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

JAN 26 2006

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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 REPLY BRIEF

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I. INTRODUCTION

The State's response to Flanagan's Opening Brief cavalierly dismisses most of Flanagan's claims on the grounds that his claims are procedurally barred, constitute "bare/naked" allegations are belied or repelled by the record or are barred by law of the case. The State is simply wrong, as Flanagan will demonstrate in this reply.

Flanagan will address the State's arguments made against multiple claims by argument rather than by claim. Flanagan will then refute the State's claim-specific arguments to the extent they are not adequately treated in his Opening Brief. Because of space limitations, Flanagan cannot specifically reply to the State's response to each claim, but rather relies on his Opening Brief.

II. ARGUMENT

A. The purported procedural bars are inapplicable to this case.

The State asserts that all of Flanagan's claims are barred under three theories of procedural default. First, the State contends that NRS 34.810(2) bars consideration of the 1998 petition because Flanagan's trial counsel filed a petition for writ of habeas corpus in 1995, prior to the third penalty hearing or the entry of judgment in his case.[1] Second, the State asserts that NRS 34.726, which was enacted in 1991, required Flanagan to raise all guilt phase claims no later than 1989, one year following this Court's affirmance of the convictions but reversal of sentence. Third, the State similarly asserts that the laches doctrine codified in NRS 34.800 bars consideration of the guilt phase claims because five years had elapsed between the issuance of the remittitur in 1988 and the filing of the instant petition. These procedural bars, however, are inapplicable to this case for several reasons.

1. The State's failure to raise the purported procedural bars in a timely fashion precludes their application to this case.

[1] The District Court denied that petition on June 6, 1995 (35 Appellant's Reply Appendix ("ARA") 8136-37), but the third penalty hearing started on June 13, 1995 and did not conclude until June 23, 1995 (25 AA 5966-67), when the jury returned the death sentence. Thereafter, this Court considered both the jury's verdict and the habeas petition in Flanagan v. State (Flanagan V), 112 Nev. 1409, 930 P.2d 691 (1996) (25 AA 6040).

The State's failure to raise the procedural default issues in the District Court constitutes a waiver of these arguments before this Court. See State v. Eighth Judicial Dist. Court ex rel. County of Clark, 112 P.3d 1070, 1075-76 (Nev. 2005). While this Court has said that a procedural bar "cannot be ignored when properly raised by the State," id. (emphasis added) this Court will not consider such arguments in the first instance. Id. at 1074, 1076. Such a requirement not only ensures that the factual record necessary to resolve such issues is developed in the District Court, but also that the District Court is afforded the opportunity to determine the applicability of the procedural bars in the first instance. See, e.g., Walch v. State, 112 Nev. 25, 30, 909 P.2d 1184 (1996) ("Ordinarily, if a party fails to raise an issue below, this court need not consider it on appeal."); see also NRS 34.800 (requiring that "the respondent or the State of Nevada must specifically plead laches" in a "motion to dismiss the petition based on that prejudice"). The pleadings in the District Court demonstrate that none of the procedural defaults were raised in a timely fashion, and the State failed to mention them in an responsive pleading, file a motion to dismiss, or provide the District Court with any reasons why it was prejudiced in responding to the writ, as required by NRS 34.800.[2]

2. The State is barred under the doctrine of judicial estoppel from asserting that either the 1995 petition constitutes a first petition for successor purposes or that petitioner could have raised guilt phase issues prior to the filing of the instant petition.

The doctrine of judicial estoppel precludes a party from taking inconsistent positions in litigation. See, e.g., Sterling Builders, Inc. v. Fuhrman, 80 Nev. 543, 549, 396 P.2d 850 (1964) ("'Under the doctrine of judicial estoppel a party may be estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding the contrary of the assertion sought to be made.'") (quoting 31 C.J.S. Estoppel § 121 at 649); see also United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993) (judicial estoppel prevents parties from "'playing fast and loose' with the courts, and prohibit[s them] from deliberately changing positions according to the exigencies of the

[2] Should this Court determine that the procedural defaults apply, the proper remedy is to remand to the District Court to determine the applicability of the procedural defaults.

moment"); Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (state barred from asserting procedural default defenses when state informed petitioner adequate state remedies were available). "The primary purpose of judicial estoppel is to protect the judiciary's integrity, and a court may invoke the doctrine at its discretion." NOLM, LLC v. County of Clark, 120 Nev. 736, 100 P.3d 658, 663 (Nev. 2004).

In the District Court, the State argued that Flanagan's 1995 petition was not a post-conviction habeas petition because it challenged convictions that were not final. As counsel stated, "[w]hat was filed as a writ of habeas corpus could not have been entitled a writ of habeas corpus, because these can only be filed after judgment of conviction." (19 AA 4548). Counsel warned that a different interpretation would mean that "every single time a jury came back with a guilty verdict and you set a sentencing hearing somewhere down the line, a writ could be filed in the interim. . . . We would never get to sentencing hearings." Id.

The State's briefing on appeal to this Court followed the same pattern: because the sentence Flanagan received after the original trial was overturned, the conviction was not final at the time Flanagan filed his 1995 petition. As the State pointed out, the judgment of conviction on the charges Flanagan now challenges was not entered until July 11, 1995—after the District Court had already denied Flanagan's habeas petition (35 ARA 8136-37). Thus, as the State said in 1993:

> this Court vacated the death sentences of Flanagan and Moore and remanded the case back to the District Court for a new penalty hearing [citation omitted]. As a result of the new penalty hearing, Judgment of Conviction was not entered until July 11, 1995. Therefore, the Petition for Writ of Habeas Corpus was not the proper procedure to request a new guilt phase.

(35 ARA 8153).

In ruling against Flanagan's 1995 appeal on the merits, this Court did not directly address the State's arguments above. See Flanagan v. State (Flanagan V), 112 Nev. 1409, 930 P.2d 691 (1996). Nor did any court address Flanagan's request for a ruling on whether filing the 1995 petition would prejudice Flanagan from raising other issues in the future (35 ARA 8122-24). To now adopt the State's shifting interpretation of Nevada habeas corpus procedure would be to

effectively hold that a prisoner such as Flanagan never had—and never will have—the opportunity to raise a number of guilt-phase claims. Such analysis defies this Court's instruction that the State's habeas procedure protects against unwarranted executions by ensuring an avenue of review of meritorious claims. See Snow v. State, 105 Nev. 521, 779 P.2d 96 (1989).

This Court should invoke the doctrine of judicial estoppel to preclude the State from eschewing its previous positions regarding the 1995 habeas petition. In response to the filing of that petition, the State contended that it was premature for the courts to consider the issues, implicitly arguing that the vehicle for raising all challenges to the judgment was the filing of a post-conviction petition. The State's original positions must be construed as a concession estopping the State from now arguing that petitioner's claims are procedurally barred. See Russell, 893 F.2d at 1037.

3. The instant petition does not constitute a successor or successive petition.

The prohibition on successor petitions applies when a habeas petitioner has previously filed a petition challenging "a judgment of conviction or sentence in a criminal case." NRS 34.720. The State asserts that this provision applies because Flanagan filed a pre-trial habeas petition in 1995. Not surprisingly, the State cites no case authority for the proposition that the filing of a pre-trial habeas petition precludes the filing of a post-judgment habeas petition because no such authority exists. This Court routinely has delineated the limited purposes to be served by a pre-trial habeas petition. See, e.g., State v. Nelson, 118 Nev. 399, 403-04, 46 P.3d 1232 (2002) (holding that pre-trial petition may not challenge a discretionary ruling, but is a proper vehicle for raising jurisdictional issues); Sheriff, Clark County v. Hatch, 100 Nev. 664, 691 P.2d 449 (1984). Indeed, this Court has recognized that a habeas petition filed while direct review is pending is premature. See Wehrheim v. State, 84 Nev. 477, 479, 443 P.2d 607 (1968).[3] Thus, given the inherent

[3] Courts in other jurisdictions have come to similar conclusions under their own systems for post-conviction relief. See Hughes v. State, 77 S.W.3d 801, 803 (Tenn. Crim. App. 2001) ("A petition for post-conviction relief, complaining of the original conviction and sentence, may not be maintained while a direct appeal of the same conviction and sentence is being prosecuted.") (internal citation and quotation marks omitted); Commonwealth v. O'Neil, 573 A.2d 1112, 1116 (Pa. Super. Ct. 1990) (petition for post-conviction relief filed under Pennsylvania statute was premature because "defendant's direct appeal remains pending"). These courts have also recognized that the premature filing for relief does not prejudice the filing of a subsequent petition at the proper time. See O'Neil, 573 A.2d at 1118 n.7 (conclusion that petition was premature "does

limitations on the scope of a pre-trial habeas petition and despite the widespread practice of filing pre-trial habeas petitions, this Court has never suggested, let alone held, that the filing of a pre-trial habeas petition precludes the filing of a subsequent challenge to the judgment.[4]

More fundamentally, NRS 34.810 does not apply because the 1995 habeas petition, which challenged the propriety of proceeding with a third penalty trial, was not a challenge to any judgment because no judgment had been entered. By the express language of the statutory scheme, the successor petition bar applies only where a previous petition has been filed challenging "a judgment of conviction or sentence." NRS 34.720. It is well-established that a "judgment" that sets forth the plea, verdict, and sentence and is signed and filed in the District Court, NRS 176.105, is a legal formality that divests the District Court of jurisdiction and has specific legal consequences. See, e.g., Miller v. Hayes, 95 Nev. 927, 929, 604 P.2d 117 (1979) (a "district judge's pronouncement of judgment and sentence from the bench is not a final judgment and does not, without more, oust the district court of jurisdiction over the defendant. Only after a judgment of conviction is 'signed by the judge and entered by the clerk,' as provided by NRS 176.105, does it become final and does the defendant begin to serve a sentence of imprisonment"). As no judgment had been entered and no sentence imposed at the time of the filing of the 1995 petition, that petition cannot constitute a challenge to the judgment or sentence.

4. The instant petition was timely filed and all claims are properly before the court.

The State argues that under NRS 34.726, Flanagan had just one year from this Court's initial affirmation of his conviction (in 1988) in which to file his habeas petition (Respondent's Brief at 4-5). Apparently the State is advocating a bifurcated system which could result in simultaneous state trial court, state appellant court, federal trial court and federal appellate court litigation. The

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not preclude appellant from refiling his petition at an appropriate time"); see also Hughes, 77 S.W.3d at 803-804 (holding that filing of premature petition did not waive filing on other grounds).

[4] Should this Court create such a rule, it cannot be applied retroactively to petitioner whose actions at all times were governed by controlling law. See Ford v. Georgia, 498 U.S. 411, 424-25 (1991) (federal review may not be barred when state procedural rule had not been announced at time of the purported default since rule not "firmly established and regularly followed").

State's position is preposterous.

The time period for filing habeas petitions contained in NRS 34.726 commences "after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur." NRS 34.726(1). The filing, on May 22, 1998, of the instant petition was within one year of this Court's issuance of the remittitur (35 ARA 8165). The express language of the statute belies the State's unsupported assertions that "remittitur" in NRS 34.726(1) refers to this Court's 1988 vacation of the judgment. In its 1988 decision, this Court vacated the judgment when it remanded the case for another penalty trial. Prior to any commencement of the time period for the filing of a habeas petition, a new judgment had to be entered. As this Court explained in Bennett v. Eighth Judicial Dist. Court ex rel. County of Clark, 121 P.3d 605, 609 (Nev. 2005), a remand for a new penalty trial affects the finality of a case, even when that relief occurs in post-conviction proceedings:

> [T]he State incorrectly asserts that Bennett's case is final. A conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the United States Supreme Court has been denied or the time for such a petition has expired. This occurred in Bennett's case in 1990. But such "finality" is not necessarily absolute, and it was undone in Bennett's case when he was granted post-conviction habeas relief, his death sentence was vacated, and a new penalty hearing was ordered. Because Bennett is awaiting a new penalty hearing, his conviction, at least in regard to his sentence, is clearly no longer final.

Id.; see also Guisti v. Guisti, 44 Nev. 437, 441, 196 P. 337 (1921) (clarifying that the Court's previous reversal on appeal "was to leave the litigation in the situation it was prior to the entry of the judgment").

Thus, the one-year time period did not start until after the imposition of a valid judgment following the third penalty trial (25 AA 6000-03), this Court denied the appeal (Flanagan V, 112 Nev. 1409 (1996)), and issued its remittitur (35 ARA 8165). As with the question of whether a pre-trial habeas petition qualifies as a "first" petition for successor petition purposes, this Court has never suggested, let alone held, that the time limits in NRS 34.726(1) begin to run prior to the completion of the criminal proceedings whenever the Court affirms a conviction but remands for a

new penalty trial.[5]

Moreover, accepting the State's position would create chaos. Under the State's view, petitioner was obligated to file a state habeas petition on the guilt phase claims in 1989, prior to the start of his penalty retrial.[6] In addition to creating piecemeal litigation, likely simultaneously in several state and federal courts, it would subject habeas petitioners to the State's charges of filing "successor" petitions prohibited by NRS 34.810(2).[7]

5. Prior to any determination that a procedural default bars consideration of the claims in the instant petition, petitioner must be afforded the opportunity to demonstrate that the "cause and prejudice" and "miscarriage of justice" doctrines apply.

If this Court decides that consideration of the applicability of the procedural bars raised by the State is necessary, the proper remedy is to remand to the District Court to permit Flanagan to establish his entitlement to merits review by establishing "cause" for the failure to comply with such rules and demonstrating that a miscarriage of justice will result by invoking such rules.

Each of the defaults cited by the State may be excused by a showing of "good cause." See, e.g., Brimage v. Warden, 94 Nev. 520, 521, 582 P.2d 375 (1978) (concluding cause for failure to file post-conviction petition within one year established). This Court has concluded that deprivation of the right to counsel constitutes such cause. See Crump v. Warden, 113 Nev. 293, 302-04, 934 P.2d 247 (1997). Unquestionably, Flanagan was entitled to effective representation at the time of the alleged defaults. See NRS 34.820(1)(a) (providing that appointment of counsel for a habeas petitioner sentenced to death is mandatory if "the petition is the first one challenging the validity of the petitioner's conviction or sentence"); Crump, 113 Nev. at 302-04 (recognizing that a petitioner

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[5] Should this Court create such a rule, it cannot be applied retroactively to petitioner whose actions at all times were governed by controlling law. See Ford, 498 U.S. at 424-25.

[6] Presumably, the State will concede that Flanagan could not have compiled with NRS 34.726 in 1989 given that the statute was not enacted until 1991.

