

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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3  
4 **ORIGINAL**

5 DALE EDWARD FLANAGAN,  
6 Appellant Petitioner,

7 v.

Case No. 40232

8 THE STATE OF NEVADA, and E.K.  
9 McDaniel, Warden, Ely State Prison  
10 Respondent..

**FILED**

11 **STATE'S RESPONSE TO DEFENDANT'S**  
12 **SECOND MOTION TO EXTEND**  
13 **REMAND TO DISTRICT COURT**

JUL 20 2004

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

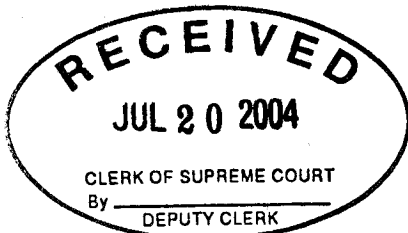
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19 and

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Counsel for Respondent

04-13201

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12 **STATE'S RESPONSE TO DEFENDANT'S**  
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15 COMES NOW the State of Nevada, by DAVID ROGER, Clark County District  
16 Attorney, through his Chief Deputy, Steven Owens, and hereby submits the attached  
17 Points and Authorities in Response to Appellant Petitioner's Second Motion to Extend  
18 Remand to District Court.

19 This Response is made and based upon all the papers and pleadings on file  
20 herein and the attached points and authorities in support hereof.

21 Dated Date.

22 Respectfully submitted,

23 DAVID ROGER  
Clark County District Attorney  
Nevada Bar # 002781

24  
25 BY

26   
STEVEN OWENS  
Chief Deputy District Attorney  
Nevada Bar #004352

27 Attorney for Respondent  
28

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12                                    **STATE'S RESPONSE TO DEFENDANT'S**  
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15                                    **Points and Authorities**

16            Defendant filed an appeal to the Nevada Supreme Court on September 18,  
17    2002, appealing the denial of his petition for writ of habeas corpus. Briefing on the  
18    appeal was unable to proceed due to the absence of certain transcripts from the record  
19    on file with the clerk of the district court which appellant wanted to include in his  
20    appendix. Therefore, in an Order of Limited Remand dated March 2, 2004, this Court  
21    remanded the case to the district court "for the limited purpose of clarifying,  
22    assembling, and settling upon an adequate record."

23            This Court ordered appellant to file in district court a memorandum specifying  
24    the transcripts or other parts of the record which are necessary for the appeal, but  
25    which appellant has been unable to obtain. Then, the State was to file a memorandum  
26    indicating whether any of the documents or transcripts constituting the missing parts  
27    of the record were in its possession. Then the district court was to settle upon and  
28    approve a reconstructed record.

1 The State maintains that the initial delay in filing its memorandum was due to  
2 the large volume of the file and the failure of appellant to specify missing documents  
3 as ordered. All other delay in the proceedings has been due to appellant's desire to go  
4 beyond this Court's Limited Order of Remand to conduct general discovery and go  
5 fishing through the State's files and to obtain the State's attorney notes and work  
6 product. The State is willing and eager to begin reconstruction of any missing parts of  
7 the record, but Defendant has yet to articulate to the district court what transcripts  
8 need to be reconstructed.

9 **District Court Proceedings on Remand**

10 On March 16, 2004, Appellant simply filed a memorandum listing numerous  
11 "entries in the Court minutes" (which was obviously cut and pasted from  
12 "Blackstone"), referencing various status checks, motions, minute orders, further  
13 proceedings, calendar calls, etc. The State contacted both attorneys of record, Cal  
14 Potter and Robert Newell, in an attempt to clarify exactly what was being requested  
15 for each of the referenced court dates. Attorney Robert Newell responded that because  
16 the record is so incomplete that he would like anything that the State could provide  
17 regarding any of the referenced court dates.

18 The State began an intensive search through its files (consisting of  
19 approximately seven boxes of documents) to locate anything at all relating to the  
20 numerous court dates referenced in appellant's memorandum. Much of the requested  
21 information did not have an associated transcript, either because only a limited  
22 hearing was held or the referenced court date was continued or vacated. In only a few  
23 situations were transcripts located for a particular court date; in all other cases, where  
24 available, a copy of the court minutes was provided. On May 17, 2004, the State  
25 completed its exhaustive review of the files in its possession, filed its responsive  
26 memorandum in district court and provided to appellant all documents in its  
27 possession relating in any way to the court dates referenced in appellant's  
28 memorandum.

