

No. 40232

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,

Appellant,

v.

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

FILED

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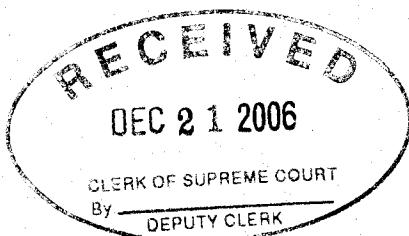
Appeal from an Order Dismissing a Petition For Writ of Habeas Corpus  
Eighth Judicial District Court, Clark County  
The Honorable Mark Gibbons, District Judge  
Case No. C69269  
Death Penalty Case

APPELLANT'S SUPPLEMENTAL MEMORANDUM

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**TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	1
III.	ARGUMENT .....	1
A.	This Court's recent decisions in Bejarano and Rippo provide additional support for the unconstitutionality of Appellant's death sentence .....	1
1.	There is no procedural bar to application of the McConnell rule to Appellant's case.....	1
2.	Appellant's case merits reversal because the unconstitutional aggravating factors given to the jury materially prejudiced the jury's penalty phase decision. ....	2
IV.	CONCLUSION.....	5

## TABLE OF AUTHORITIES

### Cases

#### Bejarano v. State,

122 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (122 Adv. Op. No. 92, November 16, 2006) ..... 1, 2, 3, 4

#### Jimenez v. State,

112 Nev. 610, 918 P.2d 687 (1996) ..... 5

#### Lane v. State,

114 Nev. 299, 956 P.2d 88 (1998) ..... 5

#### McConnell v. State,

120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004) ..... passim

#### Moran v. State,

103 Nev. 138, 734 P.2d 712 ..... 5

#### Rippo v. State,

122 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (122 Adv. Op. No. 93, November 16, 2006) ..... 1, 2, 3, 4

### Statutes

Nev. R. App. Proc. 31(d) ..... 4

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## I. INTRODUCTION

Pursuant to Nev. R. App. Proc. 31(d), Appellant files this supplemental memorandum to supplement Appellant's claims made pursuant to this Court's holding in McConnell v. State, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004). See Appellant's Opening Brief ("AOB"), Claim 16, at p. 57. The holdings of this Court in the recently decided cases Bejarano v. State, 122 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (122 Adv. Op. No. 92, November 16, 2006) and Rippo v. State, 122 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (122 Adv. Op. No. 93, November 16, 2006) are directly on point, and provide persuasive authority that this Court should find in Appellant's favor.

## II. BACKGROUND

Appellant filed his Opening Brief in August 2005. Claim 16 of the AOB argued that Appellant's death sentence was invalid under McConnell v. State, *supra*, due to the duplicative use of the felonies charged in Appellant's case both to support his conviction on a felony murder theory and to support aggravating factors. See AOB at 57. In addition, Appellant demonstrated the invalidity of another aggravator in Claim 13. See AOB at 54-56.

## III. ARGUMENT

### A. This Court's recent decisions in Bejarano and Rippo provide additional support for the unconstitutionality of Appellant's death sentence

#### 1. There is no procedural bar to application of the McConnell rule to Appellant's case.

In McConnell v. State, 120 Nev. 1043, 102 P.3d 606, 624 (2004), this Court held that it is impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated. McConnell, *supra*, at 1069.

This Court recently held that the McConnell rule is both substantive and

1 retroactive. Bejarano v. State, 122 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (122 Adv. Op. No. 92,  
2 November 16, 2006). The court will excuse procedural default upon demonstration of  
3 good cause and prejudice, and with regard to McConnell claims, good cause exists  
4 because a McConnell claim's legal basis was not reasonably available to Appellant  
5 prior to the Court's ruling in that case. Bejarano, supra; Rippo v. State, 122 Nev. \_\_\_,  
6 \_\_\_ P.3d \_\_\_ (122 Adv. Op. No. 93, November 16, 2006). Here, Appellant timely  
7 raised the McConnell issue in his opening brief. See AOB at p. 57. Appellant could  
8 not have raised the issue prior to his opening brief, because McConnell was decided in  
9 2004, five years after Appellant filed his Supplemental Petition for Writ of Habeas  
10 Corpus and two years after this Court denied that Petition. See AOB at 2. Moreover,  
11 because the McConnell rule presents an issue of law, it may be decided on appeal.  
12 Bejarano, supra. As a result, Appellant's McConnell claim is properly before this  
13 Court.