[7] In addition, the failure of the State to comply with the requirements of NRS 34.800 to "specifically plead laches" in a "motion to dismiss the petition based on that prejudice" precludes any bar under that doctrine.

is entitled to effective assistance of counsel pursuant to NRS 34.820(1)(a)).[8]

Flanagan's 1995 petition itself demonstrates why it is problematic to require a petitioner to raise all challenges to the guilt-phase of a trial before he is even sentenced. The public defender's office representing Flanagan in the ongoing sentencing trial also filed the 1995 habeas petition on his behalf. That same office had also represented Flanagan for a period before the guilt-phase of Flanagan's trial, before withdrawing because of a conflict of interest. To adequately investigate all potential grounds for habeas relief, the public defender's office would have had to investigate itself for potential ineffective assistance, while—at the same time—continuing to represent Flanagan in his ongoing direct proceedings. Such a situation presents a conflict of interest, a fact that counsel apparently recognized in Flanagan's 1995 petition.

> Petitioner Flanagan would need to have independent counsel from outside the Clark County Public Defender's Office appointed to even identify [all issues concerning post-conviction relief arising from the guilt phase], since the Clark County Public Defender's Office has represented Petitioner Flanagan numerous times and throughout the various stages of these proceedings.

Prior to invoking the bars, Flanagan should be afforded the opportunity to develop the factual record to support good cause for the failure to comply with any procedural rules. See Matias v. Oshiro, 683 F.2d 318, 321 (9th Cir. 1982) (reversing and remanding for district court to make findings as to whether procedural default was excused).[9] (35 ARA 8124).

Similarly, Flanagan should be permitted to demonstrate in the District Court that a miscarriage of justice will result by invoking the procedural bars. See, e.g., State v. Bennett, 119 Nev. 589, 81 P.3d 1 (Nev. 2003); NRS 34.800 (laches doctrine does not apply if the claims in the petition demonstrate that "a fundamental miscarriage of justice has occurred in the proceedings

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[8] Moreover, Flanagan had a Sixth Amendment right to effective representation because no judgment had been entered at the time of the alleged defaults.

[9] In addition, the improper denial of relief in Flanagan's previous appeals constitutes cause, permitting their consideration in the instant petition. See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944 (1994) (holding that when a claim has merit, denial of relief constitutes an impediment external to the defense that would excuse a default in presenting the same claim in a successive petition).

resulting in the judgment of conviction or sentence"). Given the strength of the claims presented in the petition, Flanagan is entitled to merits review.

B. Bare / Naked Allegations.

The State argues that many of Flanagan's claims are merely "bare / naked" allegations that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). But Hargrove does not require factual proof; it only requires that the petitioner set forth factual allegations which, if true, would entitle petitioner to relief. The Nevada post-conviction habeas provisions (NRS 34.722 et seq.) and Hargrove contemplate that both discovery and an evidentiary hearing will be allowed when adequate factual allegations are made, especially in capital cases.

Appellant's opening brief details the factual allegations and evidence in the record, which fully refute the State's assertions. In each instance where the State makes the "bare / naked" charge, Flanagan has made adequate factual allegations with references to the record that would entitle him to relief. This is simply a boilerplate defense by the State that has no basis in the record.

C. Belied / Repelled by the Record.

The State erroneously expands the term "belied by the record" to include factual disputes.

> A claim is not "belied by the record" just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings. A claim is "belied" when it is contradicted or proven to be false by the record as it existed at the time the claim was made. For example, a petitioner's claim that he was not informed of the maximum penalty that he could face before he pleaded guilty is belied if the transcript of the entry of plea shows that the district court judge clearly informed the petitioner of the penalty.

Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228 (2002). In every instance in which the State claims that Flanagan's allegations are "belied by the record," the State points only to a factual dispute and not to a contradicting record. Flanagan, on the other hand, has cited specific facts in the record supporting his allegations.

D. Denial of Discovery and Evidentiary Hearing.

1. Denial of an evidentiary hearing was improper.

A convicted person must be allowed an evidentiary hearing when factual allegations are made which, if true, could establish a right to relief unless the available record belies the allegations. Doggett v. State, 91 Nev. 768, 771, 542 P.2d 1066 (1974). Even the allegation of facts outside the record can necessitate an evidentiary hearing. Bolden v. State, 99 Nev. 181, 183, 659 P.2d 886 (1983). A claim is only considered belied when it is "contradicted or proven to be false by the record." Mann, 118 Nev. at 354. Here, the allegations made by Flanagan are not contradicted by the record and therefore an evidentiary hearing was required. NRS 34.770.

a. The standard for granting an evidentiary hearing.

The United States Supreme Court, as early as 1883, classified habeas corpus proceedings as civil proceedings. Ex parte Tong, 108 U.S. 556, 559 (1883) ("The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. . . . Proceedings to enforce civil rights are civil proceedings."). The Nevada habeas statute itself reflects the civil nature of habeas proceedings by mandating the use of Nevada's Rules of Civil Procedure to the extent that they are not inconsistent with the statute. NRS 34.780(1). As this Court has stated, a court can look to general civil rules for guidance when the habeas statute does not address the issue presented. Mazzan v. State, 109 Nev. 1067, 1070, 863 P.2d 1035 (1993).

While NRS 34.770 instructs a judge to review the pleadings and all supporting documentation to decide whether an evidentiary hearing is required, the statute is silent on how that determination is to be made. No instruction or guidance is given on the manner in which evidence is to be weighed and what facilities and procedures are to be afforded to a petitioner before a writ is granted.

The law regarding summary judgment is the most closely analogous civil procedure for the court to follow in deciding whether to grant an evidentiary hearing. This Court has said as much: "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record." Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). That is conceptually indistinguishable from the familiar summary judgment standard:

reviewing the facts most favorably to the party resisting the motion, if the record reflects genuine issues of material fact, the motion must be denied and the case be allowed to go to trial. NRCP 56(c); Lumbermen's Underwriting Alliance v. RCR Plumbing, Inc., 114 Nev. 1231, 1234, 969 P.2d 301 (1998). In other words, unless the State can point to facts in the record which defeat the claims (not merely create a factual dispute), the court must allow an evidentiary hearing. Under that standard, the court here erred by, in effect, granting the State's motion to dismiss the writ and denying an evidentiary hearing.

2. Flanagan was entitled to discovery.

Furthermore, the court erred in refusing to allow discovery. When a habeas petitioner alleges facts which, if true, would entitle him to relief, he must certainly be entitled to develop those facts through discovery. Indeed, due process concerns require giving a habeas petitioner a "'full opportunity for presentation of the relevant facts,' which includes 'the benefit of compulsory processes.'" Blackledge v. Allison, 431 U.S. 63, 82, 83, n.26 (1977) (quoting Harris v. Nelson, 394 U.S. 286, 298 (1969)). Without an opportunity to conduct discovery, Flanagan's due process rights to fully develop his habeas claims were denied. See NRS 34.780.

E. Law of the Case.

The law of the case doctrine has no application in these proceedings because this is Flanagan's first opportunity to "try the trial." Claims of ineffective assistance of counsel cannot be raised on direct appeal, and the State fails to acknowledge that each of the substantive law issues raised by Flanagan are presented in terms of ineffective assistance of counsel or other constitutional frameworks such that prior review by this Court is not "law of the case." It is remarkable that the State devotes so much of its response brief to this Court's prior statements about "overwhelming evidence of guilt" (see pp. 6-7, 14-15, 17, 48) when the thrust of Flanagan's claims is that, with effective counsel, the evidence would have been far different. Indeed, the wealth of evidence presented in support of Flanagan's claims for relief demonstrates that this Court's previous conclusions were predicated on a false version of the crime and Flanagan's culpability.

