasonable doubt that the jury would not have found the three mitigating circumstances—Flanagan's youth, lack of prior criminal record, and "any other mitigating circumstances"—sufficient to outweigh the two remaining aggravating circumstances. We further conclude that the jury would have imposed a sentence of death. The murders in this case were particularly brutal and disturbing considering the familial relationship between the victims and Flanagan and the evidence establishing that Flanagan shot his grandmother. Moreover, the

---

[29]See Clemons v. Mississippi, 494 U.S. 738, 741 (1990).

[30]See Browning v. State, 120 Nev. 347, 364-65, 91 P.3d 39, 51-52 (2004); Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

[31]Flanagan IV, 112 Nev. at 1420-21, 930 P.2d at 698-99.

methodical planning exercised in the plot appreciably raised the level of malevolence displayed in these senseless murders.

Direct appeal claims

Flanagan raised a number of claims that were appropriate for direct appeal. We conclude, however, that Flanagan showed neither good cause for failing to raise these issues earlier nor actual prejudice.[32] Therefore, we conclude that the district court did not err in summarily dismissing these claims. Although these claims are procedurally barred, we elect to comment on two of his allegations.

Flanagan argued that the district court improperly directed defense objections and motions to be made to the court reporter and outside his and the jury's presence. In an effort to streamline anticipated frequent objections related to severance matters, Judge Donald M. Mosely instructed all defense counsel to either wait until there was break in the trial to raise an objection or ask the district court for leave to approach the court reporter and inform her of the nature of the objection counsel desired to be recorded. Although we conclude that Flanagan failed to overcome applicable procedural default rules in raising this claim in his habeas petition,[33] we take this opportunity to express our disproval of the district court's procedure in this regard. Parties are required to assert contemporaneous objections to preserve alleged errors for appellate review.[34] Judge Mosely's unusual procedure frustrated the defense's ability to comply with this fundamental rule of appellate review.

---

[32]See NRS 34.810(1)(b)(2); State v. Williams, 120 Nev. 473, 476-77, 93 P.3d 1258, 1260 (2004).

[33]See NRS 34.810(1)(b)(2), (3).

[34]See McKague v. State, 101 Nev. 327, 330,705 P.2d 127, 129 (1985).

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

Flanagan also argued that he was prejudiced by the district court's instruction to the jury on premeditation and deliberation, commonly known as the Kazalyn instruction.[35] This instruction was later determined in Byford v. State[36] to inadequately explain the distinction between first- and second-degree murder. Flanagan also contends that Polk v. Sandoval,[37] a recent decision by the United States Court of Appeals for the Ninth Circuit, mandates reversal of his first-degree murder conviction. In sum, Polk concluded that in reviewing the Kazalyn instruction in Byford, this court ignored clearly established federal law holding that an instruction omitting an element of the crime and relieving the prosecution of its burden of proof violates the federal Constitution.[38] The Polk court concluded that given the "State's exceptionally weak evidence of deliberation," it could not conclude that the instructional error was harmless in that case.[39] We conclude however, that the evidence adduced at trial overwhelming established that Flanagan and his cohorts methodically planned the murders for pecuniary gain. Considering Polk,

---

[35]Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992).

[36]116 Nev. 215, 994 P.2d 700 (2000).

[37]503 F.3d 903 (9th Cir. 2007).

[38]Polk, 503 F.3d at 911.

[39]Id. at 913.

we nonetheless conclude that any error in the challenged instruction was harmless beyond a reasonable doubt.

CONCLUSION

Having considered Flanagan's arguments and concluded that the district court did not err in dismissing his habeas petition,[40] we

ORDER the judgment of the district court AFFIRMED.[41]

_____, J.
Maupin

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

_____, J.
Saitta

---

[40]Flanagan also raised the following claims on appeal: he was denied the effective assistance of counsel due to a conflict within the Clark County Public Defender's Office; his counsel was ineffective for failing to seek an instruction informing the jury that it had to find that the aggravating circumstances were not outweighed by the mitigating circumstances beyond a reasonable doubt to find him eligible for the death penalty; and the district court improperly denied his challenge for cause against a prospective juror. However, as he did not present these matters for the district court's consideration below, we decline to consider them here. See Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002).

[41]The Honorable Mark Gibbons, Justice, and the Honorable Michael L. Douglas, Justice, did not participate in the decision of this matter.

cc: Eighth Judicial District Court Dept. 7, District Judge
Hon. Michelle Leavitt, District Judge
Hon. Donald Mosley, District Judge
Davis Wright Tremaine LLP
Potter Law Offices
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk