

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

APR 05 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 SUPPLEMENTAL OPENING BRIEF
ADDRESSING AIDING AND ABETTING INSTRUCTIONS

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INTRODUCTION 1

Claim 1C: The State failed to disclose exculpatory evidence, and instructed witnesses not to disclose exculpatory evidence to the defense or to the Court. 1

Claim 4: Flanagan’s conviction and death sentence are invalid under the state and federal constitutional guarantees of effective assistance of counsel, due process of law, equal protection of the laws, cross examination and confrontation, and a reliable sentence due to the failure of trial counsel to provide reasonably effective assistance. 2

Claim 10: Flanagan’s conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection of the laws, effective assistance of counsel and a reliable sentence because Flanagan was not afforded effective assistance of counsel on appeal. 2

Claim 12: Flanagan’s conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence because the trial court failed to instruct the jury during the guilt and penalty trials concerning reasonable doubt, thereby lessening the State’s burden of proof. 2

Claim 22: Flanagan’s conviction and death sentence are invalid under state and federal constitutional guarantees of due process of law, equal protection, the right to be informed of the nature and cause of a criminal accusation and a reliable sentence because the charging document did not specifically apprise Flanagan of those acts he was alleged to have committed. 2

Claim 25: Flanagan’s conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the admission of evidence and unconstitutional jury instructions, misconduct by state officials and witnesses, and ineffective assistance of counsel. 3

Claim 37: Flanagan’s conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, a fair tribunal, an impartial jury, and a reliable sentence due to the trial court’s erroneous instructions to the jury regarding the standard for conviction for aiding and abetting. 3

TABLE OF AUTHORITIES

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Cases

Mitchell v. State,
 122 Nev. Adv. Op. No. 107 (Dec. 21, 2006)..... 1, 4

Sharma v. State,
 118 Nev. 648 (2002) 1, 4

1 **Claim 4: Flanagan's conviction and death sentence are invalid under the**
2 **state and federal constitutional guarantees of effective assistance of**
3 **counsel, due process of law, equal protection of the laws, cross examination**
4 **and confrontation, and a reliable sentence due to the failure of trial**
5 **counsel to provide reasonably effective assistance.**

6 Trial counsel failed to investigate Flanagan's case and to put forth
7 evidence of Flanagan's lack of specific intent that Mr. Gordon be killed. If trial
8 counsel had conducted a minimally competent investigation, counsel would have
9 discovered such evidence. Flanagan was materially prejudiced by trial counsel's
10 failures. Flanagan was also materially prejudiced by trial counsel's failure to object to
11 the court's erroneous instructions on aiding and abetting, because if the jury had been
12 properly instructed on aiding and abetting, Flanagan would not have been convicted.

13 **Claim 10: Flanagan's conviction and death sentence are invalid under**
14 **state and federal constitutional guarantees of due process, equal protection**
15 **of the laws, effective assistance of counsel and a reliable sentence because**
16 **Flanagan was not afforded effective assistance of counsel on appeal.**

17 Appellate counsel's failure to argue the issue of the trial court's
18 erroneous instructions on aiding and abetting was constitutionally ineffective
19 assistance of counsel. Flanagan merits relief for counsel's prejudicial failure to raise
20 this meritorious issue.

21 **Claim 12: Flanagan's conviction and death sentence are invalid under**
22 **state and federal constitutional guarantees of due process, equal**
23 **protection, trial before an impartial jury and a reliable sentence because**
24 **the trial court failed to instruct the jury during the guilt and penalty trials**
25 **concerning reasonable doubt, thereby lessening the State's burden of**
26 **proof.**

 The flawed instructions given to the jury were compounded by the
erroneous instructions the jury received on aiding and abetting, which failed to give
the jury the proper burden of proof to find Flanagan guilty of aiding and abetting.

Claim 22: Flanagan's conviction and death sentence are invalid under
state and federal constitutional guarantees of due process of law, equal
protection, the right to be informed of the nature and cause of a criminal

1 **accusation and a reliable sentence because the charging document did not**
2 **specifically apprise Flanagan of those acts he was alleged to have**
3 **committed.**

4 Although the Information in Flanagan's case charged Flanagan with
5 aiding and abetting the murder of Carl Gordon, the State proceeded at trial on multiple
6 theories, including that he acted as a principal. This prejudicial error was
7 compounded by the fact that, had the jury been properly instructed on aiding and
8 abetting and had trial counsel been properly informed of the theories of liability the
9 State intended to pursue, counsel could have demonstrated that Flanagan was actually
10 innocent of the crime of aiding and abetting.