The State improperly conflates the underlying trial of the crime with these habeas

proceedings, which are a "trial of the trial." By its repeated reference to "overwhelming evidence of guilt," the State seeks to obscure the fact that the purpose of habeas is not to review the trial of the crime – which is the purpose of direct appeal – but rather to review the constitutionality of the trial and appellate processes. Herrera v. Collins, 506 U.S. 390, 400-401 (1993). Because ineffective assistance of counsel and other constitutional claims raised by Flanagan in his petition are fundamentally different from the issues presented to this court and the trial court in the criminal case (and could not be addressed on direct appeal), there can be no "law of the case" in these proceedings. This is a writ, not a criminal case, and the fundamental claim is that, if Flanagan's constitutional rights had been observed and protected, the evidence in and outcome of the underlying criminal case would have been different.

F. Mootness.

In response to Flanagan's claims regarding the first and second penalty hearings, the State's only argument is that the claims are moot because Flanagan was eventually granted a third penalty hearing, which, it argues, remedied the errors cited. The State's response ignores the fact that a habeas corpus proceeding is not a criminal appeal, but is a civil challenge to the constitutionality of the criminal procedures afforded to Flanagan. Neither the second nor the third penalty hearings would have been necessary if the first and second hearings had been conducted in accordance with constitutional requirements. Moreover, the errors cited in the first and second hearings may have prevented Flanagan's only opportunity to receive a sentence other than death. Under these circumstances, the errors that occurred in Flanagan's first and second penalty hearings must be addressed.

G. Claim 1

The State's response to Flanagan's detailed claims of prosecutorial misconduct is primarily a repetition of its "law of the case" and "overwhelming evidence of guilt" mantra. That misses the nature of the claim.

Claim 1 raises the serious constitutional violations of prosecutorial misconduct and ineffective assistance of counsel. Both the constitutional issues alleged in this claim and the

supporting evidence renders the State's position untenable. In his Supplemental Petition (26 AA 6351-63) and Opening Brief (pp. 8-20), Flanagan raised numerous instances of prosecutorial misconduct in the guilt phase. While this Court found in Flanagan I that those claims did not merit reversal, the uncontested fact is that appellate counsel raised only two guilt phase prosecutorial misconduct claims, both arising in closing argument (13 AA 3094-96).

This Court therefore has not previously had occasion to address the claims of intimidating and bribing witnesses, withholding exculpatory evidence, misuse of peremptory challenges, injection of personal opinion and reliance on biblical dogma. The failure of trial and appellate counsel to raise these issues eviscerates the State's argument that they are precluded by "law of the case." It also ignores the primary constitutional violations such prosecutorial misconduct embodies. And, because counsel did not address these serious issues, there can be little doubt that the result, under Strickland v. Washington, 466 U.S. 668 (1984), was unreliable.

H. Claim 2

Respondent argues "[b]ecause the witnesses mentioned by Flanagan in this claim were extensively cross-examined about the inducements for their cooperation in testifying, Flanagan's assertions are simply belied and repelled by the record," citing generally to Sheriff, Humboldt County v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991). Respondent's Brief at 15, lns. 23-26. Respondent's argument is misplaced. A complete review of the record cited by Flanagan, including the very cross-examination to which the State refers, reveals that Flanagan's allegations are factually supported.

For example, Flanagan alleges that the State paid key witnesses an excessive amount in exchange for their testimony, withholding full payment until after they testified to the State's satisfaction, and that these agreements were not fully disclosed to the jury or to Flanagan. These allegations, if true, entitle Flanagan to relief under Franklin v. State, 94 Nev. 220, 577 P.2d 860 (1988). See infra. Flanagan gave specific cites supporting his averments: on the allegation that the State paid key witnesses, Flanagan cited to Lucas' testimony that he received half the promised sum before the preliminary hearing (7 AA 1696-97); to support his allegation that the State withheld

payment until after the witnesses testified to the State's satisfaction, Flanagan cited the following testimony from Mr. Lucas' declaration:

> It was prior to testifying that I received the first $1000 from secret witness . . . . They told me that I would get the remainder of the reward money after I testified and the defendants were convicted.

(30 AA 7138, Lucas Dec. ¶ 9).

At the time of Flanagan's prosecution, the controlling case was Franklin, which held that a defendant is denied due process where the State withholds the benefits of the bargain to assure testimony in accord with the prosecutor's vision of the truth. Franklin, 94 Nev. 220. Appellant's allegations, if true, would entitle Flanagan to relief under Franklin and other authority. See Giglio v. U.S., 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264 (1959). Thus, with the numerous cites that he has pointed to throughout his brief, Flanagan has laid the factual background entitling him to an evidentiary hearing under the Hargrove and Marshall standard.

I. Claim 3

Here, as elsewhere, this Court's view of the satanic worship evidence has been improperly colored by the pathetically ineffective assistance of counsel (Claim 4). If counsel had been effective, this Court would have been hard pressed to find, as it did in Flanagan V, that the "overwhelming" evidence made a harmless error analysis possible for the guilt phase. Furthermore, appellate counsel devoted less than a page of his brief to the subject (13 AA 3095), and then only to a very limited remark by the prosecutor in closing argument. If harmless error analysis cannot be used in the penalty phase, it should not be used in the guilt phase, and if counsel had been effective, it would not have been.

J. Claim 4

Flanagan and the State agree that Strickland, supra, sets forth the requirements for demonstrating ineffective assistance of counsel under the Sixth Amendment (Respondent's Brief at 19). Strickland and Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996), outline a two step process: first, defense counsel must make a reasonable inquiry as to information pertinent to a

client's case; only then does counsel make a tactical decision. It is on the first requirement of reasonable inquiry where Randall Pike failed Flanagan.

1. Guilt phase.

a. Pike's inexperience in defending capital cases.

In its brief, the State does not respond to Flanagan's assertion that Pike's inexperience rendered counsel ineffective. While Pike's inexperience alone would not render counsel ineffective, the fact that Pike was a former prosecutor who had only been practicing for three years should be considered when determining ineffectiveness. See Ford v. State, 105 Nev. 850, 853-54, 784 P.2d 951 (1989).

2. Inadequate investigation and trial preparation.

a. Failure to prepare witnesses.

Pike did virtually no investigation and failed to adequately prepare for trial. In response, the State argues that Pike "competently highlighted inconsistencies surrounding the testimony of State witnesses and other credibility issues during cross examination" (Respondent's Brief at 20). In support of this assertion, the State cites to Pike's cross-examination of Havens, Akers, Lucas and Saldana. A quick read through the pages cited by the State shows that Pike was inadequately prepared and did not anticipate the responses of the witnesses.

This conclusion is consistent with the fact that Pike had neither the time nor the resources to interview the State's witnesses, and was, therefore, not fully able to exploit inconsistencies in their testimony (30 AA 7148, Pike Aff. ¶7). Since Pike did not compare the testimony given at the preliminary hearing and the evidentiary hearing with the testimony given at trial, he was unable to discredit the State's witnesses or bolster the defense witnesses as should have been done. Id.

b. Diminished capacity.

Pike also failed to make a reasonable inquiry into whether or not Flanagan's capacity was diminished when the crime occurred. He undertook no investigation into Flanagan's mental functioning prior to and during the time of the crime. He further failed to interview Michelle Thayer who could have testified that Flanagan "smoked marijuana, took acid, cocaine, PCP (angel

dust) and crystal meth" (30 AA 7191, Thayer Dec. ¶4). Pike failed to cross-examine Angela Saldana regarding Flanagan's alleged statements that on the night of the murders Flanagan was on acid (30 AA 7195, Saldana-Ficklin Dec. ¶11).

c. Failed to investigate the crime itself.

