ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 40232

RESPONDENT'S THIRD SUPPLEMENTAL ANSWERING BRIEF

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

CAL J. POTTER, III
Nevada Bar No. 001988
Potter Law Offices
1125 Shadow Lane
Las Vegas, Nevada 89102
(702) 385-1954

ROBERT D. NEWELL
Oregon State Bar No. 79091
Davis Wright Tremaine LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland Oregon 97201
(503) 241-2300

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 40232

RESPONDENT'S THIRD SUPPLEMENTAL ANSWERING BRIEF

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

CAL J. POTTER, III
Nevada Bar No. 001988
Potter Law Offices
1125 Shadow Lane
Las Vegas, Nevada 89102
(702) 385-1954

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ROBERT D. NEWELL
Oregon State Bar No. 79091
Davis Wright Tremaine LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland Oregon 97201
(503) 241-2300

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

//

//

//

Nevada Revised Statutes:

Other Authorities:

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 40232

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

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

STATEMENT OF THE CASE

The State respectfully directs this Court's attention to the State's Statement of the Case as summarized in its Answering Brief to Defendant's appeal from denial of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

STATEMENT OF THE FACTS

The State respectfully directs this Court's attention to the State's Statement of the Facts as summarized in its Answer to Defendant's appeal from denial of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

ARGUMENT

The State files this Supplemental Memorandum to Argument XII of its Answering Brief at pages 38-43 on file herein, pursuant to NRAP Rule 31 (d), and in response to Appellant's supplemental authorities.

The Ninth Circuit's recent opinion in *Polk v. Sandoval*, is not yet final[1].

[1] The Attorney General has filed a petition for rehearing.

Therefore, it is premature to consider *Polk v. Sandoval* because it errs in its application of federal law and may be subject to revision or reconsideration at a later date. Any conceivable error in this case is harmless beyond a reasonable doubt when considering the particular facts of this case.

I.
THE NINTH CIRCUIT'S DECISION IN *POLK* WAS WRONGFULLY DECIDED ON FEDERAL LAW.

Polk v. Sandoval, 2007 WL 2597437 reaches several conclusions about the constitutionality of the *Kazalyn* instruction in Nevada. The State proffers that the Ninth Circuit has misapplied the rationale of three United States Supreme Court cases: *In re Winship*, 397 U.S. 358 (1970), *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985). Furthermore, the Ninth Circuit has also misapprehended Nevada case law with respect to the meaning of the *Kazalyn* instruction and the Nevada Supreme Court's decision in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000).

In order for a federal court to avoid procedural bars under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a habeas petitioner must show that the state court's adjudication of a claim upon its merits was either one, contrary to, or involved an unreasonable application of established Federal Law as established by the United States Supreme Court or, two, based on an unreasonable determination of the facts based on the evidence in the state court proceeding. Further, a state court decision is contrary only if a state court failed to apply the correct controlling authority or applied the correct authority in a case involving materially indistinguishable facts and reaches a different result than the United States Supreme Court. In addition, the unreasonable standard means "objectively unreasonable." Unreasonable does not equate to a state court erroneously or incorrectly applying federal law. *Williams v. Taylor*, 529 U.S. 362 (2000). In other words, if the state court application of federal law can be supported by a reasoned argument, it is not

challengeable under AEDPA.

The *Polk* court appears to avoid the AEDPA by concluding that the language in the *Kazalyn* instruction creates either an unconstitutional mandatory conclusion or rebuttable presumption in violation of *Sandstrom* and *Francis* and therefore a violation of *Winship* occurred because the jury was permitted to convict Polk without finding an element of the offense beyond a reasonable doubt. The contested language is "if the jury believes...that the act constituting the killing has been preceded by and has been the result of premeditation...it is willful, deliberate and premeditated murder." To understand why the State contends that this is not correct, it is necessary to review the holdings of these federal cases.

In re Winship, 397 U.S. 358 (1970), held that in every criminal case the prosecution was required to prove beyond a reasonable doubt every fact necessary to constitute the crime charged because this standard was a fundamental principle and therefore required under due process. The Supreme Court held that this due process principle applied in juvenile delinquency adjudications rejecting a state statute that permitted a preponderance of the evidence standard in such cases.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Supreme Court had before it the following instruction:

> "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."

