IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 63703

RESPONDENT'S ANSWERING BRIEF

Appeal from Denial of Second Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 63703

RESPONDENT'S ANSWERING BRIEF

Appeal from Denial of Second Petition for Writ of Habeas Corpus (Post-Conviction) Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUE

1. Whether the District Court Properly Denied Flanagan's Second Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

In 1985, Dale Flanagan was convicted of murdering his grandparents and was sentenced to death. 3 AA 569-572. On direct appeal, by a three-two split, this Court affirmed Flanagan's murder convictions but vacated the death sentences and remanded the case for a new penalty hearing due to prosecutorial misconduct. Flanagan v. State (Flanagan I), 104 Nev. 105, 754 P.2d 836 (1988). Remittitur issued on June 7, 1988. A second penalty hearing in 1989 also resulted in death verdicts for Flanagan but was again reversed on appeal, this time due to unconstitutional admission of satanic worship evidence. Flanagan v. State (Flanagan

II), 107 Nev. 243, 810 P.2d 759 (1991); Flanagan v. State (Flanagan III), 109 Nev. 50, 846 P.2d 1053 (1993). A third and final penalty hearing in 1995 again resulted in death verdicts for Flanagan, which this Court affirmed. Flanagan v. State (Flanagan IV), 112 Nev. 1409, 930 P.2d 691 (1996). Remittitur issued on June 3, 1998.

On May 28, 1998, Flanagan filed his first post-conviction petition which was then supplemented by appointed counsel Robert Newell in association with local counsel Cal Potter. 4 AA 573-706. After an evidentiary hearing at which third penalty phase counsel Rebecca Blaskey and Dave Wall both testified, 6 AA 897-937, the petition was denied on August 8, 2002. 6 AA 938-971. This Court affirmed the district court's denial in an unpublished order dated February 22, 2008. 6 AA 972-993. Remittitur issued on March 18, 2008.

Flanagan then proceeded to federal court where he filed a habeas petition in proper person on January 13, 2009, which was then amended by appointed counsel on February 11, 2011.[1] [2] 9 AA 1320-1367. The federal court ordered a stay and

[1] Although not included in the Appellant's Appendix, Flanagan's amended habeas petition references his initial January 13, 2009 petition in the procedural history. 9 AA 1327.

[2] As the State noted in its January 18, 2013 Motion to Dismiss, the first claim of the amended federal habeas petition was identical to the claim raised in the Defendant's second state petition at issue. The State produced the first 48, of 308, pages of the federal petition for the district court to demonstrate the prior availability of this claim. 9 AA 1320-1367.

abeyance on August 23, 2012, to allow for exhaustion in state court. 9 AA 1369-1373. More than a month later, Defendant filed the successive state habeas petition at issue in this appeal on September 28, 2012. 8 AA 1105-1157. The State moved to dismiss on January 16, 2013, arguing that the petition was time barred, successive, and the State affirmatively pled laches pursuant to NRS 34.800. 9 AA 1290-1305. Flanagan filed an Opposition to the State's Motion to Dismiss on March 26, 2013, arguing that good cause existed to excuse the procedural bars and contending that application of the procedural bars would be prejudicial. 9 AA 1374-1404. The district court granted the State's Motion to Dismiss on June 6, 2013, after hearing oral arguments from Flanagan and the State and concluding that Flanagan failed to demonstrate good cause to overcome the applicable procedural bars. 9 AA 1412-31. The district court filed its written Findings of Fact, Conclusions of Law and Order on June 28, 2013. 9 AA 1432-1442. Notice of Entry was filed on July 1, 2013.

STATEMENT OF THE FACTS

Flanagan's petition focused on his allegations that Angela Saldana was induced into giving false testimony by her uncle and the District Attorney's Office. Accordingly, the only relevant facts on appeal are those concerning the development and presentation of Angela Saldana's testimony.

As early as 1985, in a pre-trial evidentiary hearing, Angela Saldana acknowledged that her aunt and uncle encouraged her to get information about the murder of Flanagan's grandparents for the police. 1 AA 73. She also admitted that she contacted police officer Ray Berni about a week or two after the murder, then Beecher Avants from the District Attorney's Office, and then the prosecutor on the case, Dan Seaton. 1 AA 89-93. She had sex with Flanagan and promised to marry him as well as co-defendant Tom Akers all in an attempt to get more information which she could pass along to law enforcement. Id. Saldana told Officer Berni, her former boyfriend, that she was going to "play along" and find out what more she could learn, although she was not asked to do so by Officer Berni. 1 AA 92, 101.

