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IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN, Petitioner-Appellant, v. THE STATE OF NEVADA, Respondent-Appellee.	Supreme Court Case No. 63703 DEATH PENALTY CASE

APPELLANT'S PETITION FOR REHEARING

Petitioner-Appellant DALE EDWARD FLANAGAN, petitions this Court for rehearing, following the Court's Order filed July 22, 2016, affirming the denial of habeas corpus relief. *Flanagan v. State*, No. 63703, Order Affirming (hereinafter "Order") (filed July 22, 2016). Mr. Flanagan petitions this Court for

rehearing on the ground that it overlooked material questions of fact and law in his case. *See* NRAP 40(c)(2)(i).

This appeal involves whether Mr. Flanagan will be permitted to develop the facts and present support for his claims that the state secured his convictions and death sentences by manufacturing and presenting the false testimony of Angela Saldana, the prosecution's star witness. After state actors successfully concealed the misconduct for over twenty-five years and Mr. Flanagan fortuitously discovered proof of the misconduct, he sought redress in the District Court. Without conducting an evidentiary hearing, the District Court precluded any inquiry into either the merits of Mr. Flanagan's claims or the reasons why the various procedural default rules were inapplicable. As a result, Mr. Flanagan has never had the opportunity to prove, or have a court resolve, the merits of his constitutional claims.

I.

REHEARING IS WARRANTED BECAUSE THIS COURT SHOULD DEFINE THE "REASONABLE TIME" STANDARD ARTICULATED IN *STATE V. HUEBLER*, 128 NEV. 192, 275 P.3D 91 (2012)

In its Order affirming the District Court, this Court concluded that Mr. Flanagan did not file his constitutional claims within a "reasonable time after the withheld evidence" was discovered. Order at 2 (citing *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012)). The Court did not define the term "reasonable time" or explain why Mr. Flanagan's filing in the District Court within days of the federal court's determination that the newly discovered facts must be presented to the state court system was unreasonable. In so doing, this Court has perpetuated the confusion surrounding this critical exception to the procedural default doctrine. Rehearing is warranted to clarify this doctrine and its application in instances in which the state's misconduct has precluded the timely assertion of constitutional rights.

For claims alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), procedural defaults are excused by "good cause" where the State withheld material evidence and the claim is brought "within a reasonable time after the withheld evidence was disclosed to or discovered by the defense." *State v. Huebler*, 128 Nev. 198 n.3, 275 P.3d 91, 95 n.3 (2012). In *Huebler*, this Court expressly declined to determine whether Mr. Huebler prosecuted the *Brady* claim within a reasonable time. *Id*. Although this Court subsequently has applied this standard, it has not defined what constitutes "reasonable time" to permit merits review of a *Brady* claim. *See, e.g., Lisle v. State,* ___ Nev. ___, 351 P.3d 725, 728-29 (2015) (applying the "reasonable time" standard to affirm denial of claim brought thirteen years after discovery, but not defining term).[1]

The failure of this Court to define what constitutes "a reasonable time" for bringing a *Brady* claim produces unnecessary confusion among litigants and the lower courts and results in the unfair and inadvertent waiver of meritorious constitutional claims. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (holding a "fundamental requisite of due process of law is the opportunity to be heard," which "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest"). As this Court noted in *State v. Rippo*, without "a bright-line rule" defining "reasonable time" for filing a constitutional claim, the parties and the courts endure unacceptable confusion:

> We are reluctant, however, to take the State's approach because it would only add to the already endless litigation over the application

[1] Following the briefing in this case, this Court did address a similar situation in which a habeas corpus petitioner raised an ineffective assistance of postconviction counsel claim. *State v. Rippo*, ___ Nev. ___, 368 P.3d 729 (2016). In *Rippo*, this Court held for the first time that habeas corpus petitioners who bring such claims within one year of discovery have satisfied the "cause" requirement. *Id*. at 739-40.

> of the procedural default rules, rules that are supposed to discourage the perpetual filing of habeas petitions, *see Pellegrini*, 117 Nev. at 875, 34 P.3d at 529. One needs only look to the California experience in applying its requirement that a habeas petition be filed without "substantial delay" to understand our reticence to use an imprecise standard in this arena. *See generally In re Gallego*, 18 Cal. 4th 825, 77 Cal. Rptr. 2d 132, 959 P.2d 290 (1998); *In re Robbins*, 18 Cal. 4th 770, 77 Cal. Rptr. 2d 153, 959 P.2d 311 (1998); *In re Clark*, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993); *see also Carey v. Saffold*, 536 U.S. 214, 223, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (discussing California's timeliness standard in context of applying federal tolling provision and observing that "[t]he fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application ... comes too late").

