

ORIGINAL

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

OCT 12 2007

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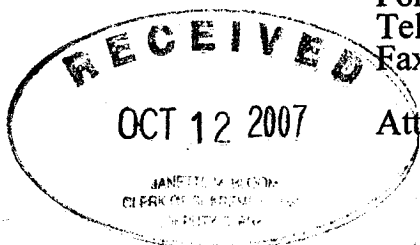
Appeal from an Order Dismissing a Petition For Writ of Habeas Corpus
Eighth Judicial District Court, Clark County
The Honorable Mark Gibbons, District Judge
Case No. C69269
Death Penalty Case

APPELLANT'S THIRD SUPPLEMENTAL MEMORANDUM

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07-22639

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	1
III.	ARGUMENT	1
A.	The Ninth Circuit has ruled that the Kazalyn instruction is unconstitutional.....	1
IV.	CONCLUSION.....	2

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TABLE OF AUTHORITIES

Cases

<u>Byford v. State</u> , 116 Nev. 215, 994 P.2d 700, 713-14 (2000)	1, 2
<u>Garner v. State</u> , 6 P.3d 1013, 1025 (2002).....	2
<u>Kazalyn v. State</u> , 825 P.2d 578 (Nev. 1992).....	1
<u>Polk v. Sandoval</u> , ___ F.3d ___ (2007) WL 2597437	1

Statutes

Nev. R. App. Proc. 31(d)	1
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I. INTRODUCTION

Pursuant to Nev. R. App. Proc. 31(d) Appellant files this supplemental memorandum to supplement Appellant's claims regarding the premeditation and deliberation instruction. See Appellant's Opening Brief ("AOB"), Claim 12 at 52. The Ninth Circuit Court of Appeals recently decided the case of Polk v. Sandoval, ___ F.3d ___ (2007) WL 2597437, holding that this Court's ruling in Byford v. State, 116 Nev. 215, 994 P.2d 700, 713-14 (2000), which held that the Kazalyn instruction was legally infirm, is of constitutional significance and should be applied retroactively.

II. BACKGROUND

Appellant filed his Opening Brief in August 2005. Claim 12 of the AOB argued that Appellant's conviction was invalid because the premeditation and deliberation instruction given at his trial blurred the distinction between First and Second Degree murder, and that counsel's failure to object to the specified jury instructions constituted ineffective assistance of counsel.

III. ARGUMENT

A. The Ninth Circuit has ruled that the Kazalyn instruction is unconstitutional.

The so-called Kazalyn instruction (Kazalyn v. State, 825 P.2d 578 (Nev. 1992)) was given at Appellant's trial (12 AA 2726). That instruction read in pertinent part:

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury beliefs, from the evidence, that the act constituting the killing has been preceded and, has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

1 This Court held in Byford v. State that the Kazalyn instruction was
2 inaccurate because it blurred the distinction between First and Second Degree murder.
3 Nevertheless, the Court refused to make Byford retroactive. Byford made clear that
4 all three elements – willfulness, deliberation and premeditation must be proven
5 beyond a reasonable doubt. This Court subsequently held, however, that the Kazalyn
6 instruction, when used before the Byford decision was announced “does not constitute
7 plain or constitutional error.” Garner v. State, 6 P.3d 1013, 1025 (2002).

8 The Ninth Circuit in Polk held that use of the Kazalyn instruction
9 violates a defendant’s constitutional right to due process “because it relieved the State
10 of its burden of proving every element of First Degree murder beyond a reasonable
11 doubt.”

12 As the Ninth Circuit ordered in Polk this Court therefore must grant the
13 writ unless the State elects to re-try Appellant within a reasonable time.

14 **IV. CONCLUSION**

15 Appellant submits this supplemental memorandum in order to provide
16 additional support for the claim that his conviction rests on the unconstitutional
17 Kazalyn jury instruction. Appellant’s conviction should be reversed.

18 DATED this 5 day of October, 2007.

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

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

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20 **CERTIFICATE OF COMPLIANCE**

21 I hereby certify that I have read Appellant's Third Supplemental Memorandum,
22 and to 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 8th day of October, 2007.

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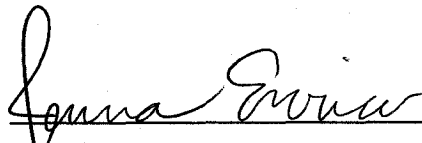
19 Attorneys for Appellant Dale Flanagan

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 THIRD SUPPLEMENTAL MEMORANDUM and CERTIFICATE OF
5 COMPLIANCE addressed to:

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

11 Dated this 8 day of October, 2007.

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14 Employee of Potter Law Offices
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