At the conclusion of the evidentiary hearing, Flanagan's attorney, Randy Pike, made the same "police agent" argument that Flanagan advanced in his second petition for writ of habeas corpus 29 years later:

> One thing, your Honor. By this time she [Angela Saldana] would be a police agent and I think what she was doing was pumping him trying to get information for Officer Berni that she could turn over to him or the district attorney's office. I think anything beyond the point that she first contacted Officer Berni and was turned over at which point she became a police agent and it was acting as an arm of the state should be excluded in consideration against Mr. Flanagan.

1 AA 173-174. The district court judge who had heard Saldana's testimony disagreed:

> Concerning the theory of agency, I find the testimony does not substantiate that. Miss Saldana indicated she was acting on her own volition. The officer told her to put the knife back and stay out of harm's way, in essence. The officer didn't direct her and she, for whatever reason, decided to follow the matter up.

1 AA 178.

At trial later that year, Angela Saldana admitted that she expected to be paid $2,000.00 from the Secret Witness Program for her work and assistance on the case. 2 AA 282-283, 344. She again testified that she contacted Beecher Avants of the District Attorney's Office at the suggestion of her aunt and uncle because Beecher was a friend of the family. 2 AA 291-292. When asked by Flanagan's attorney which police officer had instructed her to "play along" to get additional information, she responded that no officer asked her to play along. 2 AA 318. Rather, she testified it was her uncle who had asked her to do that and she confirmed that her uncle was affiliated with law enforcement as an attorney. Id.; 2 AA 331. She also confirmed that if she learned any more information, she would go tell Metro or Officer Berni or Beecher Avants or even Dan Seaton in the District Attorney's Office. 2 AA 322. Later, when asked whether Officer Berni had suggested in any way that she become an agent of law enforcement and go elicit information from Flanagan, she responded no, that it was her idea alone. 2 AA 338-339, 342, 351-352, 354-355. Her motive in voluntarily reporting to the police was her desire for experience to become a criminal investigator. Id.

In closing argument, defense counsel vehemently attacked Saldana's character and credibility both as a stripper as a police informant for money. She was called a "performer" and a "phony" and that "she is as willing to dance for money in this courtroom as she is on the stage at Bogie's." 1 RA 23 (argument by counsel for Luckett).[3] Flanagan's counsel extensively argued that Saldana could not be trusted and that her memory suspiciously improved over time "...all the way to the bank." 1 RA 54-56. He characterized her as a "user" of people who enjoyed the limelight and who would be paid for her "performance." 1 RA 57-58. The value and credibility of Saldana's testimony was summed up for the jury as follows:

> I think she has been characterized appropriately, stripper, loose woman, sex with Tom Akers while she was living with Dale, wanted to be a private investigator and so she thought this would be a marvelous opportunity to become an agent on her own. Of course, the fact that she had spoken to her boyfriend who was a police officer, spoke to Beecher Avants and spoke to Detective Levos, how much credence can we probably give to the testimony of that kind of person?

1 RA 72 (argument by counsel for Moore).

By the time of the third penalty hearing, Saldana's testimony against Flanagan was further impeached with an intervening criminal charge. 3 AA 535-537. Saldana acknowledged on cross-examination by Flanagan's attorney that she had been

[3] Defendant only included a portion of the October 10, 1985 transcript in his Appellant's Appendix. Thus, the State has included the omitted portion of the record in its Respondent's Appendix.

arrested on a drug trafficking charge in 1989 for which she was in custody at the time of the second penalty hearing. Id. After her testimony at the second penalty hearing, the drug trafficking charge was reduced to a misdemeanor trespass and she received just a $200 fine. Id. This line of questioning by Flanagan's attorney suggested that the prosecutor had rewarded Saldana with the charge reduction in exchange for her testimony. See Id. But Saldana clarified that the plea negotiation was separate and not in exchange for her testimony on this case. 3 AA 542.

In 1998, Flanagan again questioned Saldana's testimony in his first state post-conviction petition proceedings. In his supplemental petition, Flanagan alleged that Saldana was a known prostitute who, at the behest of law enforcement, engaged in sexual relations with police officers and with Flanagan in an effort to elicit incriminating statements and thereby became a police agent. 4 AA 575, 580-581. Flanagan also alleged that in exchange for her testimony and cooperation, Saldana escaped prosecution for several offenses and was paid cash, inducements which were not disclosed to the defense. Id.; 4 AA 588-589. Finally, Flanagan further argued that the prosecution coached and influenced Saldana to shape her testimony consistent with that of other witness accounts. Id. In this way, Flanagan alleged that the State manufactured and elicited false testimony against him.