11 **Claim 25: Flanagan's conviction and death sentence are invalid under**
12 **state and federal constitutional guarantees of due process, equal**
13 **protection, the effective assistance of counsel, a fair tribunal, an impartial**
14 **jury, and a reliable sentence due to the cumulative errors in the admission**
15 **of evidence and unconstitutional jury instructions, misconduct by state**
16 **officials and witnesses, and ineffective assistance of counsel.**

17 The erroneous jury instructions on aiding and abetting added weight to
18 the numerous other constitutional errors that occurred during Flanagan's trial, and
19 Flanagan merits relief for these errors.

20 **Claim 37: Flanagan's conviction and death sentence are invalid under**
21 **state and federal constitutional guarantees of due process, equal**
22 **protection, a fair tribunal, an impartial jury, and a reliable sentence due to**
23 **the trial court's erroneous instructions to the jury regarding the standard**
24 **for conviction for aiding and abetting.**

25 Flanagan was charged with aiding and abetting the murder of Carl
26 Gordon. 1 ROA 111-16. With regard to aiding the abetting, the jury was instructed
27 as follows:

28 Where several parties join together in a common design to
29 commit any unlawful act, each is criminally responsible for
30 the acts of his confederates committed in furtherance of the
31 common design. In contemplation of law, the act of one is
32 the act of all. (Instruction No. 6, 12 AA 2714.)

1 Every person concerned in the commission of a crime,
2 whether he directly commits the act constituting the
3 offense, or aids and abets in the commission, and whether
4 present or absent; and every person who, directly or
5 indirectly, counsels, encourages, hires, commands, induces
6 or otherwise procures another to commit a crime, is a
7 principal, and shall be proceeded against and punished as
8 such. (Instruction No. 31, 12 AA 2739.)

9 To aid and abet is to assist or support the efforts of another
10 in the commission of a crime. (Instruction No. 32, 12 AA
11 2740.)

12 These instructions were precisely the kind of instructions this Court
13 found deficient in *Sharma v. State*, 118 Nev. 648 (2002), and *Mitchell v. State*, 122
14 Nev. Adv. Op. No. 107 (Dec. 21, 2006), because they permitted the jury to find
15 Flanagan guilty of aiding and abetting even if he did not have the specific intent that
16 Mr. Gordon be murdered. In fact, Flanagan did not have that specific intent. *See*,
17 *e.g.*, AOB at 3 (noting Robert Ramirez told police Flanagan was actively trying to
18 prevent the murders, and citing 30 AA 7186, Ramirez Dec. ¶ 13). The instructional
19 error was more prejudicial because, although Flanagan was charged with aiding and
20 abetting, at trial the State proceeded against Flanagan on multiple theories including
21 principal liability. The jury convicted Flanagan of First Degree murder in connection
22 with the death of Mr. Gordon without ever specifying the theory of liability used to
23 convict Flanagan. The prosecutor was not required to prove intent in order to convict
24 Flanagan of first degree murder. Flanagan merits relief on this claim because the
25 Court, the prosecutor, and defense counsel permitted the jury to, and the jury did in
26 fact, convict Flanagan using an unconstitutional burden of proof.

27 The court in *Mitchell* concluded that “under case law at the time of the
28 robbery, Mitchell could have only been guilty of attempted murder if he specifically
29 intended to aid [his co-defendant] in killing [the victim] and if he specifically intended
30 that [the victim] be killed.” *Mitchell, supra*, 122 Nev. Adv. Op. No. 107. The court
31 concluded that under *Sharma*, a defendant should not be convicted of attempted

1 murder as an aider or abettor unless he had the specific intent to kill. Flanagan was
2 convicted without being given the benefit of an accurate instruction on this issue. His
3 conviction and death sentence should be vacated.

4 DATED this 8 day of March, 2007.

5 Respectfully submitted,

6 **POTTER LAW OFFICES**

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

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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

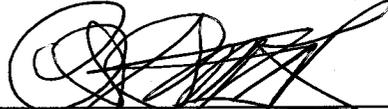
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20 **CERTIFICATE OF COMPLIANCE**

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

1 I understand that I may be subject to sanctions in the event that the accompanying brief is not in
2 conformity with the requirements of the Nevada Rules of Appellate Procedure.

3 DATED this 8 day of March, 2007.

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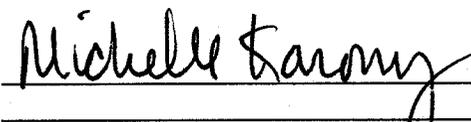
18 Attorneys for Appellant Dale Flanagan
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRC 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 OPENING BRIEF ADDRESSING AIDING AND
5 ABETTING INSTRUCTIONS and CERTIFICATE OF 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 March, 2007.

12 
13 _____
14 Employee of Potter Law Offices