ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Case No. 40232

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RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

Appeal From Order Dismissing Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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In compliance with this Court's Order filed April 5, 2007, the State hereby submits the following supplemental answering brief addressing only the requested issue of *Sharma*'s application to the aiding and abetting instructions used in this case.

ARGUMENT

I

SHARMA SHOULD NOT BE RETROACTIVELY APPLICABLE TO DEFENDANT'S CASE

The State requests that this Court reconsider its decision in *Mitchell v. State*, 122 Nev. Adv. Op. No. 107, 149 P.3d 33 (2006)(*Mitchell II*, and find that since *Sharma* announces a new rule, it is not retroactively applicable. Under the ruling of *Sharma,* a defendant will be held liable for his cohort's or co-conspirator's specific intent crimes only if the defendant had the requisite intent to aid that individual in the commission of the charged crime. *Sharma v. State*, 118 Nev. 684, 56 P.3d 868 (2002). Contrary to the holding of *Mitchell*, *Sharma* did not clarify, but rather *changed* the previous rule regarding aiding and abetting. Previously, a person was held criminally liable for any

crime committed as a probable and natural consequence of the crime the person intended to aid or abet. *See Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180 (1946); *Mitchell v. State*, 114 Nev. 1417, 971 P.2d 813 (1998). (*Mitchell I)* (approving of the natural and probable consequences doctrine).

In *Colwell v. State*, 118 Nev. 807, 59 P.3d 463 (2002), this Court delineated exact guidelines to follow when addressing issues of retroactivity. These guidelines were adapted from longstanding principles established in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), and involve a three-step analysis. *Colwell* was intended to adopt the retroactivity analysis in *Teague*, with some qualifications. *Colwell*, 118 Nev. at 819-20, 59 P.3d at 471-72. It narrowed, to a slight extent, what could be considered a "new" rule, rejecting the concept that a rule is new "whenever any other reasonable interpretation of prior law was possible." *Id.* In addition, it rejected the Supreme Court's requirement that a new rule be a "bedrock" or "watershed" principle before retroactivity would apply. *Id.* However, the opinion makes it clear that the phrase "likelihood of an accurate conviction is seriously diminished" must be interpreted in relation to the purpose of the new rule. That is, a new rule is not applied retroactively because it implements a better procedure. Thus in *Colwell*, this Court refused to apply *Ring v. Arizona,* 536 U.S. 584 (2002) retroactively, concluding *Ring* was designed to address 6th Amendment jury trial rights, not some perceived inaccuracy in having judges make death penalty aggravator adjudications. There was no likelihood that the accuracy of aggravator findings was not seriously diminished by the lack of a jury trial. *Colwell* at 472-73, P.3d at 821-22.

The first step is to determine whether the subsequent interpretation by the court established a "new rule." If a rule is not considered "new," it applies even to final cases on collateral review and retroactivity is not at issue. *Colwell*, at 819-820, 59 P.3d at 472. While this Court stated that there is no bright-line test to determine if a rule is "new," it did maintain that when a decision merely *interprets* and *clarifies* existing rules, it is not new. *Id.* In other words, if a decision simply applies a well-established constitutional principle to govern a case which is closely analogous to those which have been

previously considered in prior case law, it is not new. *Id.* On the other hand, a decision announcing that it overrules precedent, "or disapproves of practices this Court has arguably sanctioned in prior cases, or overturn[s] a longstanding practice that lower courts had uniformly approved," then the rule qualifies as new. *Id.*

The second step requires determining whether the conviction of the person(s) seeking the application of the new rule has become final. *Id.* A conviction qualifies as final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for the petition has expired. *Id.* If a conviction is not final, then the Court must apply new rules of federal constitutional law or be in violation of the basic norms of constitutional adjudication. *Id.* However, if a conviction is final, then the general rule is *not* to apply new rules retroactively. *Id.*

Finally, once it is determined that a subsequent interpretation has announced a new rule and that the conviction of the person(s) seeking adjudication has become final, a determination must be made as to whether one of two exceptions to the retroactivity bar applies to the specific case at hand:

Exception 1: Did the new rule establish that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense?