Flanagan freely admits raising this same claim in his second petition. 9 AA 1418-19; see also AOB 13. This time Flanagan added color to his previously

rejected claim by including two new declarations from Wendy Mazaros (formerly Peoples) and Amy Hanley-Peoples which he claimed "proves that [the State] mislead[] the Court." 9 AA 1415; see also 9 AA 1280-1289. The district court rejected his position, telling counsel that the affidavits did not bear out his allegations. 9 AA 1423. In sum, Flanagan has claimed that Saldana gave false testimony for nearly 30 years but he has never established that falsity.

ARGUMENT

I

The District Court Properly Dismissed Flanagan's Petition

Flanagan's second state petition for writ of habeas corpus was nothing more than a regurgitation of long-known facts and conspiracy theories which the district court, and this Court, have rejected multiple times over the past 28 years. Initially, Flanagan readily admitted that five of the six claims for relief in his second petition were previously presented in the first state habeas proceedings. 7 AA 1010-11. But he claimed that his first claim was "new" and not previously raised. Id.; 7 AA 1020. After the State pointed out that in reality his first claim was not new, Flanagan later conceded that it was the same legal claim presented with "new" additional facts. 9 AA 1418-19.[4] The district court dismissed Flanagan's petition because it was

[4] Despite his concession, Flanagan continues to argue that the State took a contrary position in federal court, contending that Claim 1 differed from the claims he presented in his initial habeas petition. AOB 9 n. 4. On appeal, he argues that the district court erred in not ruling on his doctrine of judicial estoppel argument and specifically contends that the State's position in federal court should have been

untimely and successive, and to the extent that Flanagan alleged new facts in support of one claim, such facts did not constitute good cause because they were not withheld by the State and Flanagan failed to demonstrate good cause for his delay in bringing these "new" facts to the state court once they were discovered. 9 AA 1433-1434. As discussed below, the district court's decision was not in error.

A. Application of the State Procedural Bars

Flanagan does not dispute that there were three applicable procedural default rules in this case. First, his petition was untimely pursuant to the procedural bar of NRS 34.726. 9 AA 1434. Second, the State affirmatively pled laches and was entitled to a rebuttable presumption of prejudice which Flanagan did not overcome.

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construed as a concession estopping it from arguing that the claims were procedurally barred in state court. Id. Flanagan misconstrues the record in support of his argument.

In federal court, the State adamantly opposed Flanagan's motion for stay and abeyance because Flanagan "failed to demonstrate that he has good cause for his failure to first take his unexhausted claims to state court and further failed to show that said unexhausted claims are potentially unmeritorious." 1 RA 195. Even if a petitioner raises precisely the same legal claims in state and federal proceedings, reliance in the two proceedings upon different factual grounds that fundamentally alter the legal claim will foreclose a conclusion that the claim is exhausted. Vasquez v. Hillery, 474 U.S. 254, 260, 106 S.Ct. 617, 621-22 (1986). While maintaining that some of the factual allegations were not new and not previously raised in state court, the State also argued to the district court that such claims were procedurally barred without an adequate showing of good cause and prejudice. 9 AA 1409-1410. Those two positions are not in conflict. The State has consistently asserted, both in state and federal court, that Flanagan's new factual allegations were unexhausted and procedurally barred. Thus, Flanagan's assertion that the district court should have precluded the State from taking inconsistent positions is without merit and Flanagan is simply misrepresenting the record in his favor.

Id. Third, Flanagan's petition was barred by NRS 34.810 because it was successive and included claims that were, or could have been, presented in the first habeas proceeding. Id.

Instead, Flanagan faults the district court for adopting the State's position on the application of the procedural default rules, AOB 8, and claims that he demonstrated "good cause" to overcome his procedural defaults. As discussed *infra*, he asks this Court to disavow the usual deference it gives to the district court because the court adopted the State's position. AOB 8 n. 2, 11 n. 6. This Court must decline Flanagan's request because he has failed to demonstrate that the district court's application of the procedural bars was in error.