Rippo, 368 P.3d at 739.

Moreover, the confusion permits the state to continue to reap the benefits of its own misconduct. As this Court recognized in *Huebler*, the state's concealment of its misconduct constitutes "good cause," because it is an "impediment external to the defense." *Huebler*, 128 Nev. at 198, 275 P.3d at 95. Finally, the continued application of this undefined standard results in unnecessary litigation in the federal courts and does not result in foreclosing merits review. *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).

Thus, this Court should grant rehearing to define what constitutes a "reasonable time" for presenting *Brady* claims, despite the existence of procedural

bars.

II.

REHEARING IS WARRANTED BECAUSE MR. FLANAGAN WAS ENTITLED TO AN EVIDENTIARY HEARING ON WHETHER "CAUSE" AND "PREJUDICE" EXISTS TO EXCUSE ANY PURPORTED PROCEDURAL DEFAULTS.

The Supreme Court has long held that when federal constitutional claims are "plainly and reasonably made," a state court must engage in meaningful fact-finding to resolve them. *Angel v. Bullington*, 330 U.S. 183, 188 (1947); *see also Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."); *McNeal v. Culver*, 365 U.S. 109, 110 (1961) (state court must hold hearing to determine facts when petition alleged constitutional violation "with reasonable clarity"); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 119 (1956) (well-pled federal claim cannot be summarily dismissed, even where respondent "files an answer denying some or all of the allegations"); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923) (states may not create "unreasonable obstacles" to resolution of federal constitutional claims that are "plainly and reasonably made"). As the Supreme Court explained, "[t]he power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution." *Angel*, 330 U.S. at 188.

The Supreme Court's command that a habeas corpus petitioner is entitled to have disputes over material facts "decided only after a hearing," *Herman*, 350 U.S. at 121, applies with equal force to factual issues implicated by procedural bars. Indeed, this Court previously has held that an evidentiary hearing is necessary to determine whether "cause" exists to preclude application of the procedural default

doctrine. *See, e.g.*, *Hathaway v. State*, 119 Nev. 248, 71 P.3d 503, 508 (2003) (remanding "for an evidentiary hearing to determine whether Hathaway can demonstrate good cause"); *see also Hasan v. Galaza*, 254 F.3d 1150, 1154-55 (9th Cir. 2001) (remanding for further factfinding on when petitioner discovered the factual basis for the claim and concluding that if petitioner "did not have, or with the exercise of due diligence could not have had, knowledge of the factual predicate of both elements of his claim until on or after May 24, 1996, his June 1, 1998 filing was timely"). Similarly, resolving whether a habeas corpus petitioner can establish prejudice requires a similar factual inquiry. *See, e.g.*, *Jenkins v. Anderson*, 447 U.S. 231, 234-35 n.1 (1980) ("application of the 'cause'-and-'prejudice' standard may turn on factual findings that should be made by a district court"). In particular, courts consistently have recognized that claims brought pursuant to *Brady v. Maryland* involve factual issues that ordinarily must be resolved at an evidentiary hearing. *See, e.g.*, *Williams v. Ryan*, 623 F.3d 1258, 1266-67 (9th Cir. 2010) (holding that the district court abused its discretion for failing to hold an evidentiary hearing on a *Brady* claim).

In this case, an evidentiary hearing is necessary to establish the timing and circumstances of the purported procedural default. Although this Court apparently assumed that the procedural default doctrines contained in Nevada Revised Statutes 34.726(1), 34.810(1)(b), and 34.800, applied in this case, this Court did not analyze whether the state's concealment of its misconduct precluded compliance with the procedural rules at the time of the purported defaults. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 507 (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). As explained in the briefing before this Court, Mr. Flanagan could not have complied with any of the procedural default provisions because, at the time of the default, the state concealed its misconduct and the witnesses supporting Mr. Flanagan's claims were unavailable. Opening Br.