The Montana State Supreme Court construed the instruction to be a rebuttable presumption which shifted the burden of production of evidence to the defendant but not the burden of proof. The U.S Supreme Court concluded that the test was not how the Montana Supreme Court viewed the instruction, but how a reasonable juror would view the instruction and it was uncontested in the case that reasonable jurors' might misunderstand the instruction and believe they had to find the defendant guilty if they found his actions to be voluntary and the death was an ordinary consequence of those actions. The majority of the High Court also indicated it did not matter whether the

instruction was viewed as a mandatory conclusive presumption or a mandatory rebuttable presumption.[2]

In *Francis v. Franklin*, 471 U.S. 307 (1985), the instructions in controversy involved use of the word "presumed," but also added additional language qualifying the use of the presumptions:

> "A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted."

The facts of that case are highly relevant. In *Francis*, defendant was an escapee who threatened but did not shoot several people, even when those people failed to comply with his orders and ultimately were released by Defendant from his control. However, one person slammed a door in his face while he was holding a gun to them and defendant claimed that the door slamming in his face startled him and that he just squeezed the trigger instinctively and accidentally. Shortly after deliberations began in Defendant's trial for murder, the jury wanted to be reinstructed on intent and the definition of accident.

Five Justices in that case found that the instructions established mandatory rebuttable presumptions and that a reasonable jury would not have understood that

---

[2] Chief Justice Burger and Justice Rehnquist concurred with general holding but reserved ruling about the effect of a rebuttable presumption.

these were permissive presumptions. The dissenting Justices did not agree and held that the language was constitutionally permissible because of the last sentence in the instructions and that no reasonable jury would understand that they must convict even if they found the shooting to be accidental.

Here and in *Polk*, the *Kazalyn* instruction is significantly different from these instructions. It does not contain any presumption language. Rather, read in its entirety, as required by *Sandstrom* and *Francis*, the instruction indicates that if a killing is the product of a distinctly formed **design** and **determination** to kill, then the killing is willful, deliberate, and premeditated. AA XII, 2726. The instruction correctly defines both premeditation and deliberation, although it only talks about premeditation. Moreover, when taken in context with instructions on implied malice, AA XII, 2724-25, a jury would know that first degree murder involves a cool thought process, however short as opposed to an instantaneous impulsive emotional reaction which would constitute second degree murder or, if additional facts warranted, voluntary or involuntary manslaughter.[3] AA XII, 2734.

The State further asserts that Flanagan has not raised or preserved any challenge to the *Kazalyn* instruction as creating an unconstitutional presumption as was addressed by the *Polk* court. Rather, Flanagan challenges the sufficiency of the *Kazalyn* instruction in its description of the requisite mens rea for first degree murder and the refusal to give an instruction separately defining deliberation. Similarly, *Byford* did not address the *Kazalyn* instruction in terms of creating an unconstitutional presumption, rather, only that the instantaneous language of the instruction blurred the distinction between second and first degree murder because a rash, unconsidered impulsive, emotional, gut reaction is always instantaneous. In fact, that is exactly what the *Kazalyn* court held. The Nevada Supreme Court noted the *Kazalyn*

[3] The *Polk* opinion does not take into consideration any instructions on second degree murder or manslaughter, it does not indicate the defense theory of the case and the facts it does cite, pre-murder threats, the use of a bullet-proof vest, or the fact that multiple shots fired from a gun would support premeditation and deliberation.

definition of premeditation and the rapidity by which such a decision can be made comported with the Nevada Supreme Court's definitions of deliberate and premeditated in *Payne v. State*, 81 Nev. 503, 406 P.2d 922 (1965). The Court further noted that willful, premeditated and deliberate are three separate elements, but felt *Kazalyn* encompassed all three and that the speed of the decision was not at issue.

In *Payne*, the Nevada Supreme Court indicated that the distinguishing characteristic between second and first degree murder is the lack of impulse. An impulsive act is an instantaneous reaction with no thought or consideration of the consequences. The terms "design" and "determination" both contemplate a thought process and the remaining *Kazalyn* language simply notes this thought process can be virtually instantaneous. There is no reasonable likelihood that a reasonable juror would mistakenly believe that the defendant could be convicted first degree murder based on an impulsive, emotional reaction to kill, so long as other instructions specify the correct definition of second degree murder or manslaughter.