Flanagan's second petition was filed on September 28, 2012, well outside the one-year time limitation of NRS 34.726 which requires post-conviction petitions to be filed within one year of issuance of Remittitur after direct appeal. This Court has held that the procedural bars are mandatory, State v. District Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), and has previously rejected a habeas corpus petition filed just two days after the one year time bar pursuant to the clear and unambiguous provisions of NRS 34.726. Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002). Flanagan contends that the district court erred in failing to explain why it ran the statute of limitations period from this Court's 1988 Remittitur date. AOB 8 n. 3. The district court properly ran the time bar from *both* Flanagan's 1988 and

1998 Remittitur dates. 9 AA 1434. Although Flanagan's death sentence was not affirmed until 1998, his conviction of guilt became final in 1988 when this Court affirmed his conviction of guilt. See People v. Jackson, 60 Cal.Rptr. 248, 250, 429 P.2d 600, 602 (1967) (holding that a conviction for murder is a final judgment even when the death sentence is reversed and is not yet final); People v. Kemp, 111 Cal.Rptr. 562, 564, 517 P.2d 826, 828 (1974) (holding that when a judgment is vacated only insofar as it relates to the death penalty, "the original judgment of the issue of guilt remains final during retrial of the penalty issue and during all appellate proceedings. . . .").[5] Because Flanagan claimed that counsel was ineffective at all stages of the proceeding, 7 AA 1058, and the State engaged in misconduct through the entirety of his case, 7 AA 1055, 1100, he was attacking counsel's performance at both the guilt and penalty phases of this case and thus, both Remittitur dates were relevant. Flanagan did not initiate his second state habeas proceedings until September 28, 2012, more than 24 years after the Remittitur from his guilt direct appeal and more than 14 years after the Remittitur from his penalty direct appeal. Thus, the one-year bar of NRS 34.726 was clearly applicable.

[5] This case is distinguishable from Whitehead v. State, 128 Nev. __, 285 P.3d 1053 (2012), which Flanagan relies on, because Whitehead was not bifurcated into guilt and penalty phases. AOB 8 n. 3. Thus, the holdings of Jackson and Kemp are more applicable.

Given the length of time between the issuance of Remittiturs from Flanagan's direct appeal and the affirmance of Flanagan's death sentences, there was a rebuttable presumption that the Flanagan's delay in bringing his second petition to district court prejudiced the State. NRS 34.800(2). He failed to overcome that presumption by delegating his response to the State's latches argument to a mere footnote in his Opposition to the State's Motion to Dismiss. 7 AA 1393 n. 15. Flanagan repeats his argument verbatim in this appeal, contending that NRS 34.800 should be inapplicable to this case because the State has sworn testimony from its witnesses and the grounds he seeks relief on allegedly constitutes a "fundamental miscarriage of justice." Compare AOB 18 n. 16 with 7 AA 1393 n. 15. Flanagan's argument is unconvincing. If the rebuttable presumption of delay could be overcome simply by the State having the ability to re-use old sworn testimony from its witnesses, NRS 34.800(2) would be rendered toothless because any defendant could be re-tried based on the record from his first trial. Moreover, in order to demonstrate a fundamental miscarriage of justice, Flanagan was required to make a colorable showing of actual innocence such that "no reasonable juror would have convicted him absent a constitutional violation." Pellegrini v. State, 117 Nev. 860, 867, 34 P.3d 519, 537 (2001). He failed to make that showing by only summarily quoting the language of Pellegrini, and thus, the district court properly rejected these arguments.

Lastly, Flanagan's petition was successive under NRS 34.810 because it was, admittedly, his second attempt at post-conviction relief and he re-raised multiple claims of relief that had already been denied on the merits.[6] AOB 13 n. 8, 19 n. 17. The district court was required to dismiss the successive petition if it failed to allege new or different grounds for relief and the prior determination was on the merits, or if new and different grounds were alleged, the failure to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(2). Flanagan had the burden of pleading and proving specific facts to demonstrate good cause for the failure to present the "new" claim, or for presenting the claim again, and actual prejudice. NRS 34.810(3); see also Evans v. State, 117 Nev. 609, 646-647, 29 P.3d 498, 523 (2001) ("A court must dismiss a habeas petition if it presents claims that either were or counsel have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner."). As discussed *infra*, he failed to make that showing.

This Court has observed that "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is

[6] Although Flanagan filed an earlier post-conviction petition, filed in 1995, that raised guilt phase issues, it was deemed to be premature and not a bar to the 1998 petition, which was considered the "first" petition. See 6 AA 974-75.

final." Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984). In Lozada, this Court stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 901 P.2d 123, 129 (1995). If the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-4987 (1991). "Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." Riker, 121 Nev. at 231, 112 P.3d at 1074. The district court gave effect to this Court's holdings affect by applying the relevant mandatory procedural bars to Flanagan's appeal.