1 Meanwhile, on April 23, 2004, appellant submitted to the district court and  
2 obtained an ex-parte Order requiring the State to produce its entire file for inspection  
3 by appellant. This was done without notice to the State and without an opportunity to  
4 be heard. After the State filed its memorandum, Attorney Newell expressed his  
5 desire to inspect the State's entire file for himself and sought enforcement of the  
6 district court's earlier ex-parte Order through a motion to compel. The State opposed  
7 the motion on the grounds that the State had already reviewed the entire file and  
8 produced what documents it had, that inspection by appellant would be redundant and  
9 unnecessary, that inspection by appellant would take weeks to accomplish and would  
10 first require the removal of privileged materials (ie. attorney notes and work-product)  
11 which were scattered throughout the file. The State further argued that inspection by  
12 appellant was purely a fishing expedition and was well beyond the intent of the  
13 Nevada Supreme Court as expressed in its Order of Limited Remand.

14 On June 22, 2004, at the hearing on the motion to compel, the district court  
15 authorized appellant to inspect the State's files, but only after Mr. Newell inspected  
16 the court's files first, which he had failed to do (On May 27, 2004, the district court  
17 had compiled and made available to appellant four or five banker's boxes of court  
18 files and suggested it would take weeks for Mr. Newell to inspect it all). The district  
19 court then ordered that if after inspecting the court's files, Mr. Newell still believed  
20 that documents were missing, then he could contact the State and review their files,  
21 but the scope would be limited and would not include any privileged material such as  
22 attorney notes or work product.

23 After court that same day, June 22, 2004, Mr. Newell contacted the State  
24 claiming that he had just finished inspecting the entire district court file and that he  
25 still wished to look through the State's files. To accommodate Mr. Newell's schedule  
26 and his desire to remain in Las Vegas no longer than one day, the State agreed to  
27 permit inspection that same afternoon. When he arrived Mr. Newell stated that he  
28 was still unable to narrow the scope of what he was looking for. Nonetheless, the

1 State provided Mr. Newell with access to its entire case file (consisting of the seven  
2 file boxes which had been previously searched) after removing a relatively small  
3 amount of attorney notes and work product as the district court had instructed. Mr.  
4 Newell spent just over an hour ostensibly inspecting documents which should have  
5 taken him days to review. Before leaving to catch his flight, Mr. Newell identified  
6 twenty-one documents which he requested be photocopied and mailed to him. None  
7 of these documents had been previously identified or requested in his original  
8 memorandum as being parts of the record he was missing. In fact, many of the  
9 documents were appellate briefs already on file with the Nevada Supreme Court.  
10 Nonetheless, the State promptly produced all the requested documents, except for one  
11 which contained attorney notes to which the Defendant was not entitled.

12 Rather than proceed with reconstruction of missing transcripts as the State  
13 would like to do, Mr. Newell now seems intent on litigating and trying to breach the  
14 attorney work-product privilege for the few attorney notes withheld from him. Mr.  
15 Newell has turned this Court's Order of Limited Remand into a fishing expedition  
16 under the guise of some fabricated right of pre-appeal discovery. The State has opened  
17 its entire file to appellant except for a few privileged notes which were never part of  
18 any court record necessary for appeal. Despite the State's repeated requests, the  
19 parties have yet to begin the process of reconstructing missing parts of the record due  
20 to appellant's continued failure to identify them.

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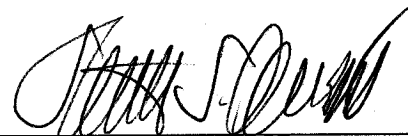
1        WHEREFORE, the State agrees that additional time is needed to reconstruct  
2 the missing parts of the record and stands ready to do so, but maintains that the delay  
3 is due to appellant's failure to identify the missing transcripts and his desire to enlarge  
4 the purposes for which this case was remanded.

5                Dated this 16th day of July 2004.

6                                Respectfully submitted,

7                                DAVID ROGER  
8                                Clark County District Attorney

9  
10                                BY



11                                STEVEN OWENS  
12                                Chief Deputy District Attorney  
13                                Nevada Bar #004352  
14                                200 South Third Street  
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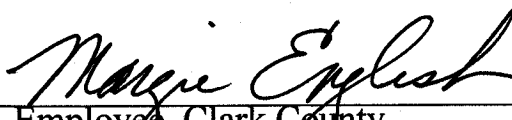
1 **CERTIFICATE OF MAILING**

2 I hereby certify and affirm that I mailed a copy of the foregoing Fast Track  
3 Response to the attorney of record listed below on this 16th day of July 2004.

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13 Portland, Oregon 97201

14 Judge Michelle Leavitt  
15 Clark County Courthouse  
16 District Court, Department XII  
17 Las Vegas, Nevada 89101

18  
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20 Employee, Clark County  
21 District Attorney's Office  
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28 OWENS/KC Knox/english