

ORIGINAL

CAL J. POTTER, III, ESQ.
Nevada Bar No. 001988
POTTER LAW OFFICES
1125 Shadow Lane
Las Vegas, Nevada 89102
Telephone: (702) 385-1954
and
ROBERT D. NEWELL, ESQ.
DAVIS WRIGHT TREMAINE
1300 S. W. Fifth Avenue
Suite 2300
Portland, Oregon
(503) 241-2300

Attorneys for Appellant

IN THE
SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,
AppellantPetitioner,

vs.

CASE NO.: 40232

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

Respondents.

MOTION TO EXTEND REMAND TO DISTRICT COURT

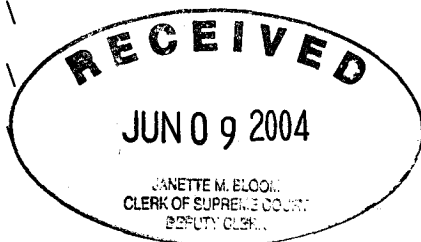
COMES NOW, the Appellants attorneys, ROBERT D. NEWELL, ESQ. of DAVIS
WRIGHT TREMAINE, and CAL J. POTTER, III, ESQ., of POTTER LAW OFFICES, and
moves this Honorable Court for an order granting an extension of time of thirty (30) days of the
remand to District Court.

\\

\\

\\

\\



FILED

JUN 9 2004

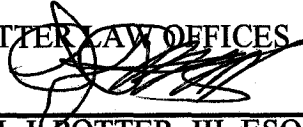
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

04-16727

1 This Motion is made and based on the Points and Authorities within and the Affidavit of
2 Robert D. Newel, Esq., attached hereto.

3 DATED this 4th day of June, 2004.

4 POTTER LAW OFFICES

5 By 
6 CAL J. POTTER, III, ESQ.
7 Nevada Bar No. 001988
8 1125 Shadow Lane
9 Las Vegas, Nevada 89102
10 Attorneys for Appellants

11 **POINTS AND AUTHORITIES**


12 This Honorable Court entered an order on or about March 2, 2004, of limited remand
13 pursuant to SCR 250 (8)(b). The Appellant requests that this Honorable Court further extend the
14 remand an additional 30 days so that lead counsel Robert D. Newell, Esq. Can travel from
15 Portland, Oregon to Las Vegas, Nevada to view the Clerk's transcripts.

16 It should be noted that counsel Robert D. Newell, Esq. is involved in this case through the
17 ABA Death Penalty project and has donated his time and his firm's resources on a *pro bono* basis
18 and needs additional time to complete the record on appeal.

19 WHEREFORE, the Appellant requests an enlargement of time of thirty (30) days for
20 remand to District Court, so that the primary counsel in this matter, Robert D. Newell, Esq., of
21 Davis Wright Tremaine, be allowed to travel to Las Vegas and review the Court's file.

22 Respectfully submitted,

23 POTTER LAW OFFICES

24 By 
25 CAL J. POTTER, III, ESQ.
26 Nevada Bar No. 001988
27 1125 Shadow Lane
28 Las Vegas, Nevada 89102
Attorneys for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER

IT IS SO ORDERED:


NEVADA SUPREME COURT JUDGE

AFFIDAVIT OF COUNSEL

COUNTY OF CLARK)
 ss.)
STATE OF NEVADA)

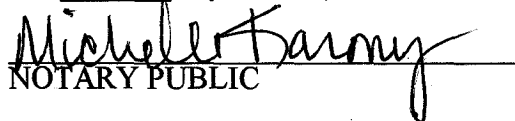
That Your Affiant is an attorney duly licensed to practice law on the State of Nevada,
and in such capacity represents the Appellant herein as local counsel to Robert D. Newell, Esq. Of
the Portland, Oregon law firm of Davis Wright & Tremaine.

Further Affiant sayeth naught.

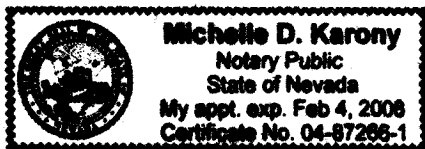


CARL J. POTTER, III, ESQ.

SUBSCRIBED and SWORN to before me
this 4th day of June, 2004.



NOTARY PUBLIC



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

STEVEN S. OWENS
DEPUTY DISTRICT ATTORNEY
200 South Third Street
Las Vegas, NV 89101

CLERK OF THE COURT
Supreme Court of the State of Nevada
201 S. Carson Street, Suite 201
Carson City, Nevada 89701-4702

An Employee of Potter Law Offices

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

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

7 Attorneys for Petitioner
8 Dale Edward Flanagan

9
10 **EIGHTH JUDICIAL DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 **DALE EDWARD FLANAGAN,**

13 Petitioner,

14 v.

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

16 Respondents.

DEATH PENALTY CASE

Case No. C69269

Dept. No. XII

Docket "S"

17
18 **AFFIDAVIT OF ROBERT D. NEWELL**

19 **STATE OF OREGON**)
20 **County of Multnomah**) ss.

