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 REPLY BRIEF

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RULE 26.1 DISCLOSURE

The attorneys representing Mr. Dale Edward Flanagan in this Court are Cal J. Potter III, of Potter Law Offices and Michael Laurence. In the district court, Mr. Flanagan also was represented by Robert D. Newell, of David Wright Tremaine, LLP. Neither Mr. Flanagan's counsel nor their law practices are owned by a parent corporation or are a publicly owned company.

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Introduction

In his Petition for Writ of Habeas Corpus, filed September 28, 2012 ("Second Petition"), Mr. Flanagan presented the district court with five constitutional claims, the substance of which was presented in his first state habeas corpus proceedings ("First Petition"). Appellant's Appendix ("App.") 573-706; 753-801; *see also* App. 580-83, 588-89, 754, 757-58, 994-1104. The claims focused on state misconduct in manufacturing and presenting the false testimony of Angela Saldana, the prosecution's star witness.[1] Mr. Flanagan has challenged the testimony of Angela Saldana as false and the product of unlawful state manipulation since the pretrial proceedings in his original trial. App. 173-74 (prior to the 1985 trial, trial counsel arguing that Ms. Saldana's testimony should be excluded because she was a "police agent" "trying to get information for Officer [Ray] Berni that she could turn over to him or the district attorney's office"); 177-78 (co-defendants joining in motion to exclude her testimony). Mr. Flanagan returned from federal court to re-present these claims to the district court because he finally was able to obtain sworn declarations from Ms. Saldana's aunt Wendy Peoples (nee Mazaros) and her daughter Amy Hanley-Peoples who witnessed the state's misconduct with respect

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[1] Footnote one of Appellant's Opening Brief, which explained the relationship between Claims 1 and 2-5 in the Second Petition, was inadvertently truncated in the conversion to a .PDF file. The full text of that footnote should have read:

> Claim 1 of the Second Petition detailed the state misconduct concerning the development and presentation of Angela Saldana's testimony. App. 1021-41. Claims 2 through 5, which included additional allegations of misconduct and ineffective assistance of counsel, had been presented in the first state habeas corpus petition and were included in the Second Petition to permit full consideration of the extent and prejudicial effects of the State's misconduct. App. 1042-101.

to Ms. Saldana's testimony. Appellant's Opening Brief ("Opening Br.") 1-2, 16-18. Indeed, the declarations document that Clark County District Attorney Chief Investigator Beecher Avants, in concert with Angela Saldana's uncle Robert Peoples, instructed and coerced Angela Saldana to testimony falsely about Mr. Flanagan's involvement in the crimes. App. 1286-86, 1280-81.

The record further demonstrates that the State concealed its misconduct first by threatening Ms. Saldana with prosecution for murder and possible execution, App. 1281, 1287, and later denying in pleadings that Ms. Saldana was acting as a police agent or that her testimony "was somehow scripted." App. 714-15. In so doing, the Clark County District Attorney's Office has shielded itself and its misconduct from discovery and judicial inquiry. While continuing to conceal its misconduct, in the proceedings before the district court and this Court, the Clark County District Attorney's Office attempts to preclude any discovery and fact-finding by invoking procedural default rules. App. 1290-373 (Motion to Dismiss); Respondent's Answering Brief ("Resp. Br.").

Without explaining its reasoning and adopting verbatim the Clark County District Attorney's proposed order, the district court dismissed the Second Petition based on three procedural default provisions. App. 1432-42 (finding that Mr. Flanagan's claims are barred by Nevada Revised Statutes 34.726, 34.800, and 34.810). Notably, Respondent does not dispute that, through its concealment of the misconduct, Mr. Flanagan could not comply with any of those procedural default rules. Opening Br. 18-19; Resp. Br. 22 (acknowledging, but not disputing, Mr. Flanagan's reasoning). Nor does Respondent seriously dispute that Mr. Flanagan's allegations and supporting exhibits – taken as true – establish that the State had violated Mr. Flanagan's due process rights guaranteed by *Brady v. Maryland*, 373 U.S. 83 (1963). Opening Br. 20-30; Res. Br. 7-8 (asserting, without reasoning or discussion of the proof, that the new declarations merely add "color" to the

previously raised claims); 19 (asserting, without discussion of the facts contained in the declarations, that they provide "only provide cumulative evidence"); 25 (acknowledging, but declining to address, Mr. Flanagan's extensive discussion of the importance of the new evidence and its effect on Ms. Saldana's testimony).