Exception 2: Did the new rule establish a procedure without which the likelihood of an accurate conviction is seriously diminished? *Id.*

Here, under the first step of the retroactivity analysis, the rule enunciated in *Sharma* qualifies as "new." It specifically overruled *Mitchell I.* It did not clarify or interpret the law encompassed by*Pinkerton* and *Mitchell I*, that allowed conviction of a specific intent crime without the requisite intent to aid or abet that particular crime so long as the crime was a natural and foreseeable consequence of aid rendered in another crime. As such, *Sharma* announced a new rule.

Under the second step, here, the conviction is final. Since Defendant has exhausted his appeals, retroactivity should not apply.

Finally, under the third step, neither exception applies. The new rule of *Sharma* does not establish that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense, nor does this rule establish a procedure without which the likelihood of an accurate conviction is seriously diminished. The most recent decision of the United States Supreme Court, *Whorton v. Bockting*, 549 U.S. ____(2007) makes it abundantly clear that such exceptions are rare, indeed only one case has meet this standard, *Gideon v. Wainright*, 372 U.S. 334 (1963). The jury instruction issue involving the natural and probable consequences doctrine does not meet that standard.

This Court believed the natural and probable consequences doctrine allowed a person to be convicted of a specific intent crime for only negligent conduct. This is inaccurate. The decision to aid and abet requires a specific intent to assist someone in violating the law. One cannot negligently aid and abet. By abolishing the common law distinctions between first-degree principals (those who actually commit the crime) and second-degree principals (aiders and abettors at the scene of the crime) legislatures intended that once a person decides to aid in a criminal activity, that person is responsible for all criminal activity that occurs in their presence. *Gonzales v. Duenas-Alvarez*, 549 U.S. ___, 127 S.Ct. 815 (2007). Thus the accuracy of the conviction is not seriously diminished because the doctrine never permitted someone to be convicted based upon mere presence or negligence. While the Court is free to establish a new doctrine requiring intent to aid in the specific intent crime before one can be convicted as a principal of a specific intent crime, it should not be applied retroactively. As such, Defendant has not met the three-pronged analysis triggering retroactivity. The State asks this Court to overturn Mitchell and find that *Sharma* does not apply retroactively.

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II

THE ONLY RELEVANT CONSIDERATION UNDER *SHARMA* IS DEFENDANT'S CONVICTION FOR THE MURDER OF CARL GORDON

Dale Flanagan, hereinafter Defendant, challenges his convictions based on the decision in *Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002), arguing that the *Sharma* decision rendered the jury instructions used in his case inappropriate. In general, Nevada does not distinguish between an aider and abettor of a crime and an actual perpetrator of a crime; both are equally culpable under the law. *Sharma v. State*, 118 Nev. 684, 56 P.3d 868 (2002). NRS 195.020 states that every person involved in the commission of a crime, whether that person commits the act constituting the offense or aids/abets in its commission is guilty as a principal. Under the ruling of *Sharma,* a defendant will be held liable for his cohort's or co-conspirator's specific intent crimes if the defendant had the requisite intent to aid that individual in the commission of the charged crime. *Sharma v. State*, 118 Nev. 684, 56 P.3d 868 (2002). As such, only charges dealing with aiding and abetting are subject to *Sharma.*

Here, Defendant was charged *as a principal* with respect to the burglary of Carl and Colleen Gordon's home, as well as in the murder of Colleen Gordon. As such, *Sharma* is wholly inapplicable to these crimes, and the death penalty verdict associated with the murder of Colleen must stand. Thus, the only conviction that is even *potentially* vulnerable under *Sharma* is Defendant's murder of Carl Gordon, since there Defendant was charged not as a principal, but as an aider and abettor to his cohort Randolph Moore who actually shot Carl. Therefore this Court need only consider Defendant's conviction for the murder of Carl Gordon.