21 I, Robert D. Newell, being duly sworn, depose and say:

22 1. I am one of the attorneys for Petitioner in this matter. By order dated
23 March 2, 2004, the Nevada Supreme Court required Petitioner to file a memorandum detailing
24 what Petitioner believed to be the portions of the record missing that are required to prosecute
25 the appeal in this matter. I prepared and filed that memorandum through local counsel
26 Cal Potter.

JUN 04 2004

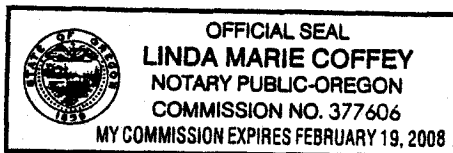
1 2. The State did not respond to the memorandum as required by the Nevada
2 Supreme Court's order. Accordingly, I prepared an order and served it on the State. The State
3 did not object to the order and it was submitted and signed by Judge Leavitt on April 22, 2004.
4 That order required the State to turn its file over to Petitioner for inspection so that the record on
5 appeal could be completed.

6 3. On May 17, 2004, the State filed its memorandum attaching some
7 documents that it claimed it was able to find in its file. That list did not include all documents
8 Petitioner sought and Petitioner is therefore left with an incomplete record on appeal.

9 4. On June 1, 2004, after leaving messages for Mr. Owens during the
10 previous week, I was finally able to speak with Mr. Owens by telephone. I asked when he would
11 be willing to make his file available for my inspection and he indicated that he would not do so.
12 He said it would take him too much time, would require too much of his time to supervise as I
13 inspected the file and further asserted that the State's file contained privileged material. I asked
14 him to prepare a privilege log, which he declined to do. He further declined to make his file
15 available under any circumstances.

16
17
18 _____
ROBERT D. NEWELL

19 SUBSCRIBED and SWORN to before me this 3rd day of June, 2004.



Linda Marie Coffey
NOTARY PUBLIC FOR OREGON
My Commission Expires: 2-19-08

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 40232

FILED

MAR 02 2004

ORDER OF LIMITED REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Although this appeal was filed in this court on September 18, 2002, briefing in this matter has been unable to proceed due to the absence of certain transcripts from the record on file with the clerk of the district court.¹ Appellant has requested this court to vacate the latest briefing schedule established by this court until transcripts of several proceedings can be prepared, filed in the district court, and included in appellant's appendix. This court has also been advised by Sharleen Nicholson, a court recorder for Department II of the Eighth Judicial District Court, that tapes and notes have been discarded respecting proceedings conducted in these death penalty proceedings in

¹In a motion filed in this court on April 2, 2003, counsel for appellant represents: "[the district court] record continues to be incomplete in that the district court's clerk's office is unable to locate portions of the file. Despite indications that transcripts were filed with the district court on some of the dates for which appellant has requested transcripts, those transcripts are not in the record and appellant does not have copies of them."

1994. See NRS 656.335 (requiring certain notes and records to be maintained for 8 years).

Due to the incomplete state of the record on file in the district court and the uncertainties regarding the court reporters' or recorders' ability to reproduce any missing transcripts, this appeal is hereby remanded to the district court pursuant to SCR 250(8)(b) for the limited purpose of clarifying, assembling, and settling upon an adequate record. Appellant shall have 10^{3/12} days from the date of this order within which to prepare, file in the district court, and serve upon counsel for the State a memorandum specifying the transcripts or other parts of the record which are necessary for this appeal, but which appellant has been unable to review or obtain for inclusion in appellant's appendix. The State shall have 10^{3/12} days thereafter within which to file in the district court and serve upon counsel for appellant a memorandum indicating whether the State is in possession of any of the documents or transcripts comprising the missing parts of the record which appellant has been unable to locate.

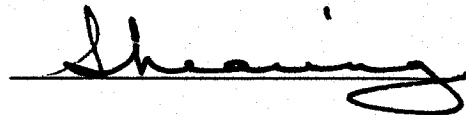
Within 30 days from the date of this order, the district court shall conduct such proceedings as are necessary to determine precisely what parts of the original record are missing from the original file in the district court and to settle upon and approve a reconstructed record. The district court may utilize any reasonable means to reconstruct the record including the procedures specified in NRAP 9(d).²

²For example, with the district court's approval, the parties may be able to reconstruct any missing parts of the district court record with copies of any documents or transcripts in the State's possession that the parties agree are accurate copies of the missing originals. Additionally,

continued on next page . . .

Within 45 days of the date of this order, the district court shall file with the clerk of this court an order setting forth its findings regarding any missing portions of the district court record and the steps taken to reconstruct, settle and approve the record. The briefing schedule in this appeal is hereby suspended until further order of this court.³

It is so ORDERED.

 C.J.

cc: Hon. Stewart L. Bell, District Judge
Davis Wright Tremaine LLP
Potter Law Offices
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

... continued

the district court may direct a court reporter or recorder to promptly prepare any missing transcripts that are capable of being reproduced from any available audio tapes or logs. If no other means are available to reconstruct the missing parts of the record, the district court shall direct the parties to prepare to the extent possible a statement of the evidence or proceedings pursuant to NRAP 9(d) and shall settle and approve that statement for inclusion by the clerk of the district court in the trial court record.

³We deny as moot appellant's motion to vacate the briefing schedule.