

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

JAN 02 2007

DALE EDWARD FLANAGAN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. M. W. S. G. D. O.
DEPUTY CLERK

Case No. 40232

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

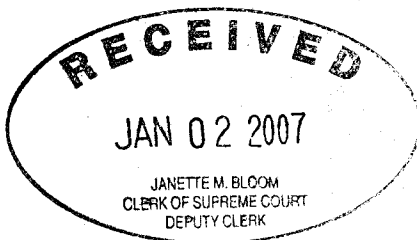
**Appeal From an Order Dismissing a Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

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

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5 DALE EDWARD FLANAGAN,)

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7 v.)

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8 THE STATE OF NEVADA,)

9 Respondent.)

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11 **RESPONDENT'S SUPPLEMENTAL MEMORANDUM**

12 The State files this Supplemental Memorandum pursuant to NRAP 31(d) and in
13 response to Flanagan's supplemental authorities. Now that McConnell v. State, 120
14 Nev. 1043, 1069, 102 P.3d. 606, 624 (2004) has been made retroactive¹, the State
15 must concede that two of the four aggravators in the instant case (namely, in the
16 commission of a robbery and burglary) are invalid because they were also used as a
17 theory of guilt to obtain convictions for first degree murder. Although there was
18 "overwhelming evidence that nineteen year old Flanagan and his co-defendants
19 *planned* to kill the Gordons," Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988),
20 there was no special verdict form used in the case to show the jury relied only on
21 premeditation and not felony-murder.

22 However, the State disagrees that McConnell also invalidates the receiving
23 money aggravator as it was based on separate facts. See Lane v. State, 114 Nev 299,
24 956 P.2d 88 (1998). The State's theory of robbery was for the taking of Colleen
25 Gordon's "purse and contents" by force (1 AA 239), whereas the theory of receiving
26 money was based instead on Flanagan's intent to "obtain insurance proceeds and an
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¹ Bejarano v. State, 122 Nev. Adv. Op. 92 (Nov. 16, 2006); Rippo v. State, 122 Nev. Adv. Op. 93 (Nov. 16, 2006).

1 inheritance under his grandparents' will." Flanagan v. State, 107 Nev. 243, 810 P.2d
2 759 (1991). In reference to the financial gain aggravator, the prosecutor argued to the
3 jury as follows:

4 This is different from the robbery. It has nothing to do with
5 the \$2 bill and any other money that they might have
6 obtained through the robbery. This has to do with Dale
7 Flanagan's – and the others, including Randy Moore –
 expectation of being in the will, of getting a part of the
 \$200,000 life insurance policy. 24 AA 5890.

8 Flanagan could have been convicted of both the robbery of his grandmother's purse
9 and attempting to fraudulently obtain insurance proceeds.

10 With two of the four aggravators stricken, the issue becomes, "Is it clear
11 beyond a reasonable doubt that absent the invalid aggravators the jury still would have
12 imposed a sentence of death?" Bejarano v. State, 122 Nev. Adv. Op. 92 (Nov. 16,
13 2006). At the third penalty hearing in June of 1995, the jury imposed two death
14 sentences for the two murders, finding the same mitigating and aggravating
15 circumstances for each crime. The two remaining aggravators of risk of death to more
16 than one person and financial gain must be re-weighed against Flanagan's lack of
17 prior criminal history and youth as well as a nondescript finding of "[a]ny other
18 mitigating circumstances." 25 App 5970. The State submits that any error in the use
19 of the robbery and burglary aggravators was harmless beyond a reasonable doubt and
20 Flanagan was not prejudiced thereby.

21 The invalid burglary and robbery aggravators both pertained to the felony-
22 murder aspect of the case from the trial phase and the bulk of the State's penalty phase
23 evidence remains intact. This was a double-murder of Flanagan's grandparents in
24 anticipation of inheriting through their will and receiving their life insurance proceeds.
25 While Flanagan may have been young at the time of the murders and was without
26 much of a criminal history, these mitigating circumstances would not have
27 outweighed the two remaining aggravators. The sentencing jury would have been free
28 to consider the burglary and robbery convictions as "other matter" evidence even if

1 they had not been included as aggravating circumstances. Defense counsel's
2 reference to certain juror declarations for the motives and influences which affected
3 their deliberations and the weighing of aggravators is impermissible. See NRS
4 50.065.

5 Bejarano and Rippo, supra, are new authority directly on point justifying the
6 filing of a supplemental brief, but neither opinion was available to the district court
7 judge whose decision to deny post-conviction relief is now under review. For that
8 matter, the district court judge did not even have the benefit of the McConnell
9 decision at the time of the ruling below and petitioner's Claim 16 was properly denied
10 under the valid case law in existence at the time. It remains to be seen whether this
11 Court on review is willing to apply the new law in the first instance and re-weigh the
12 aggravating circumstances, or remand the case to district court to do the re-weighing
13 so this Court can then review the decision for error. Whichever way this Court
14 proceeds, the State maintains that the results of the re-weighing should be the same
15 and that the two relatively inconsequential felony-aggravators did not prejudice
16 Flanagan because the jury still would have imposed the death penalty.

17 Dated this 28th day of December, 2006.

18 Respectfully submitted,

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Dated this 28th day of December, 2006.

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