Instead, Respondent asserts that it should be permitted to continue to conceal its misconduct because Mr. Flanagan "unreasonably" delayed presentation of the claims following their submission to the federal court. Resp. Br. 21 (insisting that Mr. Flanagan was obligated to file a successor state petition as soon as the State raised its exhaustion defense in federal court). Although this Court has not defined what constitutes "a reasonable time" within which to file an otherwise default *Brady* claim, *State v. Huebler*, 128 Nev. ___, 275 P.3d 91, 95 (2012), by any standard Mr. Flanagan acted with diligence and filed the Second Petition within a reasonable time. Unlike petitioners who have intentionally by-passed the state court process, Mr. Flanagan vigorously – albeit unsuccessfully – litigated his right to develop his claims regarding Angela Saldana's testimony in his first state habeas corpus proceeding. Opening Br. 12-16. Raising the same legal claims in the federal proceedings, but now augmented with the additional declarations, Mr. Flanagan sought a determination by the federal district court of whether additional state habeas corpus proceedings were necessary. Opening Br. 16-18. As soon as the federal court determined that the additional *facts* required Mr. Flanagan to return to state court, he did so immediately. Opening Br. 17-18. Under such circumstances, and as the district court found, Mr. Flanagan acted with diligence and filed his *Brady* claim within "a reasonable time." App. 1371.[2]

[2] Respondent expresses "surprise[]" that Mr. Flanagan relies on the federal district court findings of due diligence and asserts those findings are irrelevant to this Court's inquiry. Resp. Br. 17-18. What Respondent fails to acknowledge, let alone address, is that the federal district court made these findings in direct

Argument

I. Respondent Should not be Permitted to Maintain Inconsistent Legal Positions Regarding the Availability of a State Forum to Resolve the Merits of Mr. Flanagan's Claims.

In Appellant's Opening Brief, Mr. Flanagan argued that the State had taken inconsistent positions in federal court and the district court. Opening Br. 9 n.4. In federal court, the State took the position that there was an available state court remedy to address the merits of his claims, a position that is directly contrary to the Clark County District Attorney's position in the district court and this Court that the state's procedural default rules preclude merits review. Respondent's Answering Brief fails to address the State's inconsistent positions or their effect on these proceedings.[3]

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response to the State's assertion that Mr. Flanagan did not establish "'good cause' for his failure to raise said unexhausted claim in state court previously" and that he "engage[d] in dilatory litigation practices." Respondent's Appendix (Resp. App.) 182; *see also* Resp. App. 183 (arguing that Mr. Flanagan "has not demonstrated good cause to excuse his failure to first exhaust in state court"); 184-85 (asserting that Mr. Flanagan was not sufficiently diligent in his attempts to locate Wendy Mazaros). Applying a more rigorous standard than this Court's "good cause" standard, the federal district court rejected the State's arguments. App. 1371-72. Respondent asserts that "these standards operate independently," but fails to address that a fact-finder – using a more rigorous standard – and resolving the factual issue raised by the State determined that Mr. Flanagan did not engage "in any dilatory litigation tactics" and made a "good faith effort to develop this specific claim in state court." App. 1371. Under such circumstances, Respondent should be precluded from relitigating the issue and, at the very least, the federal district court's findings should be given persuasive authority. *Cf. Mack v. Estate of Mack*, 125 Nev. 80, 92, 206 P.3d 98, 106 (2009) (recognizing that the Court may take "judicial notice of other state court and administrative proceedings when a valid reason presented itself").

[3] As noted in Appellant's Opening Brief, although Mr. Flanagan raised this issue below, the district court did not address it. Opening Br. 9-10 n.4.

After Mr. Flanagan presented Claims 1-5 to the federal district court, the State asserted that the exhaustion doctrine required Mr. Flanagan to re-present the claims with the additional declarations to the state courts. Resp. App. 134 ("because the claims therein are unexhausted in that they have not been fully and fairly presented to any state court"); 136 ("the legal claims and supporting facts were not fully and fairly presented to any state court, which renders Claim 1 unexhausted"). In so doing, the State necessarily advanced a position that there was an available state court forum to resolve the merits of the claims. Section 2254(c) of Title 28 of the United States Code explicitly defines the exhaustion doctrine in this manner: a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State ... if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Indeed, the United States Supreme Court consistently has held that "exhaustion of any specific state remedy" is not required "when a State has provided that that remedy is unavailable." *O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999). "The exhaustion doctrine, in other words, turns on an inquiry into what procedures are "available" under state law." *Id*. In determining "whether a remedy for a particular constitutional claim is 'available,' the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner *a hearing on the merits* of his claim." *Harris v. Reed*, 489 U.S. 255, 268 (1989) (O'Connor, J. concurring, joined by Rehnquist, C.J., and Scalia, J.) (emphasis added).