Byford noted that the trouble with the *Kazalyn* instruction involved an over emphasis on premeditation. This, combined with the Court's subsequent holding in *Powell v. State*, 108 Nev. 700, 838 P2d 921 (1992) that "deliberate" was redundant with "premeditate " and *Greene v. State*, 113 Nev. 157, 931 P.2d 54 (1997) which stated that "willful, deliberate and premeditated" was a single phrase denoting intent to commit the act and intention that the act result in death. Thus it was not the *Kazalyn* instruction that was the problem, but the subsequent case law and the Nevada Supreme Court's concerns that this was blurring the common law distinction between first and second degree murder

The Court noted that no definition of premeditation and deliberation ever needed to be given, as these were commonly understood words with an everyday meaning. As noted in Justice Maupin's concurrence, premeditation means "to think, consider, or deliberate beforehand" and deliberate is "to do on purpose" or the process of deliberation. The two words are so close in their ordinary meaning, that they are

virtually indistinguishable. Nevertheless to avoid the possibility that lower courts might incorrectly conclude, based on *Powell* and *Greene*, that Nevada law no longer recognized the distinction between a rash impulse and a considered course of action, the Court decided it was better to set forth definitions of all three terms to be used in the future while also recognizing that no definitions need be given at all.

The new instructions define willful as the intention to kill, thus eliminating accidents or mischance. Deliberation is defined as the ability to weigh or consider one's actions before shooting. It can be a short time period and the key feature is either lack of passion or a "cooling off" period between the passion and the act – it cannot be a rash unconsidered impulse. Premeditation is a distinct design to kill and again it can be formed instantaneously but is distinguished from the unconsidered rash impulsive decision that constitutes second degree murder or, if provocation exists, manslaughter. As noted by Justice Maupin, the new instructions indicate there is no appreciable difference between premeditation and deliberation, except, perhaps, the concept of the cooling off period. Because the definitions of deliberate and premeditated are virtually indistinguishable in their everyday sense and in the new instructions and a "design" to kill is always deliberate, the *Byford* Court concluded the *Kazalyn* was not erroneous and did not implicate constitutional issues. This is why the Nevada Supreme Court did not see any issue of retroactivity in *Garner v. State*, 116 Nev. 770, 6 P.3d 1013 (2000). The Court simply looked at the facts (bartender found handcuffed with two gunshots to the head) and determined there was no issue that the killing was deliberate and premeditated. Garner claimed he was not the shooter, he drove a friend to the bar without knowing what his friend was up to and the friend shot and killed the bartender.

The above review of case law demonstrates why the Nevada Supreme Court's rulings are not an unreasonable interpretation of federal law and why AEDPA applied. It also demonstrates why the Ninth Circuit's harmless error analysis is in error. The Ninth Circuit relied on *Byford*'s use of words like "coolness and reflection" but

ignored that this process can be instantaneous and the "passion" and "unconsidered rash impulse" language. The Ninth Circuit redefined "deliberate" in a meaning inconsistent with Nevada law. For these reasons, the *Polk* decision is bad law and should not apply here.

II.
ANY ERROR IN THE INSTRUCTIONS ON PREMEDITATION AND DELIBERATION IS HARMLESS BEYOND A REASONABLE DOUBT.

A defendant would not be entitled to relief for a Constitutional error unless that defendant can show that "the error had a substantial and injurious effect or influence in determining the jury's verdict." *Polk, citing Brecht v. Abrahamson*, 507 US 619, 637, 113 S.Ct. 1710 (1993) (internal quotation marks and citation omitted); *see also Fry v. Pliler*, 127 S.Ct. 2321 (2007); *California v. Roy*, 519 US 2, 117 S.Ct. 337 (1996).