The most important witness that Pike failed to even locate, let alone interview, was Robert Ramirez. In its response, the State dismisses Pike's failure to discover Ramirez because "the declaration contains hearsay within hearsay" (Respondent's Brief at 23). The State then refers to its argument that the police did not have the obligation to inform Flanagan's defense of the existence of Ramirez (Respondent's Brief at 12 and 23).

First, the State asserts that the police did not believe Ramirez had knowledge of the events and therefore had no duty to inform Pike. The State's argument supports Flanagan's request for an evidentiary hearing. The State's assertion – which creates issues of disputed facts – is unsupported by any evidence whatsoever. Even if true, this fact does not relieve Pike of his obligation to make a reasonable inquiry into the facts of the case and investigate the crime on his own. Second, since the evidentiary hearing began almost immediately after Pike was appointed, Pike was unable to investigate and prepare for trial (30 AA 7148, Pike Aff. ¶6). Third, had Pike made a reasonable inquiry into the crime, he would have discovered Ramirez as a witness. Fourth, had Pike interviewed Ramirez, he would have discovered that Ramirez could testify that:

(a) Roy McDowell said Randy Moore (not Flanagan) shot Mrs. Gordon (30 AA 7186, Ramirez Dec. ¶12).

(b) McDowell said Flanagan was freaking out and could not believe what was happening and wanted it to stop (30 AA 7186, Ramirez Dec. ¶13).

(c) McDowell said he and Moore threatened Flanagan's life if Flanagan did not keep quiet. Id.

Ramirez is a witness who casts grave doubt on whether Flanagan shot his grandmother (the only murder Flanagan was charged with). The failure to discover Ramirez (and his testimony) is Pike's single most important failure and there can be no doubt under Strickland that Ramirez's

testimony would have drastically altered the outcome of the trial.

The State's hearsay argument lacks merit because McDowell's statements to Ramirez are not hearsay. Had Ramirez testified, the statements would have been made against a party about the acts and statements of a co-conspirator during the course and in furtherance of a conspiracy. NRS 51.053.

d. Inconsistent statements.

The State argues that Pike was effective because he pointed to inconsistencies between testimony and physical evidence, yet the State does not explain what inconsistencies were allegedly present. Pike himself admits that he failed to cross-examine key witnesses on prior statements and testimony to exploit the inconsistencies (30 AA 7148, Pike Aff. ¶16). The State's argument ignores testimony that Flanagan himself broke the window with his fist, yet there was no cross-examination by Pike about wounds to Flanagan's hand or cross-examination by Pike regarding testimony that the window was broken with a closet pole (2 AA 323-24; 3 AA 609; 6 AA 1440; 30 AA 7148, Pike Aff. ¶¶7, 17; 9 AA 2043, 2076-89; 11 AA 2520). Failing to exploit these inconsistent statements rendered Pike's counsel ineffective, and that failure rendered the verdict unreliable.

e. Psychotropic medication

The State argues that Flanagan was competent; therefore, Pike's failure to make an inquiry into whether or not Flanagan was on psychotropic medication before and during his trial is irrelevant (Respondent's Brief at 21). In support of its argument, the State argues that Flanagan was able to "clearly and coherently . . . answer the required series of questions illustrating his mentally [sic] clarity" and "able to read a coherent unsworn statement to the jury in the penalty phase." Id. However, Flanagan's answers amounted to six words (four "yes's" and two "no's"). The unsworn statement occupies two pages in the Record (12 AA 2774-75) and consists of Flanagan begging for his life.

The State does not address Pike's failure to obtain jail medical records that would have revealed to him that Flanagan was receiving substantial psychotropic medications that rendered him incompetent to stand trial (30 AA 7148, Pike Aff. ¶¶7, 10).

3. Inadequate pretrial motions and trial conduct.

a. Charged with one murder, convicted of two.

The State responds to Flanagan's argument that Pike failed to realize that Flanagan was charged with one murder but convicted of two with, "[a] simple check of the record of the case shows that the complaint, amended complaint and information all charged Flanagan with two (2) counts of murder." (Respondent's Brief at 22, citing 1 AA 4-6, 19-24 and 237-243).

While Flanagan was first charged with murdering Colleen Gordon and Carl Gordon (1 AA 4-6), the State amended the complaint to charge Flanagan only with murdering Mrs. Gordon (1 AA 23). The information is the same (1 AA 237). Flanagan was only charged with murdering Mrs. Gordon, yet he was convicted of murdering both (12 AA 2761-62). This simple mistake sums up Pike's ineffective representation of Flanagan.

b. Change of venue.

The State argues that Pike filed a motion for change of venue and thus Pike was effective. (Respondent's Brief at 22, citing 2 AA 388-390). Unfortunately, while Pike did file a motion for a change of venue, the court never ruled on it and Pike never pressed the issue (30 AA 7148, Pike Aff. ¶15). Failing to get a ruling on a motion made is no different than never filing the motion.

c. Cross-examination of Wayne Wittig.

The testimony of Wayne Wittig was incredibly prejudicial to Flanagan in the guilt phase. Wittig testified that Flanagan belonged to a Satanic cult and was involved in "black" and "white" magic. Pike failed to adequately investigate Wittig's testimony (30 AA 7148, Pike Aff. ¶13). Had he done so, he would have discovered that Wittig's testimony mirrored a story that appeared in the July 14, 1984 *Review-Journal*. In that story, Flanagan was quoted as saying, "A black magician wouldn't be considered the highest level, but certainly one of the highest. The highest would be a sorcerer or a wizard."

Pike never interviewed Wittig prior to trial (30 AA 7170, Wittig Dec. ¶44). Had he done so, he would have discovered that Wittig had spoken with Saldana and Moore about how the two State witnesses would be "taken care of" after they testified against Flanagan (30 AA 7170, Wittig Dec.

¶39) and how in exchange for Wittig's testimony, the District Attorney offered to "take care of" some of Wittig's troubles with the law (30 AA 7170, Wittig Dec. ¶40). Pike was ill prepared for Wittig's testimony and failed to even cross-examine Wittig about the true source of his testimony. As a result, Pike's counsel was ineffective.

d. Failure to exclude evidence of witchcraft in testimony.

In its response, the State argues that Pike was effective because he moved to sever Flanagan's trial from the remaining defendants and objected to evidence of witchcraft. The State cites 6 AA 1231, 9 AA 2061-2062 and 2118 in support of its argument. While it is true that Pike moved to sever the trials recognizing that he was faced with "three prosecutors" instead of two (6 AA 1231), he failed to move to exclude the witchcraft testimony which proved so prejudicial to Flanagan (30 AA 7148, Pike Aff. ¶13). When dealing with the severance motions, Judge Mosley encouraged Pike to bring up any motions against testimony that may have prejudiced Flanagan (6 AA 1235). Judge Mosley practically invited Pike to make a motion in limine to exclude Wittig's testimony. However, rather than make the motion, Pike allowed Wittig to testify without any effort to contain the damage to Flanagan.

e. Saldana's criminal record.

Saldana, the State's star witness, was a prostitute (30 AA 7168, Samples-Smith Dec. ¶2). She had a sexual relationship with Officer Berni (Id. at ¶11). During the evidentiary hearing, Saldana testified in a prison outfit (30 AA 7148, Pike Aff. ¶19). However, Pike failed to investigate Saldana's criminal record and her career as a prostitute. Id. The importance of Saldana's testimony would have been diminished by full disclosure of her criminal background, and her need to satisfy the prosecution (and law enforcement) by her testimony. Id. Pike's failure to fully investigate Saldana and her background rendered his counsel ineffective and the verdict unreliable.