The State's inconsistent positions violate the doctrine of judicial estoppel. "The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." *Russell v. Rolfs*, 893 F.2d 1033, 1037

(9th Cir. 1990) (quoting *Religious Technology Center v. Scott*, 869 F.2d 1306, 1311 (1989) (Hall, J., dissenting)). "'Under the doctrine of judicial estoppel a party may be estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding the contrary of the assertion sought to be made.'" *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 549, 396 P.2d 850, 854 (1964)) (quoting 31 C.J.S. Estoppel § 121 at 649). The application of the doctrine is critical to prevent parties from "'playing fast and loose' with the courts, and prohibit[s them] from deliberately changing positions according to the exigencies of the moment." *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993); *see also Rockwell International Corp. v. Hanford Atomic Metal Trades Council,* 851 F.2d 1208, 1210 (9th Cir. 1988) (judicial estoppel is "intended to protect against a litigant playing fast and loose with the courts").

The Ninth Circuit's decision in *Russell v. Rolf* – cited in Appellant's Opening Brief, Opening Br. 9 n.4, but not discussed by Respondent – involved materially indistinguishable circumstances to those presented here. In *Russell*, the state invoked the exhaustion doctrine and argued that the petitioner had an adequate state court remedy and should be required to return to state court before proceeding with his federal habeas corpus action. 893 F.2d at 1037. Thereafter, in state court, the state argued that the petitioner was procedurally barred from presenting his claim. *Id*. at 1037-38. The Court of Appeals held that, on return to federal court, the state was precluded by judicial estoppel from asserting a procedural bar defense. *Id*. at 1038-39. As the Ninth Circuit held, the state's duty

> to advise district courts as to whether state remedies have been exhausted is best met with candor, not misdirection. A state under these circumstances misleads a district court by mentioning only that portion of its views that favors the immediate result it seeks, and the upshot is to whipsaw the petitioner back and forth between two court

systems. *Id.* at 1038.

Respondent's only response is that the "State has consistently asserted, both in state and federal court, that Flanagan's new factual allegations were unexhausted and procedurally barred." Resp. Br. 9 n.4. Respondent does not cite to anything in the federal record to support this claim. Nor could Respondent do so: The Motion to Dismiss stated only that the claims were unexhausted, which as demonstrated above necessarily requires an available state forum to address the merits of the claims. Resp. App. 120-62. In the Opposition to the Motion to Hold in Abeyance, the State did oppose a stay of the proceedings – not because any state procedural rule barred a hearing on the merits – but rather because Respondent believed that Mr. Flanagan had not demonstrated "good cause" under the United States Supreme Court decision in *Rhines v. Weber*, 544 U.S. 29 (2005), which governs the stay and abeyance procedure. Resp. App. at 19-20. Indeed, Respondent's Opposition did not cite to any Nevada state law or state procedural default rule that Mr. Flanagan allegedly violated. Resp. App. 120-62.[4] Under these circumstances, this Court should invoke the judicial estoppel doctrine to preclude Respondent's arguments that the state forum is unavailable because of the procedural default doctrine.

[4] The State also has taken inconsistent positions regarding whether Mr. Flanagan previously has raised the claims presented to the district court. In federal court, the State advanced the position that the additional factual allegations in Claim 1 rendered that claim distinct from the claims previously raised in the state proceedings. Resp. App. 134, 136. This position is directly contrary to the Clark County District Attorney's current position that Mr. "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." Resp. Br. 8; *see also* Resp. Br. 7 ("the State pointed out that in reality his first claim was not new"); 7-8 (asserting that the two new declarations only "add color" to previously presented claims).