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III

EVEN IF THIS COURT FINDS THAT SHARMA DOES RETROACTIVELY APPLY TO DEFENDANT'S CASE, THE ERROR IS HARMLESS IN LIGHT OF THE FELONY MURDER RULE

Under NRS 200.030(1)(b) first degree murder includes murder which is "[c]ommitted in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years or child abuse"

Here, Defendant was adjudged guilty of both burglary and robbery, felonies which support the felony murder rule. As such, he *automatically* possessed the requisite mental intent necessary to be guilty of first degree murder. In other words, the jury instructions on intent could not have altered the jury's judgment in this case since they found defendant guilty of two felonies which support the felony murder rule. What is more, robbery, of which Defendant was found guilty, is a *general* intent crime, and as such *Sharma* is inapplicable. In sum, since Defendant was found guilty of two underlying felonies, one of which required only general intent, the instructions that Defendant takes issue with, even if erroneous, were harmless. Therefore, this Court must uphold Defendant's first degree murder conviction.

IV

SHARMA IS INAPPLICABLE TO DEFENDANT'S CASE BECAUSE THE DANGER ENVISIONED BY THE COURT WHEN REACHING ITS DECISION WAS PREVENTED BY ARTFULLY DRAFTED JURY INSTRUCTIONS

Sharma requires that to be convicted of a specific intent crime of another, an aider and abettor "must have knowingly aided the other person with the intent that the other person commits the charged crime." *Sharma, supra.* It rejected the application of the natural and foreseeable consequences doctrine to aiding/abetting cases involving specific intent crimes. *Sharma* at 653-55, 870-72. The ruling addressed what the Court considered to be a dangerous possibility than an individual who agreed to aid or abet in

the commission of a general intent crime, would also be charged as a principal for specific intent crimes committed by the primary perpetrator without the consent or knowledge of the aider/abettor. In essence, *Sharma* did nothing more than eliminate the possibility that a jury would convict a defendant as an aider and abettor even though such defendant lacked specific intent merely because his cohort's crime was foreseeable.

Here, the danger considered by the Court in *Sharma* does not exist since the jury instructions do not contain any natural and probable consequences language and the instructions, as a whole, required the jury to find that Defendant intended to aid Moore in killing Carl Gordon. As Defendant himself quotes in his Supplemental Opening Brief, jury instructions number 31 and 32, dealing with aiding and abetting, read as follows:

> Every person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in the commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a crime, is a principal, and shall be proceeded against and punished as such.

(Instruction No. 31, 12 AA 2739).

> To aid and abet is to assist or support the efforts of another in the commission of a crime.

(Instruction No. 32, 12 AA 2740).

Instead of using the general word "felony," the instruction uses the word "crime," relating back to the Information which indicated Flanagan entered the building with the intent to kill Colleen Gordon and aid and abet Moore in the killing of Carl Gordon.[1] (AA Vol. I, 237-43, Vol. 12, 2710-11).

While Defendant argues that *Sharma* requires specific intent to kill, such argument illustrates a misunderstanding of the law. *Sharma* merely requires that in order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commits the charged crime. Jury

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[1] Defendant also alleges that jury instruction number 6 (12 AA 2714) violates *Sharma*. This jury instruction relates to conspiracy, not aiding and abetting, and therefore has no relevance.

Instruction Number 32 does just that because it requires that one aid and abet another in the commission of a particular crime. Indeed the State's entire theory as evidenced by the Information and the arguments at trial, was that Flanagan and his cohorts entered the residence with the intent to kill the Gordons. As noted by this Court on the Direct Appeal, overwhelming evidence supported that conclusion. *Flanagan v. State*, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988).

Finally, Flanagan's jury was instructed similarly to that in *Bolden* where this Court held the instruction sufficient even though it did not precisely track the language from the *Sharma* decision. *Bolden v. State*, 121 Nev. 908, 124 P.3d 191 (2005). So, even assuming application of *Sharma* to Flanagan's case, the instructions were adequate. This is not a case like *Sharma* where the defense spent substantial portions of their case arguing mere presence and disputing that Sharma harbored the specific intent to kill at the time of the shooting. Rather, Flanagan's defense was to discredit the witnesses against him and argue they had motives to lie. (AA Vol. 11, 2605-2620).