14  
15 **2. Appellant's case merits reversal because the unconstitutional**  
16 **aggravating factors given to the jury materially prejudiced the**  
17 **jury's penalty phase decision.**

18 This Court held in McConnell that it is unconstitutional to base an  
19 aggravating circumstance on the same felony upon which a felony murder conviction  
20 is predicated. McConnell, supra, at 1069. This Court's recent decisions illustrate the  
21 proper reweighing process to determine if a defendant was prejudiced by  
22 unconstitutional aggravating factors. In Bejarano, supra, Bejarano was charged with  
23 first-degree murder with the use of a deadly weapon. The jury at the penalty phase  
24 found two aggravators in violation of McConnell, and four additional aggravators: a  
25 probation violation for battery on a police officer, two previous felony convictions for  
26 aggravated assault, and the murder was committed to avoid or prevent a lawful arrest.  
Because Bejarano's McConnell claim was subject to procedural default, the court  
reweighed the aggravators to determine if Bejarano sufficiently demonstrated

1 prejudice by showing that it was “clear beyond a reasonable doubt that absent the  
2 invalid aggravators the jury still would have imposed a sentence of death.” The Court  
3 considered the four remaining aggravators as well as the un compelling mitigating  
4 evidence presented at the penalty phase and concluded that, considering the testimony  
5 presented regarding Bejarano’s propensity for violence and Bejarano’s testimony  
6 showing lack of remorse, even with those four aggravators the jury would still have  
7 sentenced Bejarano to death.

8           In Rippo, supra, the jury found six aggravators, three of which violated  
9 McConnell. The court analyzed the three remaining aggravators (the murder was  
10 committed by a person under sentence of imprisonment, with a previous felony  
11 conviction involving the use or threat of violence, and it involved torture) to  
12 determine whether it “can conclude beyond a reasonable doubt that the jurors would  
13 have found that the mitigating circumstances did not outweigh the aggravating  
14 circumstances even if they had considered only the three valid aggravating  
15 circumstances.” As in Bajarano, this Court in Rippo concluded beyond a reasonable  
16 doubt that the jurors would have found the mitigating circumstances did not outweigh  
17 the valid aggravating circumstances and would have returned a sentence of death.

18           Unlike the aggravating factors in Bejarano and Rippo, the remaining  
19 aggravating factor in Appellant’s case does not support a death sentence. Appellant’s  
20 jury found four aggravating circumstances, three of which are constitutionally  
21 deficient under McConnell: Two of the aggravators – (1) that the victims’ murders  
22 were committed during the commission, attempt, or flight after a burglary, and (2) that  
23 the murders were committed during the commission, attempt, or flight after a robbery  
24 – are identical to the felony murder theories used to support the first-degree murder  
25 convictions and thus were improperly considered. A similar conclusion applies to a  
26 third aggravator used in this case – that the victims’ murders were committed “for the

1 purpose of receiving money or any other thing of monetary value” – because the facts  
2 supporting this aggravator are identical to the predicates for the felony murder  
3 theories underlying Appellant’s conviction. Thus, only one aggravator remains: that  
4 defendants “knowingly created a great risk of death to more than one person by means  
5 of a weapon, device, or course of action which would normally be hazardous to the  
6 lives of more than one person. (This one, too, is invalid, as Appellant has shown in  
7 Claim 13, AOB pp. 54-56.) Had this been the only aggravator, when coupled with the  
8 mitigating evidence, Appellant would not have been sentenced to death.