II. Respondent's Interpretation of the Procedural Default Rules Conflicts with this Court's Precedents.

In Appellant's Opening Brief, Mr. Flanagan detailed the reasons why the district court misinterpreted and improperly applied the procedural default provisions contained in Nevada Revised Statutes sections 34.726, 34.800(2), and 34.810. Opening Br. 8-30. In his Answering Brief, Respondent repeats the district court's errors. Critically, Respondent fails to address Mr. Flanagan's argument that he could not have complied with any of the procedural default provisions because, at the time of the default, the State concealed its misconduct and Ms. Mazaros and Ms. Haney-Peoples were unavailable. Opening Br. 18-19 (noting that he could not file the claims in 1999, as required by NRS 34.726, 2003, as required by NRS 34.800, or in 1998, as required by NRS 34.810); *see* Resp. Br. 22 (acknowledging, but not addressing, Mr. Flanagan's argument). Thus, these statutory provisions are inapplicable. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 507 (2003) (holding that the test for whether a procedural default rule bars merits review is whether the claim was "reasonably available" at the time of the default).

A. Nevada Revised Statutes Section 34.726.

As noted in Appellant's Opening Brief, the district court held that Mr. Flanagan failed to comply with the one-year statute of limitations provision set forth in Nevada Revised Statutes section 34.726, without explaining why the Court cited two different dates as when the statute of limitations began to run. Opening Br. 8 n.3. On appeal, Respondent suggests that Mr. Flanagan was obligated to file a petition raising his guilt phase claims in 1989, one year after this Court affirmed the convictions, but reversed the death sentences and remanded for a new penalty trial. Respondent also suggests that Mr. Flanagan was obligated to file another petition raising the same challenges to his guilt phase claims in 1999, one year after this Court affirmed the re-imposition of his death sentences. Resp. Br. 10-11.

In addition to being a post hoc rationalization of the district court's unexplained application of Nevada Revised Statutes section 34.726, Respondent's position conflicts with this Court's case law and would result in piecemeal litigation. As this Court recognized in *Whitehead v. State*, "a judgment of conviction" that creates a punishment obligation – in that case restitution – "but does not specify its terms is a not a final judgment" for the purposes of starting the one-year statute of limitations period codified in Nevada Revised Statutes section 34.726. 128 Nev. ___, 285 P.3d 1053, 1054 (2012). Respondent attempts to distinguish *Whitehead*, by noting that "*Whitehead* was not bifurcated into guilt and penalty phases." Resp. Br. 11 n.5. Respondent's attempt to distinguish *Whitehead* is meritless. The procedural posture of this case is materially indistinguishable from *Whitehead*; Mr. Flanagan's guilt trial created a punishment obligation, but it was not a final judgment for the purposes of section 34.726 until this Court affirmed the judgment following his penalty retrial in 1988.[5]

B. Nevada Revised Statutes Section 34.800(2).

In Appellant's Opening Brief, Mr. Flanagan detailed the exceptions to the application of the laches doctrine codified in Nevada Revised Statute section

[5] Respondent's reliance on two California cases is unavailing. This Court has relied neither on these cases nor their reasoning in interpreting Nevada Revised Statutes section 34.726. Moreover, Respondent misinterprets these cases. In *People v. Jackson*, the California Supreme Court addressed whether a defendant may raise a challenge to his convictions premised on *Escobedo v. Illinois*, 378 U.S. 478 (1964), during an appeal from a death penalty retrial that resulted from the granting of *habeas corpus relief*. 67 Cal.2d 96, 60 Cal. Rptr. 248, 250, 429 P.2d 600, 602 (1967). The issue in the case was whether the defendant was entitled to the retroactive application of *Escobedo* when his guilt and penalty judgment had been affirmed on appeal prior to the announcement of *Escobedo*. The reasoning in *People v. Kemp* resolves the identical *Escobedo* issue addressed in *Jackson*. 10 Cal. 3d 611, 111 Cal. Rptr. 562, 517 P.2d 826 (1974). Neither case purported to decide whether a defendant may and should file piecemeal habeas corpus petitions.

34.800, which creates a rebuttable presumption of prejudice when more than five years have elapsed between the issuance of the remittitur regarding the conviction and the death sentences and filing of the Second Petition. Opening Br. 10-11, 18-19.