V

EVEN IF THE INSTRUCTION QUALIFIED AS IMPROPER, THE COURT APPLIES A HARMLESS ERROR ANALYSIS

Even if this Court determines that the jury was not properly instructed under *Sharma*, then any error is harmless. *Sharma*, 118 Nev. 657, 56 P.3d 873 (applying a harmless error analysis). Regarding the standard, "[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 P.3d 582 (Nev. 2005) Judicial error with respect to jury instructions is subject to harmless error analysis and a conviction will not be reversed if the error was harmless beyond a reasonable doubt. *Id.* at 586.

In upholding the guilty verdict in this case, this Court noted that the evidence overwhelmingly demonstrated that Flanagan intended to kill or have one of his cohorts[2] kill, both Carl and Colleen Gordon. *Flanagan* 104 Nev. at 107, 754 P.2d at 837). The evidence adduced at trial demonstrated that Flanagan, Moore and others met before the killings to plan out how they would get into the Gordon residence, how Carl and Colleen Gordon would be killed and by whom. Flanagan would kill Colleen and the noise would lure Carl downstairs where he would be killed by Moore. (AA Vol. 6, 1238-47; 1375-81; Vol. 7, 1597-1601). Other witnesses testified the Flanagan shot Colleen while Moore killed Carl as he came down the stairs to investigate what was happening. (AA Vol. 6, 1408-33; Vol. 7, 1619-29). Additional testimony was presented that Flanagan admitted to committing, and aiding in commission of, the murders. (AA Vol. 8, 1754-57, 1772-79). Two of the weapons used in the shootings were recovered from Lake Mead, where they had been dumped by Moore and another accomplice. (AA Vol. 7, 1632-33; Vol. 8, 1945-49, 1956-67; Vol. 9, 1968-73). Witnesses also identified a knife found at the scene as Flanagan's or similar to one Flanagan carried and that he and another accomplice purchased a duplicate knife after the murders to protect against allegations that the knife at the scene belonged to him. (AA Vol. 6, 1290-92, 1354-56; Vol. 7, 1480-85; Vol. 8, 1721-28, 1750-53). Finally, Flanagan was scheduled to work on the day of the murders and called to say he couldn't take his shift. (AA Vol. 8, 1738-41).

The evidence overwhelmingly supports the conclusion that Flanagan planned the murder of Carl Gordon and had the specific intent to aid and abet Moore in that murder.

Defendant now asserts, through the hearsay declaration of Robert Ramirez, that Flanagan only wanted to steal from his grandparents, not kill them. Mr. Ramirez claims that McDowell told Ramirez McDowell and Moore were the shooters and that Flanagan only planned to steal from his grandparents. Ramirez further claimed McDowell stated Flanagan was shocked and surprised by Moore's actions and wanted it to stop. First,

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[2] In addition to Flanagan, the following individuals were involved in the plan: Randolph Moore, John Ray Luckett, Roy McDowell, Tom Akers and Michael Walsh.

contrary to Defendant's assert, Mr. Ramirez never indicates he provided this information to the police or any State official. In fact, he states he refused to talk to the police and didn't want anyone else in his gang to talk either for fear that they would implicate his brother-in-law, John Lucas. (AA, Vol. 30, 7186-90). Defendant somehow claims if Ramirez had testified and *Sharma* instructions given that this would demonstrate factual innocence. This is an improper argument when considering harmless error at trial. To the extent Defendant is now trying to bolster his ineffective assistance of counsel claim, Ramirez's statements were inadmissible hearsay against Flanagan, but even if admitted, the statement was contradicted by Ramirez's own brother-in-law, Lucas, who testified Flanagan was part of the plan to kill the Gordons. (AA Vol. 7, 1597-1601, 1605-1614, 1619-29). Moreover, Lucas was present and heard Flanagan in comparison to Ramirez's hearsay statements. Thus there is no reasonable probability of a different result in the guilty verdict had Ramirez testified.

CONCLUSION

For the reasons cited above, the State submits *Sharma* does not apply to Defendant's case and that, even if applicable, any error in the jury instructions was harmless.

Dated this 25th day of April, 2007.

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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 25th day of April, 2007.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Supplemental Answering Brief to the attorneys of record listed below on this 25th day of April, 2007.

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