4. First and second penalty phases.

The State fails to respond to Pike's failure to conduct any mitigation investigation (30 AA 7148, Pike Aff. ¶10). He conducted virtually no investigation of Flanagan's life growing up, drug addiction, or any other aspect of his background. Moreover, he did not seek the appointment of

appropriate professionals, including a psychiatrist. Id. Additionally, the State fails to respond to Flanagan's argument that his legal team during the second penalty phase had a conflict of interest and failed to adequately investigate and prepare for trial. (See Flanagan's Opening Brief at 35).

5. Third penalty phase.

a. Ethical conflict of interest.

The State confuses Flanagan's ethical conflict of interest argument with the personal conflict between attorneys Blaskey and Wall (Respondent's Brief at 25-27). In the second and third penalty phases, Flanagan was once again represented by the Clark County Public Defender's Office (14 AA 3191 and 19 AA 4534). At the first trial, the Public Defender's Office successfully moved to withdraw as Flanagan's counsel because of a conflict of interest (2 AA 252, 254). No explanation appears in the record for this conflict, neither does any explanation appear for its resolution. In its response, the State offers no argument or facts to explain this conflict of interest. Without a resolution, the ethical conflict must be presumed to continue and, as articulated in Flanagan's Opening Brief, to have prejudiced Flanagan at the second and third penalty phases.

b. Mitigation.

The communication between co-counsel was virtually non-existent during the Third Penalty Hearing and thus counsel was ineffective. The State argues that counsel was effective because Mr. Wall testified that he and Ms. Blaskey had discussions regarding strategy in the Flanagan case (Respondent's Brief at 25, citing 31 AA 7388). However, Mr. Wall could not remember one specific strategy session – he could only surmise that such sessions occurred because his and Ms. Blaskey's offices were next door to each other (31 AA 7388-7389). Ms. Blaskey, however, testified that Mr. Wall kept his distance and had no extended discussions about strategy and tactics (30 AA 7339-7340).

The poor communication between co-counsel, and Mr. Wall's inattention to the case, caused all sorts of problems for Flanagan. The most disturbing was the prosecution's access to Dr. Etcoff's raw data, the defense's only expert witness.

Mr. Wall was appointed to the case nearly three months prior to the trial (30 AA 7332), yet

Dr. Etcoff's examination of Flanagan happened the Friday before the hearing (24 AA 5736). As a consequence of the eleventh hour exam, the defense was ordered to reveal Dr. Etcoff's raw data. Had Dr. Etcoff had the time to prepare a report, the raw data would not have been revealed.

The State argues that Dr. Etcoff's examination was delayed because Flanagan was not transported from the prison as early as the District Court order requested (Respondent's Brief at 25, citing 31 AA 7394). However, the record shows that the court order for transport was filed on Wednesday, June 7, 1995, for a Friday, June 9, 1995 transfer and examination (35 ARA 8139).

The State does not dispute that the defense's release of the expert's raw data led to a devastating cross-examination. Simply put, the court would not have ordered the raw data turned over to the prosecution if Dr. Etcoff had more time to prepare a report. For whatever reason, Mr. Wall's failure to have Flanagan examined by Dr. Etcoff well enough in advance to issue a report caused harm to Flanagan and thus assistance of counsel was ineffective.

K. Claim 5

The record supports the claim that Flanagan was incompetent to stand trial. Moreover, in violation of his constitutional guarantees, Flanagan was not given a formal competency hearing. This was due to an ineffective defense by trial counsel, and a failure of the District Court to protect Flanagan's due process guarantees under the federal and state constitutions. The State's suggestion that Flanagan's allegation is belied and repelled by the record is wrong. In his affidavit, Pike indicates that he did not present the incompetency defense to the court (30 AA 7148, Pike Aff. ¶11). Pike did not review Flanagan's medical records prior to trial and was unaware at the time of trial that "Mr. Flanagan was receiving substantial psychotropic medications which may have rendered him incompetent to stand trial." Id. Flanagan's medical records clearly indicate that he was being administered large doses of psychotropic medications during crucial phases of the trial (29 AA 7082-7134). The State's assertion that no medications were given to Flanagan from the middle of September 1985 through the beginning of October 1985 is simply not true. For example, one physician's order dated "9/11/85," during the crucial preparation days just before the evidentiary hearing and trial, indicates "Vistoril 50mg BID X 10 days" and "Benadryl 50mg BID X 10 days"

and on "9/16/1985," the day before the Sept. 17, 1985 evidentiary hearing, "Sudafed 10cc Bid X 7 days." (29 AA 7113). The orders indicate that these medications were administered over lengthy periods into late September and were administered more than once per day. This evidence in the record, in conjunction with the Pike affidavit, clearly establishes a factual background sufficient to meet the Hargrove standard for an evidentiary hearing. Flanagan was incompetent to stand trial and not able to assist counsel in preparing an adequate defense.

To support its argument that Flanagan was competent to stand trial and that Flanagan's argument is repelled by the record, the State indicates that Dr. Aralica rendered the opinion that Flanagan is "fully competent to stand trial." (29 AA 7110). Respondent fails to put the statement in context, however. Dr. Aralica begins his assessment (made in May, 1985, four months before trial) by saying that "[i]t is indeed unfortunate that I do not have [Flanagan's] social history, I have no idea if he was hyperactive as a child and if he was lying, cheating, missing school, etc. With no previous exposure to psychiatry, in his case, I am opting here that we are probably dealing here with a Personality Disorder [emphasis added]." Id. He concludes, "[l]et me volunteer here something I learned in the past ten years or so and that is that there are no incompetent defenders, there are only incompetent lawyers [emphasis added]." (29 AA 7110). Given his clearly expressed predisposition, Dr. Aralica is not able to render a sound medical diagnosis on Flanagan's fitness for trial. His statement does not repel the voluminous factual background that Flanagan has cited in this regard.

L. Claim 7

Flanagan presented a prima facie claim of racial discrimination in the selection of the jury pool. There were no African Americans in the pool (30 AA 7148, Pike Aff. ¶ 14) yet no challenge was made. Those are two distinct constitutional violations that Flanagan has properly asserted and supported and on which he was, at a minimum, entitled to discovery. His race is irrelevant. Duren v. Missouri, 439 U.S. 357 (1979).

M. Claim 9

The trial judge required that defense objections and motions be made directly to the court reporter, rather than to the trial judge, and outside the presence of Flanagan and the jury (6 AA

1234-36; 8 AA 1895; 9 AA 2114-16, 2215; 30 AA 7148, Pike Aff. ¶¶5, 9).

The State misinterprets Flanagan's claim and offers nothing to counter Flanagan's allegations other than unsupported assertions. Flanagan's argument does not, as Respondent suggests, center around "meritless objections." In his affidavit, Pike indicates that "[b]ecause Judge Mosley made it clear that he did not want to hear objections from defense counsel during trial, I did not object [to] the obvious prosecutorial misconduct that pervaded both the guilt and penalty phases of the trial." (30 AA 7148, Pike Aff. ¶ 5).