Respondent summarily discounts Mr. Flanagan's arguments that the presumption of prejudice has been rebutted because the state has the same ability to present its case today as it did in 1985, 1989, and 1995, and that the constitutional violation is sufficient to constitute a miscarriage of justice. Opening Br. 19 n.16, 21 (detailing the critical nature of Angela Saldana's testimony); Resp. Br. 12, 24-25 (asserting that Mr. Flanagan's miscarriage showing is insufficient, but failing to address the merits of and prejudice resulting from his *Brady* claim). More fundamentally, the laches doctrine does not apply because the State's misconduct and concealment of that misconduct prevented Mr. Flanagan from complying with the default doctrine. *Cf. Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 637-38, 189 P.3d 656, 662 (2008) (doctrine of unclean hands "bars relief to a party who has engaged in improper conduct in the matter in which that party is seeking relief"); *Home Sav. Ass'n v. Bigelow*, 105 Nev. 494, 497, 779 P.2d 85, 86-87 (1989) ("As a result of the dismissal, Bigelow faces no liability whatsoever. We cannot allow the application of the equitable doctrine laches to produce such an inequitable result.") (citing *Hanns v. Hanns*, 246 Or. 282, 423 P.2d 499, 513 (1967) (denying defendants a windfall which would result if defense of laches was sustained is not the kind of prejudice which would impel the court to deny relief which is otherwise appropriate).

C. Nevada Revised Statutes Section 34.810.

In Appellant's Opening Brief, Mr. Flanagan argued that the district court improperly applied Nevada Revised Statutes section 34.810 because it failed to specify which claims were subject to the default rule, or identify which claims

could have been raised in a direct appeal or the first post-conviction petition or were in fact raised previously and were denied on the merits. Opening Br. 9. Rather than address these defects in the district court's order, Respondent repeats the general description used by the district court. Resp. Br. 13. The district court's failure to identify which claims are defaulted pursuant to Nevada Revised Statutes section 34.810 is a fatal defect, as neither Mr. Flanagan nor this Court or any federal court can divine the district court's reasoning. *See, e.g.*, *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 233, 112 P.3d 1070, 1076 (2005) (remanding for the "district court to assess the record and Riker's specific claims, consider and apply the appropriate rules of procedural default, and decide in a written order whether claims are procedurally barred").

III. Respondent Fails to Address the Reasons Why the District Court Improperly Dismissed Mr. Flanagan's Petition.

A. The District Court Failed to Provide Reasons for its Decision and Improperly Adopted Verbatim Respondent's Findings and Conclusions.

Contrary to this Court's decisions, the district court failed to provide sufficient guidance to Respondent in drafting a proposed order and compounded that failure by adopting verbatim the State's position regarding the application of procedural default rules.[6] *See State v. Greene*, 129 Nev. ___, 307 P.3d 322, 325-26 (2013) (finding district court failed to make "express findings in support of its determination and provided no guidance for the prevailing party"); *Byford v. State*,

[6] As argued in Appellant's Opening Brief, the district court also improperly weighed the credibility of Mr. Flanagan's witnesses without conducting a hearing. Opening Br. 3; App. 1417 (Court: "[L]et's not forget who this affidavit is being authored by, and apparently, she doesn't have anything good to say about her ex-husband.").

123 Nev. 67, 70, 156 P.3d 691, 693 (2007) (holding that "the district court should have . . . either drafted its own findings of fact and conclusions of law or announced them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order"). Indeed, such requirements are compelled by the Due Process Clause of the United States Constitution. *See, e.g., Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972) (holding due process prohibits the appearance of bias); *L.K. Comstock & Co. v. United Eng. & Constructors, Inc.*, 880 F.2d 219, 222 (9th Cir. 1989) (noting that when a district court's conclusions are adopted from the prevailing party's suggestions … the appellate court is to engage in 'careful scrutiny'"); *Watson v. Patterson*, 358 F.2d 297, 298 (10th Cir. 1966) (holding that procedural due process guaranteed by the United States Constitution demands that adjudicative proceedings be conducted with "fundamental fairness").

Respondent seeks to distinguish *Greene* by asserting that the decision applies only when "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." Resp. Br. 16. As detailed in Appellant's Opening Brief, this Court's holding was not so cramped. Opening Br. 8 n.2. Even under this standard, however, the district court failed to sufficiently explain its reasoning. The full extent of the district court's "guidance" to the Clark County District Attorney's Office as to the basis for its decision was to "[m]ake a ruling the petitioner has failed to show good cause by failing to timely file the claim in state court." App. 1430.