B. Flanagan Failed to Demonstrate Good Cause

Because his petition was procedurally barred, Flanagan had the burden of pleading and proving facts to demonstrate good cause to excuse the delay. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). In order to demonstrate good cause, he was required to demonstrate or show that an impediment external to the defense prevented him from complying with the state procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal

basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Id., quoting Murray v. Carrier, 477 U.S. 478, 488 (1986).

When, as here, a petitioner raises a Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), claim in an untimely post-conviction petition for writ of habeas corpus, the petitioner has the burden of pleading and proving specific facts that demonstrate both components of the good-cause showing required by NRS 34.726(1): "[t]hat the delay is not the fault of the petitioner" and that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. State v. Huebler, 128 Nev. __, 275 P.3d 91 (2012). Those components parallel the second and third prongs of a Brady violation: establishing that the State withheld evidence demonstrates that the delay was caused by an impediment external to the defense, and establishing that the evidence was material generally demonstrates that the petitioner would be unduly prejudiced if the petition is dismissed as untimely. Id., *citing* State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003).

Flanagan failed to demonstrate good cause under these standards. In response to the State's motion to dismiss his petition, he advanced two good cause arguments. First, he argued that "as the federal district court found," he had been diligent in investigating the factual basis for his claims, and thus, established good cause to excuse any purported procedural defaults. 9 AA 1391, 1420. Second, Flanagan

argued that he filed his Brady claim within a "reasonable" time after locating Wendy Mazaros and Amy Hanley-Peoples. 9 AA 1393-94. The district court properly rejected both of these arguments. 9 AA 1434-36.

Typically, this Court gives deference to the district court's factual findings regarding good cause but reviews the district court's application of the law to those facts *de novo*. Huebler, 128 Nev. at __, 275 P.3d at 95, *citing* Lott v. Mueller, 304 F.3d 918, 922 (9th Cir. 2002). However, Flanagan argues in two footnotes that this Court should decline to give the district court any deference because the district court "adopted verbatim the State's proposed findings" and "provided no 'express findings in support of its determination.'" AOB 8 n. 2, AOB 11, n. 6. Flanagan relies on State v. Greene, 129 Nev. __, 307 P.3d 322 (2013), which is factually inapposite from this case. In Greene, the district court absolutely refused to explain its ruling even after the parties specifically asked the court to articulate the grounds for its decision, leaving the defendant to draft a proposed order without any guidance at all. 129 Nev. at __, 307 P.3d at 325. In this case, the district court announced the grounds for its denial and granted the State's motion to dismiss "based on procedural default rules," and directed the State to "[m]ake a ruling that the petitioner has failed to show good cause by failing to timely file the claim in state court." 9 AA 1430. Consistent with the district court's pronounced ruling and the discussions at the June 6, 2013 hearing, the State drafted a proposed Findings for the district court's

consideration. The district court was free to disregard that draft all together or make changes to it. The fact that the district court only made minor changes to the "Conclusions of Law" section demonstrates that the court gave the State sufficient guidance and the "Findings of Fact" accurately reflected its oral pronouncement. See 9 AA 1438-39 (Judge Leavitt made two corrections and initialed both in the margins). Thus, this Court should decline Flanagan's request and employ its typical standard of review. See Byford v. State, 128 Nev. 67, 70, 156 P.3d 691, 693 (2007) (holding that the district court should "either draft[] its own findings of facts and conclusions of law *or* announce[] them to the parties with sufficient specificity *to provide guidance* to the prevailing party in drafting a proposed order.") (emphasis added).

Flanagan continues to conflate the federal due diligence standard with this State's good cause standard in support of his contention that the district court erred. AOB 10-17. Unfortunately for Flanagan, a federal court's determination of good cause to impose a stay and abeyance for exhaustion does *not* obviate his need to show good cause because the state procedural bars operate independently of any federal order for stay and abeyance. See generally Riker, 121 Nev. 225, 112 P.2d 1070 (2005); Pellegrini, 117 Nev. 860, 34 P.3d 519; see also Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); Valerio v. State, 112 Nev. 383, 915 P.2d 874 (1996). The State is surprised to see Flanagan repeating this argument on appeal because he seemed to

recognize this principal at the June 6, 2013 hearing, admitting that the federal court's finding only govern the "actions by federal counsel in investigating and bringing forth claim one in the federal proceeding." 9 AA 1427. Flanagan now argues that the "due diligence" standard of federal court is somehow "more stringent" than state "good cause." AOB 17 n. 14. His repeated failure to recognize that these standards operate independently is fatal to this alleged showing of good cause.