Here, even if this Court were to find that Defendant was entitled to the revised premeditation and deliberation jury instruction, Defendant's conviction should nevertheless be affirmed because the evidence in this case supports deliberation and premeditation on Defendant's part. In fact, this Court noted that the evidence overwhelmingly demonstrated that Flanagan intended to kill or have one of his cohorts[4] kill, both Carl and Colleen Gordon. *Flanagan v. State,* 104 Nev. at 107, 754 P.2d, 837 (1988). The evidence adduced at trial demonstrated that Flanagan, Moore and others met before the killings to plan out how they would get into the Gordon residence, how Carl and Colleen Gordon would be killed and by whom. Flanagan would kill Colleen and the noise would lure Carl downstairs where he would be killed by Moore. AA VI, 1238-47; 1375-81; AA VII, 1597-1601. Other witnesses testified the Flanagan shot Colleen while Moore killed Carl as he came down the stairs to investigate what was happening. AA VI, 1408-33; AA VII, 1619-29. Additional testimony was presented that Flanagan admitted to committing, and aiding in

[4] In addition to Flanagan, the following individuals were involved in the plan: Randolph Moore, John Ray Luckett, Roy McDowell, Tom Akers and Michael Walsh.

commission of, the murders. AA VIII, 1754-57, 1772-79. Two of the weapons used in the shootings were recovered from Lake Mead, where they had been dumped by Moore and another accomplice. AA VII, 1632-33; AA VIII, 1945-49, 1956-67; AA IX, 1968-73. Witnesses also identified a knife found at the scene as Flanagan's or similar to one Flanagan carried and that he and another accomplice purchased a duplicate knife after the murders to protect against allegations that the knife at the scene belonged to him. AA VI, 1290-92, 1354-56; AA VII, 1480-85; AA VIII, 1721-28, 1750-53. Finally, Flanagan was scheduled to work on the day of the murders and called to say he couldn't take his shift. AA VIII, 1738-41.

The evidence overwhelmingly supports the conclusion that Flanagan planned the murder of Carl Gordon and had the specific intent to aid and abet Moore in that murder.

Furthermore, under NRS 200.030(1)(b) first degree murder includes murder which is "[c]omitted in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years or child abuse."

Here, Defendant was adjudged guilty of both burglary and robbery, felonies which support the felony murder rule. As such, Defendant automatically possessed the requisite mental intent necessary to be guilty of first degree murder. In other words, the jury instructions on intent could not have altered the jury's judgment in this case since they found defendant guilty of two felonies which support the felony murder rule.

Similarly, in *Bridges v. State*, 116 Nev. 752, 6 P.3d 1000, 1008 (2000), the defendant in that case argued that the jury was improperly instructed as to premeditation and deliberation. This Court ruled that the defendant was not entitled to relief on this issue because the *Byford* instruction was not retroactive, the evidence of premeditation and deliberation was overwhelming, and the evidence of first degree murder under a felony murder theory was overwhelming. This Court ruled that it was

appropriate to affirm the conviction as long as a valid independent basis existed to uphold the jury's verdict. *Id.*

Here, the Defendant is not entitled to relief because the *Byford* instruction was not a proper statement of the law at the time of the Defendant's trial and the evidence supporting the Defendant's murder conviction under both the premeditation and deliberation theory and felony murder theory was overwhelming.

Even though *Polk v. Sandoval* does not affect the instant appeal, this Court should consider overruling or at least clarifying its decision in *Byford.* The issues before the court today, most notably this case and *Polk*, are a result of *Byford* which went too far in describing willful, premeditated and deliberate as separate elements of what is in reality a single mens rea pertinent to 1st degree murder. To avoid further confusion and unnecessary reversals by the federal courts, this Court should retreat from its holding in *Byford* which has apparently led to unfortunate and unintended interpretations by the federal courts.

CONCLUSION

WHEREFORE, the State submits that *Polk* does not provide relief for Appellant on the facts of this case.

Dated this 24th day of October, 2007.

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 24th day of October, 2007.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Third Supplemental Answering Brief to the attorney of record listed below on October 24, 2007.

Cal Potter, Esq.
Potter Law Offices
1125 Shadow Lane
Las Vegas, Nevada 89102

Robert D. Newell
Davis Wright Tremaine, LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201

Employee, Clark County
District Attorney's Office

OWENS/Michael Radovcic/english