The district court did not address, let alone resolve, the numerous disputes between the parties, including:

- When the statute of limitations in Nevada Revised Statutes section 34.726 began to run;

- Whether Mr. Flanagan rebutted the presumption of prejudice contained in Nevada Revised Statutes section 34.800;
- Which claims are subject to default pursuant to Nevada Revised Statutes section 34.810;
- Whether Mr. Flanagan filed his claims within a reasonable time as required by *State v. Huebler*, 128 Nev. ___, 275 P.3d 91, 95 (2012);
- Whether Mr. Flanagan's delay in filing was caused by an impediment external to the defense;
- Whether the State withheld materially exculpatory information;
- Whether Mr. Flanagan would be unduly prejudiced by dismissal of the petition; and
- Whether Mr. Flanagan was entitled to the appointment of conflict-free counsel to explore whether ineffective assistance of post-conviction counsel provided cause to excuse and procedural defaults.

Given that the district court failed utterly to address these critical decisions and instead adopted verbatim the findings of the Clark County District Attorney's Office – the very State actor whose misconduct is challenged in the Second Petition – this Court should remand for full and fair consideration of the procedural default rules.[7] *See, e.g.*, *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225,

[7] Respondent asserts that the district court provided sufficient guidance because it made only "minor changes to the 'Conclusions of Law' section" and no changes to the "Findings of Fact" section. Resp. Br. 17. Unless Respondent had the power to divine the district court's reasoning, the much more logical explanation is that the district court improperly delegated the authority to justify its decision to the State. *See Byford*, 123 Nev. at 70, 156 P.3d at 693 (noting court's "endorsement of the order drafted unilaterally by the State did not satisfy" its obligations to review the claims presented).

233, 112 P.3d 1070, 1076 (2005) (remanding for the "district court to assess the record and Riker's specific claims, consider and apply the appropriate rules of procedural default, and decide in a written order whether claims are procedurally barred").

B. Respondent Failed to Contest that Mr. Flanagan has "Good Cause" For His Inability To Present The Claims In Accordance With Any Procedural Rules.

As detailed in Appellant's Opening Brief, Mr. Flanagan is entitled to present his claims if he established "good cause" for the failure to comply with procedural default rules. Opening Br. 10-11. This Court has defined "good cause" as a "substantial reason ... that affords a legal excuse," *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (internal quotations omitted), which is demonstrated when an "impediment external to the defense" prevented a petitioner from complying with the procedural rules, *Passanisi v. Dir., Nev. Dep't of Prisons*, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). For *Brady* claims, good cause is established by demonstrating that the State withheld material evidence and that the claim was brought "within a reasonable time after the withheld evidence was disclosed to or discovered by the defense." *Huebler*, 275 P.3d at 95 n.3 & 96.

Appellant's Opening Brief and the discussion, *supra*, demonstrate that the State concealed Clark County District Attorney Chief Investigator Beecher Avants' role in manufacturing and coercing Angela Saldana's false testimony about Mr. Flanagan's involvement in the crimes. Opening Br. 6-7, 12-17, 22-25. Compounding the withholding of the State's relationship with Robert Peoples and Angela Saldana was the State's affirmative denial that such misconduct occurred. App. 714-15 (during the first state habeas corpus proceedings, denying that Ms. Saldana was acting as a police agent or that her testimony "was somehow scripted"). Concealment of this misconduct constitutes "good cause," as it was an

"impediment external to the defense." *Huebler*, 275 P.3d at 95.

Respondent asserts that the State did not conceal the facts contained in Claim 1 because "it was Hanley-Peoples and Mazaros' decision to stay away from this case, not the State's." Resp. Br. 9, 20. Respondent's focus on the two witnesses, however, fails to address the critical nature of its misconduct. The record before this Court demonstrates that the Clark County District Attorney's Office manipulated and coerced Angela Saldana's testimony and then concealed that misconduct from Mr. Flanagan and actively deceived the district court and this Court. And it continues to do so.

Respondent asserts that Mr. Flanagan was required to initiate state habeas corpus proceedings in July 2010, when Mr. Flanagan located and interviewed Wendy Peoples and Amy Hanley-Peoples.[8] Resp. Br. 20-21. As a result, Respondent contends that Mr. Flanagan "did not bring his Brady claim to state court within a 'reasonable time.'" Resp. Br. 22.[9] Respondent ignores Mr.

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[8] As noted above and in Appellant's Opening Brief, Mr. Flanagan could not have complied with the three procedural default provisions relied upon by the district court and advanced by Respondent in this Court. By failing to respond to this argument, Respondent concedes that the three provisions are inapplicable. Resp. Br. 22 (asserting only that Mr. Flanagan "did not bring his Brady claim to state court within a 'reasonable time'").