Flanagan's second argument for good cause somewhat overlaps with the first. Flanagan continues to argue that the prosecution concealed its misconduct, prevented him from bringing this "new" evidence to state court earlier, and he filed his Brady claim within a reasonable amount of time once this "new" evidence was discovered. AOB 18-25. In addition to deciding that this "new" evidence did not constitute material exculpatory evidence withheld from the defense, the district court denied this good cause argument because Flanagan failed to demonstrate good cause for the *entire* delay. 9 AA 1434-1436. The record supports the district court's conclusion.

Hanley-Peoples and Mazaro's declarations do not establish that Angela Saldana offered false testimony in this case. The declarations merely support the testimony that Angela Saldana has repeatedly made in this case: she has always admitted talking to Robert Peoples and Beecher Avants, and to playing along to get additional information from Flanagan. 1 AA 73, 89-93, 101; 2 AA 291-92, 318, 322, 331. She

has always maintained that there were no inducements or benefits for her testimony. Id. And she has consistently maintained that her motive to voluntarily report to the police and get involved in Flanagan's case was her personal desire to become a criminal investigator, nothing more. 2 AA 338-39, 342, 351-52, 354-55. Because neither Hanley-Peoples nor Mazaros were percipient witnesses, they do not know whether Angela Saldana offered true testimony or not. Thus, they do not unequivocally establish that the State procured false testimony as Flanagan alleges.

Moreover, as discussed *supra*, Angela Saladana's character was repeatedly attacked during trial and she was consistently impeached by counsel. Given these attacks, the declarations of Hanley-Peoples and Mazaros only provide cumulative evidence. This Court has repeatedly found "overwhelming" evidence of Flanagan's culpability. Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1998) (Flanagan I) ("The record contains overwhelming evidence that nineteen year old Flanagan and his co-defendants planned to kill the Gordons in an effort to obtain insurance proceeds and an inheritance"); Flanagan v. State, 107 Nev. 243, 810 P.2d 759 (1991) (Flanagan II) ("The evidence of aggravating circumstances was overwhelming and clearly outweighed the mitigating circumstances found by the jury"); Flanagan v. State, 112 Nev. 1409, 930 P.2d 691 (1992) (Flanagan IV) ("We characterized the evidence against Flanagan and Moore as 'overwhelming' in our first opinion in this case. There is no reason to change that characterization now."); 6 AA 976-77

(Flanagan v. State, Docket no. 40232 (Order of Affirmance, February 22, 2008 at 5-6) ("The evidence adduced at trial overwhelmingly established that Flanagan and his cohorts methodically planned the murders for pecuniary gain.")). It is doubtful that the presentation of this cumulative evidence would have altered the state of the evidence in this case.

But even assuming their declarations could constitute material exculpatory evidence (a point the State does not concede), the declarations themselves belie Flanagan's concealment claim. During the first-post conviction proceeding, Flanagan received $275,100.27 for investigative services. 6 AA 985-86. Despite that allowance, Flanagan was unable to find Hanley-Peoples and Mazaros until 2010 because Mazaro "intentionally made [herself] difficult, if not impossible, to locate." 9 AA 1286-87. It was Hanley-Peoples and Mazaro's decision to stay away from this case, not the State's.

However, even assuming *arguendo* that Mazaros and Hanley-Peoples declarations could constitute material exculpatory evidence and the State somehow could be faulted for Mazaros's decision to make herself impossible to find, it is clear from the record that Flanagan's final delay, from July 2010 until September 2012, was fatal to his good cause argument. See 9 AA 1426-27, 1434-35. An allegation that the government may have been responsible for part of the initial delay does not explain or excuse his continued delay once the basis for the claim became known to

him. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); see also Huebler, 128 Nev. at __, 275 P.3d at 96 n. 3 ("We note that a Brady claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense."); Hutchinson v. Bell, 303 F.3d 720, 742-43 (6th Cir. 2002) (barring a Brady claim where there was no good cause for an 11 month delay between discovery of claim and assertion of claim in state court).