18-19; Reply Br. 7-8. Without an evidentiary hearing, no factual determinations may be made regarding when the constitutional claims became "available" to Mr. Flanagan, including the availability of necessary witnesses and counsel's decision regarding the timing of the filing;[2] the circumstances that precluded his filing of the claim any earlier;[3] or the prejudice that results from denying merits review of the claim.[4]

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[2] As explained in the District Court and in the briefing before this Court, awaiting the federal court's determination of whether Mr. Flanagan was required to return to state court was imminently reasonable. In *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), cited by this Court in its Order, the petitioner intentionally by-passed the state post-conviction process to litigate in the first instance in federal court and returned to file his *first* state petition five years after the state judgment became final. Mr. Colley had no basis for believing that his unexhausted claims could be resolved by the federal court without returning to the state court system. In contrast, in Mr. Flanagan's case, the claims presented here mirrored the claims presented in the first state petition such that the federal court could have determined that the exhaustion doctrine did not require Mr. Flanagan to file a second state petition. Waiting the short interval for the federal district court to resolve that issue best protected the state court judicial resources; had the federal district court determined that there was no need for exhaustion, Mr. Flanagan would not have returned to state court.

[3] As Mr. Flanagan noted in the briefing, the record before this Court does not contain information as to whether post-conviction counsel's ineffectiveness would constitute "cause" to excuse the procedural default and thus would require the appointment of new counsel and a hearing. *See Crump v. Warden*, 113 Nev. 293, 3034, 934 P.2d 247, 254 (1997) (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"). This Court rejected Mr. Flanagan's request, by concluding it was improperly raised only in his Reply Brief. Order at 3. Mr. Flanagan, however, respectfully notes that the issue was fully presented in Appellant's Opening Brief and the District Court. Opening Br. 30-31; *see also* Reply Br. 16-17; Appellant's Appendix 1404-05. Moreover, this Court's conclusion that ineffective assistance of post-conviction counsel cannot serve as cause conflicts with this Court's decision in *Rippo*.

[4] This Court also noted that Mr. Flanagan failed to attach the entire trial transcript in his appendix and thus "fails to demonstrate that the withheld

An evidentiary hearing also is necessary to establish that the state's misconduct in concealing the exculpatory information precludes application of the laches procedural bar because of the "unclean hands" doctrine. *See 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

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evidence was material." Order at 2-3. This Court's conclusion, however, is unsupported by the record and denied Mr. Flanagan his federal due process rights to be heard on this question. *See, e.g.*, *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (holding that "petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain"); *Mullane*, 339 U.S. at 314. First, Mr. Flanagan submitted all of the relevant portions of the record to the District Court and in the appendix to this Court, including all of the testimony relevant to the topics that Ms. Saldana covered in her testimony, the trial court's consideration and rulings on the applicable motions, and the prosecutor's argument. There are no additional portions of the record that *are* relevant because Ms. Saldana's testimony provided the critical pieces of the state's case against Mr. Flanagan.

Second, this Court's order was the first indication that the record before the District Court or this Court was in any way deficient. Respondent never presented such an argument in either court, and as this Court noted in the Order affirming the District Court, a party's failure to properly present an argument generally bars its consideration. *See* Order at 3 (applying *Talancon v. State*, 2012 Nev. 294, 302 n.4, 721 P.2d 764, 769 n.4 (1986) to reject Mr. Flanagan's argument.). Moreover, this Court has never articulated a rule that an indigent habeas corpus petitioner is obligated to provide the District Court and this Court with the entire set of transcripts, particularly when the vast majority of those transcripts are irrelevant to the claims presented. This Court's citation to *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.3d 25, 26 (2000), provides no support for any such burden. On page 66 of the *Mazzan* decision, this Court merely discusses the requirements of a *Brady* claim. (Notably, in *Mazzan*, the District Court conducted an evidentiary hearing on the *Brady* claim in order to fully develop the record. *Id.* at 52.)

of the equitable doctrine laches to produce such an inequitable result.").

Thus, this Court should grant rehearing and remand the case to the District Court to conduct the factfinding necessary to determine whether "cause" and "prejudice" excuses any purported procedural bars.

III.

CONCLUSION

For the foregoing reasons, Mr. Flanagan respectfully requests that this Court grant his petition for rehearing and vacate his judgment of conviction and sentence of death, or, in the alternative, remand for an evidentiary hearing.

DATED this 23rd of August, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing 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 I certify that it has been prepared in a proportionally spaced typeface using Word Professional 2013 in 14-point font, Times New Roman style. I further certify that this petition for rehearing complies with the page- or type-volume limitations of NRAP 40(b)(3) because it contains 2682 words.

Dated this 23rd day of August, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1)(d) on the 23rd of August, 2016, I did serve at Las Vegas, Nevada a true and correct copy of **APPELLANT'S PETITION FOR REHEARING**, on all parties to this action by:

☐ Facsimile

☐ U.S. Mail

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