Moreover, Flanagan was absent from crucial proceedings (18 AA 4376; 19 AA 4523; 25 AA 6036; 30 AA 7148; Pike Aff. ¶9). In his affidavit, Pike stated that "[t]here were numerous bench conferences which were not reported, and which did not include Mr. Flanagan." (30 AA 7148, Pike Aff. ¶9). A defendant has a fundamental right to be present during all stages of trial, to direct his counsel in the conduct of his defense, and to have an opportunity to establish any fact that would protect himself. Shields v. U.S., 273 U.S. 583, 588-89 (1927); State v. Fouquette, 67 Nev. 505, 514, 221 P.2d 404 (1950) (citations omitted). The court's unusual procedure regarding objections from defense counsel and Flanagan's absence during crucial proceedings entitle Flanagan to relief.

N. Claim 10

The State does not address Flanagan's undisputed claim of conflict of interest by the Public Defender's office, which withdrew before trial, then magically reappeared to handle the appeal and subsequent proceedings. This alone requires relief.

O. Claim 12

1. Byford should be applied retroactively because it involves a judicial interpretation of a statute that is both authoritative and foreseeable.

The jury in this case was instructed:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at a time of the killing. Premeditation need not be for a day, an hour, or even a minute. If the jury believes from the evidence that the act constituting the killing 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.

(12 AA 2726).

This instruction, commonly referred to as the Kazalyn instruction, is based in relevant part on NRS 200.030(1)(a), which provides that first degree murder is a "willful, deliberate and premeditated killing." In Byford v. Nevada, 116 Nev. 215, 235, 994 P.2d 700 (2000), this Court held that because deliberation is a distinct element of mens rea for first-degree murder, the instruction that a killing resulting from premeditation is willful, deliberate, and premeditated does not do full justice to the distinct elements and is therefore improper. The Court reasoned that the Kazalyn instruction had blurred the line between first- and second-degree murder for far too long and that the elements must be distinguished. Id; see also Hern v. State, 97 Nev. 529, 532, 635 P.2d 278 (1981) ("It is clear from the statute that all three elements, willfulness, deliberation, and premeditation, must be proven beyond . . . a reasonable doubt before an accused can be convicted of first degree murder."). The Byford court went on to delineate first- and second-degree murder and proposed an instruction that appropriately distinguished the two crimes. 116 Nev. at 236.

This Court's decree in Byford amounts to a judicial interpretation of a statute that was both authoritative and foreseeable. As such, Byford should be applied retroactively to Flanagan. See Hernandez v. Nevada, 118 Nev. 513, 530, 50 P.3d 1100 (2002) (quoting Kreidel v. State, 100 Nev. 220, 222, 678 P.2d 1157 (1984) (citing Bouie v. City of Columbia, 378 U.S. 347 (1964)), overruled on other grounds by Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 745 P.2d 697 (1987)) ("A judicial interpretation of a statute may be retroactively applied if it is both authoritative and foreseeable.").

There is no debate that Byford involves a judicial interpretation of a statute. See Garner v. State, 116 Nev. 770, 788, 6 P.3d 1013 (2000) (Byford "gives effect to the relevant statutory language in NRS 200.030(1)(a)"). There is also no debate that the Nevada Supreme Court is in a unique position of authority to provide judicial interpretation of a statute. The remaining question is whether Byford's interpretation was foreseeable.

If an interpretation is foreseeable, it is not new. Yet, in Garner, the Court contradictorily asserts that Byford imposes a "new" requirement, id. at 789, but explains that Byford is not

unprecedented and "relies on long-standing statutory language and other prior decisions of this court . . . . Basically, Byford interprets and clarifies the meaning of a preexisting statute by resolving conflicting lines in prior case law. . . . [T]he rationale in Byford is not new . . . ." Id. at n.9.

The Court's only attempt to reconcile this inconsistency is an uncertain assurance that Byford's "reasoning is not altogether new." Id. (emphasis provided). Perhaps, then, it is not altogether unforeseeable that the Court would appropriately distinguish first- and second-degree murders. Accordingly, under Hernandez, Kreidel, and Bouie, this Court must retroactively apply Byford to Flanagan because its holding was authoritative and foreseeable since it was consistent with prior case law and based on the language of the statute. See Hernandez, 118 Nev. at 530.

2. Alternatively, Byford should be applied retroactively because it is a rule that implicates constitutional rights.

Even if this Court finds that Byford was not a judicial interpretation of a statute that was both authoritative and foreseeable, Byford should still be applied retroactively to Flanagan because it announces a rule that implicates constitutional rights. See Clem v. Nevada, 81 P.3d 521, 530 (2003) (citing Teague v. Lane, 489 U.S. 288, 313 (1989) (setting forth the Supreme Court's retroactivity analysis for cases that became final before a new procedural rule was made)). [10]

In Clem, this Court spelled out exactly how Nevada courts would apply Teague to both rules that interpret substantive provisions of criminal statutes or announce procedural rules: "[I]f a rule is not new, it applies retroactively; if it is new, but not a constitutional rule, it does not apply retroactively; and if it is new and constitutional, then it applies retroactively only if it falls within one of [two exceptions]." Clem, 81 P.3d at 531 . The two exceptions are (1) when the rule establishes that it is unconstitutional to proscribe conduct as criminal or imposes a type of punishment on certain defendants because of their status or offense, or (2) when the rule establishes a procedure without which the likelihood of an accurate conviction is significantly diminished. Id.

[10] The State's reliance on the Tennessee line of cases is unpersuasive because the U.S. Supreme Court cases Flanagan cites post-date them all.

at 531-32 (citation omitted).

First, Byford announces a new rule of constitutional significance. Whether the rule is viewed procedurally or substantively, the argument and the outcome are the same. Insofar as new rules of criminal procedure are concerned, the Supreme Court has made clear that any new rule shall be applied retroactively on habeas review if "without [it] the likelihood of an accurate conviction is seriously diminished." Bousley v. United States, 523 U.S. 614 (1998) (quoting Teague, 489 U.S. at 313). With respect to a decision of substantive law, the rule shall be applied retroactively when it places conduct "beyond the power of the criminal law-making authority to proscribe." Id. at 311; see also Schriro v. Summerlin, 542 U.S. 348, 350-351 (2004) (recognizing that new substantive rules generally apply retroactively, including decisions that narrow the scope of a criminal statute by interpreting its terms). The right to not be convicted of a crime absent the requisite mens rea clearly implicates constitutional rights, regardless of whether the right is couched in procedural or substantive nomenclature.

Second, Byford is capable of falling into either of the two Clem exceptions. Although conduct that falls within the first-degree-murder category may complete the crime of second-degree murder, conduct that falls within the second-degree-murder category cannot complete the crime of first-degree murder. The Byford court recognized that the Kazalyn instruction carried significant danger of convictions for first-degree murder when the conduct amounted to only second-degree murder, hence the proposed detailed instruction clearly setting forth the definitions of each mens rea element for first-degree murder. Thus, implicit in and inescapable from Byford is the pronouncement that it is unconstitutional to convict for first-degree murder when the conduct falls only within the ambit of second-degree murder.

Similarly, Byford establishes a procedure without which the likelihood of an accurate conviction is significantly diminished. Absent the articulated jury instruction proposed in Byford, there is significant likelihood that persons, such as Flanagan, would be (and was) convicted unjustly.

In sum, the instruction regarding premeditation and deliberation created a strong likelihood

that the jury convicted Flanagan of first-degree murder, rather than second-degree murder, due to the inadequate explanation of the distinction between the two offenses. The verdict and sentence are therefore unreliable and should be vacated.