Flanagan claims that he proceeded to federal court "within days" of receiving Hanley-Peoples and Mazaros's declarations and returned to state court "immediately" after the State invoked the exhaustion doctrine. AOB 17. These assertions were squarely rejected by the district court because they were belied by the record. By Flanagan's own admission, he knew about these witnesses in July of 2010 when his Investigator located and interviewed them. 9 AA 1426. Yet he did not file a supplemental federal habeas petition with the declarations until February 11, 2011. 9 AA 1320-1367. Flanagan continued to litigate his federal petition to the exclusion of his state court remedies for two years, even after the State advised Flanagan that his "new" facts had not been raised in state court. The State raised its exhaustion claim on September 2, 2011, yet more than a year passed before Flanagan filed the second petition in state court, on September 28, 2012. 1 RA 120-162; 8 AA 1105. Delaying for more than a year is not the same as filing "immediately." Flanagan should have proceeded to state court upon finding Hanley-Peoples and

Mazaros. His decision to pursue federal habeas remedies instead does not constitute good cause to overcome the state procedural bars. See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).

Flanagan attempts to distinguish Colley in two ways because he claims that it is "wholly inapplicable" to his case. AOB 18. Neither distinction is convincing. First, he argues that he could not have possibly complied with any of the procedural default rules because they all lapsed "while the State was concealing its misconduct and the witnesses were unavailable." AOB 18. Again, Flanagan misses the point. As discussed, *supra*, Flanagan failed to demonstrate an impediment external to the defense after July of 2010. He did not bring his Brady claim to state court within a "reasonable time" (or "immediately") as alleged because he sat on his claim for two years. His failure to account for this delay does not make his case distinct from Colley.

Second, Flanagan argues that the underlying rationale driving Colley is inapplicable to his case because he raised this claim in his first state habeas proceeding. AOB 19. He tries to convince this Court that he was seeking to "avoid unnecessary litigation and wasting of scarce judicial resources" by proceeding straight to federal court on his second habeas petition. AOB 19. As Colley recognizes, allowing petitioners to pick their choice in forum and by-pass state habeas proceedings "prejudice[s] both the accused and the State since the interest of

both the petitioner and the government are best served if post-conviction claims are raised while the evidence is still fresh." Colley, 105 Nev. at 236, 773 P.2d at 1230, citing 28 U.S.C. § 2254, Rule 9, Advisory Committee Note (1976). Flanagan conceded in federal court that his claim was not exhausted so he knew that procedurally he should have filed in state court. 9 AA 1370. The rules of this state do not allow him deference to avoid his procedural obligations merely because he subjectively believed that he would be wasting judicial resources and time litigating in state court. Like Colley, he was mistaken in his belief that state habeas relief would remain indefinitely available to him if he did not succeed in federal court.

Finally, the State notes that it is perplexed by Flanagan's reliance on the federal court's conclusion that his claim was "potentially meritorious" within his contention that Colley is inapplicable. AOB 19. The federal court employs a very low standard for allowing a petitioner to return to state court for exhaustion. See Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005) (holding that a petitioner should not be prevented from returning to state court unless "it is perfectly clear that [he] does not raise even a colorable federal claim."). It is not as though the federal court heard Flanagan's petition on the merits and actually concluded that his claim was meritorious. Regardless, the federal court's surface level opinion of Flanagan's claim is not binding on this Court and does not warrant a departure from Colley's holding. Thus, applying Colley, the district court properly concluded that his delay

in bringing his petition to state court in a timely manner was fatal to his good cause claim.

Because Flanagan failed to demonstrate good cause as to claim 1, his entire petition was dismissed. On appeal, Flanagan seems to imply that if there was good cause shown as to claim 1, the district court would have had to re-consider the claims he made in claims 2 through 5, claims he admits were previously rejected by the court. AOB 19 n. 17. The State feels compelled to briefly respond. Demonstrating good cause on one claim does not mandate a reconsideration of all claims. Flanagan's proposed "totality of the record" review would require the district court to re-evaluate all previously denied claims every time a petitioner raises a new claim on post-conviction review. Yet, Flanagan gives this Court no reason to adopt such a rule. If Flanagan's position was adopted, the district court would be unjustifiably burdened and petitioners would be encouraged to file meritless, repeated, successive, and untimely petitions; precisely what this Court sought to avoid in Lozada. 110 Nev. at 358, 901 P.2d at 129. Thus, to the extent that this Court chooses to reach this issue, Flanagan's "totality of the circumstances" test to re-hash old claims should be denied.