[9] This Court has not defined what constitutes "a reasonable time" for bringing a *Brady* claim. Although Mr. Flanagan believes he has complied with any definition of that term, should this Court take this opportunity to define "reasonable time" in a manner inconsistent with Mr. Flanagan's actions, such a standard should not be retroactively applied in this case. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 424 (1991) (holding that the state may not invoke "a rule unannounced at the time of petitioner's trial" to bar a review of the merits of petitioner's claim); *People v. Collins*, 42 Cal. 3d 378, 388-89, 228 Cal. Rptr. 899, 906, 722 P.2d 173, 180 (1986) (explaining that retrospective application of a waiver rule would "change the rules after the contest was over," and is "intolerable" in a criminal case); *see also People v. McKinnon*, 52 Cal. 4th 610, 643, 130 Cal. Rptr. 3d 590, 625, 259 P. 3d 1186, 1216 (2011) (holding inapplicable

Flanagan's diligence. Although Mr. Flanagan was able to interview the two witnesses in July 2010, he was unable to obtain their declarations until February 2011, and he immediately filed them in federal court in support of claims that Mr. Flanagan had previously presented to this Court. Indeed, Respondent concedes that the State did not raise the exhaustion defense until September 2011. Resp. Br. 21.

Mr. Flanagan's actions in permitting the federal district court to resolve whether a return to state court was necessary was entirely reasonable. In an attempt to force the facts of this case to fit the holding in *Colley v. State*, 105 Nev. 235, 773 P.2d 1229 (1989), Respondent mischaracterizes the very plain reasons why Mr. Flanagan returned to state court only after the federal court's ruling. Unlike *Colley*, Mr. Flanagan did not "pick" his "forum and by-pass state habeas proceedings." Resp. Br. 22. Indeed, Mr. Flanagan actively litigated these claims in the state habeas corpus proceedings, but was denied discovery to demonstrate the truth of his allegations. Opening Br. 4, 12-15. Mr. Flanagan remained in federal court only until it decided that a return to state court was necessary given the State's invocation of the exhaustion defense. Opening Br. 19-20.

C. Alternatively, Mr. Flanagan is Entitled to a Remand for the Appointment of Conflict-Free Counsel to Investigate Whether the Deficient Representation of Post-Conviction Counsel Provides "Cause" for the Failure to Comply with Procedural Rules.

In *Brown v. McDaniel*, ___ Nev. ___, ___ P.3d ___, 130 Nev. Adv. Op. 60, 2014 WL 3882680 (Aug. 7, 2014), this Court addressed the extent to which the

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a new procedural rule "because at the time of this trial [the Court] had not expressly held that an objection is necessary to preserve" claims affected by the rule).

United States Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), applies in non-capital cases. This Court held "that *Martinez* does not alter our prior decisions that a petitioner has no constitutional right to post-conviction counsel and that post-conviction counsel's performance does not constitute good cause to excuse the procedural bars under NRS 34.726(1) or NRS 34.810 unless the appointment of that counsel was mandated by statute." *E.g., Crump v. Warden*, 113 Nev. 293, 302-03, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 163-65, 912 P.2d 255, 257-58 (1996)." *Brown v. McDaniel*, 130 Nev. Adv. Op. 60, 2014 WL 3882680 at *1. In so holding, this Court expressly re-affirmed that "Petitioners who are sentenced to death have a statutory right to the appointment of counsel in their first post-conviction proceeding, *see* NRS 34.820(1)(a), and are thus entitled to effective assistance of appointed counsel in that proceeding." *Id*. at *1 n.1 (citing *McKague,* 112 Nev. at 165 n.5, 912 P.2d at 258 n.5; and *Crump,* 113 Nev. at 303 & n.5, 934 P.2d at 253 & n.5).

Mr. Flanagan alternatively argued, that should this Court find that he failed to comply with state procedural default rules while being represented by counsel in the first state habeas corpus proceedings, this Court should remand to the district court to determine whether counsel's performance provides cause for the defaults. As this Court reaffirmed in *Brown*, Mr. Flanagan is entitled to effective assistance of counsel during state habeas corpus proceedings. *See, e.g., Crump*, 113 Nev. at 303, 934 P.2d at 253 (holding that capital habeas petitioners are entitled to "effective assistance of counsel").