P. Claim 16

The United States and Nevada constitutions prohibit the State from using the same felony predicate as a basis for both a felony murder conviction and as an aggravating factor in subsequent capital sentencing. McConnell v. State, 102 P.3d 606, 624 (Nev. 2004) ("McConnell 2"). The State misconstrues this Court's precedent in an attempt to deny Flanagan this constitutional protection.[11]

1. Under Nevada law, McConnell 2 announced a "new rule" deserving retroactive application.

Consistent with this Court's case law, McConnell 2 should be applied retroactively.[12] As previously discussed (Claim 12), this Court will apply a "new rule" of constitutional law to habeas claims if either (1) the rule establishes 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; or (2) the rule establishes a procedure without which the likelihood of an accurate conviction is seriously diminished. Colwell v. State, 118 Nev. 807, 819-20, 59 P.3d 463 (2002).

Flanagan recognizes that McConnell 2's holding fits within this Court's classification of a "new rule."[13] Colwell, 59 P.3d at 472 (stating that "a rule is new, for example, when the decision

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[11] The State's assertion that this Court has implicitly rejected applying McConnell 2 retroactively simply ignores the multiple statements by this Court to the contrary. See Bennett, 121 P.3d at 609 ("[T]his court has not decided whether McConnell is to be given retroactive effect to final cases . . . ."); McConnell v. State, 107 P.3d 1287, 1290 (Nev. 2005) ("McConnell 3") ("Amicus first points out accurately that McConnell did not address whether the ruling regarding felony aggravators is retroactive . . . .").

[12] Both the State and Flanagan have now briefed the issue of retroactivity. Unlike the procedural posture of McConnell 2, Flanagan's current appeal represents "the appropriate post-conviction case" for addressing retroactivity because it "presents and briefs the issue." See McConnell 3, 107 P.3d at 1290.

[13] Although this Court's case law indicates that McConnell 2 qualifies as a "new rule" for retroactivity purposes under Nevada law, Flanagan maintains that the decision in McConnell 2 was dictated by clearly established federal law as interpreted by the United States Supreme Court nearly two decades earlier. See McConnell 2, 102 P.3d at 620, 624 (recognizing that Nevada's use of felony aggravators was inconsistent with Lowenfield v. Phelps, 484 U.S. 231 (1988)). Should this

announcing it overrules precedent"). Even when classified as a new rule, McConnell 2 satisfies the requirements for retroactive application. First, McConnell 2 was expressly based on constitutional limitations within both the state and federal constitutions. See 102 P.3d at 624. Second, McConnell 2 triggers Colwell's second exception for retroactivity because the accuracy of the jury's sentencing verdict is "seriously diminished without the rule." Colwell, 59 P.3d at 472. This Court has recognized that the improper use of an aggravator contributes to undermining the reliability of a jury's sentencing determination. State v. Bennett, 81 P.3d at 7. In fact, McConnell 2 expressly detailed a certain procedure to be followed by prosecutors to avoid the potential of a defendant being unconstitutionally executed. McConnell 2, 102 P.3d at 624; see also Bennett, supra, (describing as "troubling" the state's position that McConnell 2 may not apply absent a specific finding by the jury that Flanagan was convicted based solely on felony murder).[14]

2. McConnell 2 dictates that Flanagan's death sentence was unconstitutionally based on the same felony predicate used for his conviction.

Flanagan was unconstitutionally sentenced to death in light of McConnell 2. This Court's admonishments read as if specifically directed at the unsound procedures followed in Flanagan's conviction and sentencing. As this Court stated:

> if [the State] charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder.

McConnell 2, 102 P.3d at 624. In Flanagan's guilt phase trial, the jury was instructed that first degree murder was satisfied by either premeditation or felony murder (12 AA 2726). But the

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Court agree, McConnell 2's holding would apply to Flanagan. See Clem, 81 P.3d at 531 (2003) ("[I]f a rule is not new, it applies retroactively.").

[14] The McConnell 2 rule can also satisfy the first retroactivity exception listed in Colwell. By prohibiting a sentence of death based on an element that also serves as a prerequisite for the underlying crime, the McConnell 2 rule proscribes imposing a certain punishment for a certain offense. See Colwell, 59 P.3d at 472.

verdict form did not specify upon which ground the jury relied (12 AA 2761-62). In the third penalty phase, the jury did find that four aggravating circumstances outweighed three mitigating circumstances. But two of the aggravating circumstances involved commission of the underlying felony, as expressly rejected by McConnell 2 (25 AA 5966-6000).

The State's attempt to downplay the significance of the felony murder charge is belied by the prosecutor's own arguments. During the guilt phase, the prosecutor expressly asked the jury to "find another way to get to first degree murder[:] The felony murder rule and here it is." (11 AA 2503); see also (11 AA 2504), "And the one final thing I should say about the felony murder rule is what is does is to take the place of premeditation."). The State's closing argument during the third penalty phase followed a similar pattern: because another jury had already found Flanagan guilty of robbery and burglary, the aggravating circumstances outweighed the mitigating circumstances in favor of a death sentence. See 24 AA 5889. McConnell 2 makes clear that such a rationale is unconstitutional. 102 P.3d at 624.[15]

Q. Claim 17

Contrary to the State's assertion, Flanagan did assert a claim of ineffective assistance of counsel in the District Court (26 AA 6896-97, 6928-29; 27 AA 6622). The State made the same erroneous assertion in its identical response to Flanagan's seventeenth claim at that time (27 AA 7062).

[15] As explained more fully above, see supra, Flanagan's claim deserves consideration regardless of any potential procedural default. A petitioner can avoid application of a procedural bar by demonstrating that, but for constitutional error, no reasonable juror would have returned a death sentence. Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519 (2001). This Court's holding in Bennett is on point. In Bennett, this Court refused to apply procedural bars to a successive petition where the improper use of an aggravator, when combined with the state's other constitutional violations, "undermined the reliability of the jury's sentencing determination." 81 P.3d at 7. Like the petitioner in Bennett, Flanagan is a habeas petitioner whose death sentence was a product of legal analysis this Court has subsequently rejected. Absent the unconstitutional use of the underlying felony as an aggravator, there is no reliable means for concluding the jury would have imposed the same sentence of death. Because this sentence was unreliable, the potential for a fundamental miscarriage of justice necessitates review of this claim regardless of potential procedural default issues.

R. Claim 20

Judge Becker's ruling on the defense motion to disqualify Judge Mosley (19 AA 4487) is a model of judicial diplomacy. Judges do not get disqualified for bias by their fellow judges when there is no basis. Pike's affidavit (30 AA 7148, ¶¶ 5-10, 12-13) makes clear the many ways in which Judge Mosley put pressure on the defense that had the effect of bias against Flanagan.

S. Claim 22

The information on which this case went to trial charged Flanagan only with the murder of Mrs. Gordon (1 AA 242). Yet he was convicted of killing her and Mr. Gordon (12 AA 2761-62). This is a fundamental constitutional violation in itself, and when coupled with counsel's failure to address it (see Claim 4) requires relief.

III. CONCLUSION

For all of the reasons set forth above, in Appellant's Opening Brief, and in the evidence presented below, Flanagan is entitled to a new trial. In the alternative, a remand for a full and fair fact-finding is required.

DATED this _____ day of January, 2006.

Respectfully submitted,

POTTER LAW OFFICES

By:_____
Cal J. Potter, III

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By_____
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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.**	Case No. 40232 Death Penalty Case

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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 20 day of January, 2006.

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CERTIFICATE OF MAILING

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

Steven S. Owens
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Office of the District Attorney
200 ~~S. Third Street~~ Lewis Ave.
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Dated this 23 day of January, 2006.

Michelle Farmer

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