C. Flanagan's Prejudice Arguments Do Not Warrant Reversal Because He Failed to Demonstrate Good Cause

Flanagan spends ten pages of his opening brief arguing prejudice. AOB 20-30. But these arguments do not warrant reversal because Flanagan was required to demonstrate good cause *and* prejudice to overcome the procedural bars. NRS 34.810(3); Lozada, 110 Nev. at 358, 871 P.2d at 950. As discussed *supra*, it was his failure to demonstrate good cause that lead to the dismissal of his petition, not the merits of his claims. Flanagan has failed to demonstrate that the district court erred in rejecting his good cause arguments, and thus, the district court's dismissal must be upheld.

However, the State briefly reiterates that the declarations Flanagan provided to the district court do not bear out his allegations that the State induced false testimony from Angela Saldana. They were merely cumulative given the duplicative nature of Saldana's testimony and the overwhelming evidence of Flanagan's guilt. See *supra*. Thus, even if this Court gets to Flanagan's prejudice arguments, they do not warrant reversal.

D. It Was Not Error to Deny Flanagan's Martinez v. Ryan Argument

Finally, Flanagan essentially copies and pastes his argument from below that, in the alternative, the procedural defaults should not be applied to his untimely and successive petition because he was allegedly "deprive of his right to counsel in the previous proceeding." Compare 9 AA 1404-05 with AOB 30-31. The district court denied this argument because it was premised on a misapplication of Martinez v.

Ryan, 566 U.S. __, 132 S.Ct. 1309 (2012), which "has no application outside of federal court and did nothing to change state law." 9 AA 1440. Flanagan has failed to demonstrate that that decision was in error.

Martinez is a narrow exception to the procedural default rules in federal habeas litigation and Flanagan is welcome to rely upon its holding in federal court. But state courts that have analyzed this issue since Martinez have concluded that it did nothing to change procedural defaults in state habeas. See e.g., Kelly v. State, 745 S.E.2d 377 (S.C. 2013) ("Like other states, we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions."), *citing* Rowell v. State, 2013 WL 1501618 (Nev. 2013) (unpublished) ("[A]ppellant's reliance upon Martinez was misplaced as Martinez relates to federal procedural bars and not state procedural bars. Thus, the holding in Martinez would not provide good cause because it is inapplicable in state court."); People v. Miller, 988 N.E.2d 1051, 1062 (Ill.App.1st 2013) (Declining to apply Martinez to state statutory habeas petition procedures because "Martinez applies to federal courts"); Commonwealth v. Saunders, 60 A.3d 162 (Pa.Super. 2013) ("While Martinez represents a significant development in federal habeas corpus law, it is of no moment with respect to the way Pennsylvania courts apply the plain language of the time bar set forth in section 9545(b)(1) of the PCRA."); Logan v. State, 377 S.W.3d 623 (Mo.Ct.App. 2012) ("The limited holding of Martinez ,

while having the potential to aid Logan should he file a future federal habeas action, does not afford Logan a second chance at obtaining relief through a [state post-conviction relief] proceeding."); Gore v. State, 91 So.3d 769 (Fla. 2012) ("It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context. . . . Martinez provides Gore with no basis for relief in this Court."), cert. denied, 132 S. Ct. 1904 (2012). This Court has not expanded Martinez to its state habeas proceedings,[7] and thus, the district court did not err in declining to apply its holding.

Moreover, the State notes that Flanagan's current counsel represented Flanagan throughout his first habeas proceeding as local counsel. So even if Martinez applies, then defense counsel would be left arguing his own ineffectiveness which is not only a conflict of interest but also undermined by his repeated assertions that he exercised due diligence and good faith in developing Flanagan's claims and attempting to locate Wendy Mazaros and Amy Hanley-Peoples over the past decade. See Bennett v. State, 146 P.3d 63, 67 (Ariz. 2006) (holding that it is improper for counsel to argue their own ineffectiveness because the objective standard of determining whether counsel was reasonably effective is best developed by "someone other than the person responsible for the conduct."); U.S. v. DelMuro, 87 F.3d 1078, 1080 (9th Cir.

[7] The issue is currently before this Court in Brown v. McDaniel, Case No. 60065.

1996) (noting that allowing counsel to argue her own ineffectiveness places her in direct conflict with the defendant); see also Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) ("Conflict of interest . . . can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of the case. In general, a conflict exists where an attorney is placed in a situation conducive to divided loyalties."). Thus, the district court did not err in concluding that the procedural rules should apply as discussed *supra*.

CONCLUSION

In light of the foregoing arguments, the State respectfully requests that the District Court's Findings of Facts, Conclusions of Law and Order be AFFIRMED.

Dated this 19th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points of more, contains 6,944 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of June, 2014.

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I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 19, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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