9         Given the retroactive application of McConnell and the consequent  
10 elimination of three of the four aggravators, the only fair result here is for the Court to  
11 remand for a new penalty hearing. Several reasons compel this result. First, the juries  
12 passing sentence consistently found the above-described four aggravators (including  
13 the three now-invalid McConnell aggravators) and variously found up to three  
14 mitigators: (1) No prior history of criminal activity; (2) the youth of the defendant at  
15 the time of the crime; and (3) any other mitigating circumstances. 25 AA 5970.

16         Second, as explained in Appellant’s Opening Brief, the knowing risk  
17 instruction was invalidly applied to Appellant because it was unconstitutionally  
18 overbroad and had inadequate evidentiary support. See AOB at 54-56. This Court  
19 has previously invalidated that instruction in much less compelling circumstances.  
20 See AOB at 54-56, citing Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998); Jimenez v.  
21 State, 112 Nev. 610, 918 P.2d 687 (1996); and Moran v. State, 103 Nev. 138, 734  
22 P.2d 712.

23         Appellant’s capital trial truly was an instance in which the McConnell  
24 factors substantially shifted the balance of the jury’s weighing toward death. The  
25 McConnell instructions explicitly directed the jury to weigh more heavily toward  
26 death if it found that appellant committed the crimes for financial gain on which his

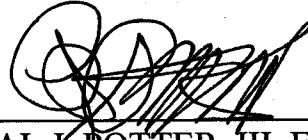
1 guilt phase verdict was based. The easy answer to these aggravators was "yes." By  
2 contrast, the remaining aggravator was far weaker and lacked sufficient weight to  
3 support a sentence of death. Indeed, the juror declarations in Appellant's case  
4 demonstrate that, even with the unconstitutional aggravating factors, the case was so  
5 close that jurors were troubled and unsure of their decision to sentence Appellant to  
6 death. See Nosal Dec. 30 AA 7135-36, Buchanan Dec. 30 AA 7137, Martinez Dec.  
7 30 AA 7184-85.

8 **IV. CONCLUSION**

9 Appellant submits this supplemental memorandum in order to provide  
10 additional support for the claim that his death sentence rests on the unconstitutional  
11 consideration of invalid aggravating factors. Appellant's sentence should be reversed.

12 DATED this 17 day of December, 2006.

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12 \* \* \*

13 **DALE EDWARD FLANAGAN,**

14 **Appellant,**

15 **v.**

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

18 **Respondents.**

Case No. 40232

Death Penalty Case


19  
20 **CERTIFICATE OF COMPLIANCE**

21 I hereby certify that I have read Appellant's Supplemental Memorandum, and to  
22 the best of my knowledge, information, and belief, it is not frivolous or interposed for any  
23 improper purpose. I further certify that this brief complies with all applicable Nevada Rules of  
24 Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief  
25 regarding matters in the record to be supported by a reference to the page of the transcript or  
26 appendix where the matter relied on is to be found. I understand that I may be subject to

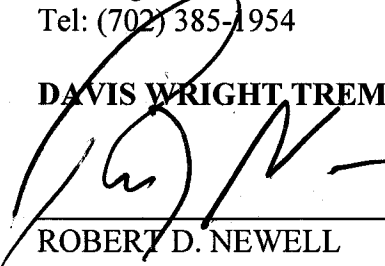
1 sanctions in the event that the accompanying brief is not in conformity with the requirements of  
2 the Nevada Rules of Appellate Procedure.

3 DATED this 14 day of December, 2006.

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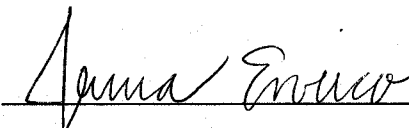
19 Attorneys for Appellant Dale Flanagan  
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I certify that I am an employee of POTTER LAW  
3 OFFICES, and that, on this date, I deposited for mailing at Las Vegas, Nevada, a true copy of the  
4 APPELLANT'S SUPPLEMENTAL MEMORANDUM and CERTIFICATE OF  
5 COMPLIANCE addressed to:

6 Steven S. Owens  
7 Chief District Attny.  
8 Office of the District Attny.  
9 200 Lewis Avenue  
10 Las Vegas, NV 89101

11 Dated this 19<sup>th</sup> day of December, 2006.

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