Since June 11, 1998, Cal J. Potter III has represented Mr. Flanagan in post-conviction proceedings. Resp. Br. 27. As Respondent notes, it is inappropriate for Mr. Potter to argue his own ineffectiveness, as it would constitute a conflict of interest. Thus, the current record before this Court does not contain any information as to whether post-conviction counsel's ineffectiveness would

constitute "cause" to excuse the procedural default. *See Crump*, 113 Nev. at 304, 934 P.2d at 254 (holding that where the record lacks sufficient information, the Court "must remand this matter to the district court for an evidentiary hearing to determine whether [post-conviction counsel's] omissions constitute ineffective assistance of counsel").

D. Respondent Failed to Contest that Mr. Flanagan has Established Prejudice for Any Failure to Comply with State Procedural Rules.

In great detail, Appellant's Opening Brief explains why the withheld information about the State's misconduct was "material" and thus provides prejudice to excuse any procedural default. Opening Br. 20-30. This discussion includes the Clark County District Attorney's extensive reliance on Angela Saldana's testimony to establish critical aspects of its case as well as the legal and credibility ramifications had defense counsel been aware of the State's misconduct. At minimum, Angela Saldana's testimony would have been excluded on the basis of her repeated perjury before and during trial, and a motion for appropriate sanctions against the State would have been brought. Opening Br. 25-26.

Respondent declined to address the extensive discussion and instead merely asserts – without any explanation – that the declarations "do not bear out his allegations that the State induced false testimony," and they "were merely cumulative given the duplicative nature of Saldana's testimony and the overwhelming evidence of Flanagan's guilt." Resp. Br. 25.

In making these arguments, Respondent does not even begin to address the detailed analysis of these witnesses' observations and the effect of their testimony. Opening Br. 20-30. Moreover, Respondent's attempts to minimize the importance of Angela Saldana's testimony are unavailing. As detailed in Appellant's Opening Brief, the Clark County District Attorney's Office relied extensively on Ms.

Saldana's testimony to establish critical elements of its case, including that Mr. Flanagan confessed to planning the crimes in an effort to obtain his grandparents' inheritance, to his and others' actions inside the house, replacing the knife that he lost on the night of the crime, and killing his grandmother – and cited her trustworthiness as unimpeachable evidence of Mr. Flanagan's guilt. *See, e.g.*, App. 372-73, 378, 387-88, 390, 405, 412-13, 429-30, 444-45, 453.

Similarly flawed is Respondent's reliance on this Court's observations that the evidence presented by the Clark County District Attorney in the guilt and penalty trials was "overwhelming." Resp. Br. 19. Respondent ignores the fact, however, that this Court's conclusions were based on Angela Saldana's testimony. Indeed, Angela Saldana provided the very testimony that resulted in this Court's conclusions that "[t]he 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*, 104 Nev. 105, 107, 754 P.2d 836, 837 (1998), and that "[t]he evidence adduced at trial overwhelmingly established that Flanagan and his cohorts methodically planned the murders for pecuniary gain," *Flanagan v. State*, Docket No. 40232 (Order of Affirmance, Feb. 22, 2008), at 5-6. *See, e.g.*, App. 249-50 (Ms. Saldana testifies at the guilt trial that Mr. Flanagan confessed to the crime), 251-52 (Ms. Saldana testifies at the guilt trial that Mr. Flanagan committed the crimes for the "will and the insurance money" and that Mr. Flanagan stated that he would receive $200,000 from the insurance policies and the house); 267-73 (Ms. Saldana testifies at the guilt trial that Mr. Flanagan described the commission of the crime in detail); 524 (Ms. Saldana testifies at the 1995 penalty trial that Mr. Flanagan confessed to the crime); 524-25 (Ms. Saldana testifies at the 1995 penalty retrial that Mr. Flanagan stated that he would receive $200,000 from the insurance policies and that he would receive half of the proceeds from the will); 525-30 (Ms. Saldana testifies at

the 1995 retrial that Mr. Flanagan described the commission of the crime in detail).

As the record before this Court demonstrates, the case that the State used to secure Mr. Flanagan's convictions and death sentences was manufactured by the Clark County District Attorney's Office. After thirty years of the State concealing its misconduct, Mr. Flanagan deserves to have the merits of his claims resolved.

Conclusion

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

DATED this 27th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply 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:

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

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

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 6,316 words.

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 27th day of August, 2014.

By 

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to NRAP 25(1)(d) on the of 27th day of August, 2014, I did serve at Las Vegas, Nevada a true and correct copy of **APPELLANT'S REPLY BRIEF**, on all parties to this action by:

[ ] Facsimile

[ ] U.S. Mail

[ ] Hand Delivery

[X] Electronic Filing

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