

IN THE SUPREME COURT OF THE STATE OF NEVADA

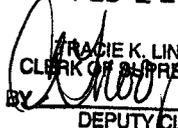
DALE EDWARD FLANAGAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40232

**FILED**

FEB 22 2008

ORDER OF AFFIRMANCE

FRADIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Mark W. Gibbons and Michelle Leavitt, Judges.

FACTUAL AND PROCEDURAL HISTORY

Appellant Dale Flanagan's grandparents, Carl and Colleen Gordon, were found dead on November 6, 1984, Carl having been shot seven times in the back and chest and Colleen having been shot three times in the head. Six young men were involved in the plot to kill the Gordons. Flanagan shot Colleen, and his codefendant Randolph Moore shot Carl. Flanagan and Moore were tried in September and October 1985 along with two other codefendants, Johnny Ray Luckett and Roy McDowell. The four men were convicted, and Flanagan and Moore received death sentences. Tom Akers and Michael Walsh were also charged in the murders and pleaded guilty to manslaughter and two counts of murder, respectively.

On direct appeal, this court characterized as overwhelming the evidence that Flanagan, Moore, Luckett, and McDowell killed the Gordons so that Flanagan could obtain insurance proceeds and an inheritance. Although this court affirmed Flanagan's convictions, it

reversed his and Moore's sentences and remanded the matter for a new penalty hearing due to prosecutorial misconduct.<sup>1</sup> Flanagan and Moore were again sentenced to death, and they appealed. This court affirmed the death sentences.<sup>2</sup> The United States Supreme Court vacated that decision, however, and remanded for reconsideration due to evidence presented at the second penalty hearing regarding Flanagan and Moore's occult beliefs and activities.<sup>3</sup> Upon remand, this court held that use of such evidence had been unconstitutional and remanded the case to the district court for a third penalty hearing.<sup>4</sup> After the third hearing, Flanagan and Moore once again received death sentences, and this court affirmed the sentences on appeal.<sup>5</sup>

Flanagan filed a timely post-conviction petition for a writ of habeas corpus. The district court summarily dismissed all of Flanagan's claims save his claim that personality conflicts between his two penalty hearing counsel deprived him of the effective assistance of counsel. The district court denied this claim as well after an evidentiary hearing. This appeal followed.

### DISCUSSION

Flanagan argues on appeal that the district court erred in denying his habeas petition without conducting an evidentiary hearing on

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<sup>1</sup>Flanagan v. State (Flanagan I), 104 Nev. 105, 754 P.2d 836 (1988).

<sup>2</sup>Flanagan v. State (Flanagan II), 107 Nev. 243, 810 P.2d 759 (1991).

<sup>3</sup>Moore v. Nevada, 503 U.S. 930 (1992).

<sup>4</sup>Flanagan v. State (Flanagan III), 109 Nev. 50, 846 P.2d 1053 (1993).

<sup>5</sup>Flanagan v. State (Flanagan IV), 112 Nev. 1409, 930 P.2d 691 (1996).

all of his claims but one. A post-conviction petitioner cannot rely on conclusory claims for relief.<sup>6</sup> An evidentiary hearing is required only if the claims presented in the petition are supported with specific factual allegations that if true would entitle the petitioner to relief.<sup>7</sup> A petitioner is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record.<sup>8</sup>

Initially, we address a procedural default matter raised by the State. In 1995, approximately one week prior to the commencement of his third penalty hearing, Flanagan filed a post-conviction petition for a writ of habeas corpus. The district court summarily denied the petition without making findings of fact and conclusions of law. Subsequently, the district court held a hearing respecting its denial of the petition. At that hearing, the parties discussed a mandamus petition that Flanagan had filed with this court challenging the district court's denial of his habeas petition. In denying the mandamus petition, this court stated that a denial of a habeas petition was an independently appealable determination and not an appropriate matter for extraordinary relief. After some discussion of the jurisdictional posture of the habeas petition, the district court concluded that its denial of the petition would be appealable only upon the entry of a final judgment in the criminal action. In this case, the district court concluded, the third penalty hearing remained pending and unresolved. Consequently, the district court concluded that Flanagan's notice of appeal did not divest it of jurisdiction

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<sup>6</sup>Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

<sup>7</sup>Id.; Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>8</sup>Hargrove, 100 Nev. at 503, 686 P.2d at 225.

to proceed with the third penalty hearing. After the third penalty hearing, this court considered the appeal from the district court's denial of habeas relief, along with Flanagan's appeal from his third penalty hearing.<sup>9</sup>

The State argues that to the extent the instant petition raised guilt phase issues, it is procedurally barred and successive in light of the 1995 habeas petition. We disagree. In denying the 1995 habeas petition, the district court essentially considered it premature in light of the then pending third penalty hearing and concluded that the filing of a notice of appeal did not divest its jurisdiction to proceed with the third penalty hearing. Because the 1995 petition was premature, we conclude that guilt phase matters raised in the instant habeas petition are not procedurally barred.

#### Claims of ineffective assistance of counsel

In his habeas petition, Flanagan raised a host of ineffective assistance of counsel claims relating to both the guilt phase of trial and subsequent penalty hearings. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Flanagan must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.<sup>10</sup> He must demonstrate prejudice by showing a reasonable probability that but for counsel's errors the result of the trial would have been different.<sup>11</sup>

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<sup>9</sup>Flanagan IV, 112 Nev. 1409, 930 P.2d 691.

<sup>10</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

<sup>11</sup>See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

### Guilt phase

Flanagan first argues that the district court erred in dismissing his claim that his counsel was ineffective for failing to adequately investigate, prepare, and present his case. Under the umbrella of this allegation, he asserts the following: counsel should have discovered that Robert Ramirez would have testified that Flanagan did not participate in the murders; counsel should have uncovered evidence demonstrating that Flanagan's character made it unlikely that he would have participated in the crimes; counsel failed to adequately cross-examine Wayne Wittig; counsel failed to investigate Angela Saldana's alleged criminal record; counsel unreasonably failed to examine crime scene evidence, interview potential witnesses, and obtain expert assistance in assessing the State's case against him; and counsel should have requested a continuance to further prepare his case.

We have carefully considered Flanagan's arguments and submissions in support of these claims and conclude that, in light of the overwhelming evidence of guilt presented at trial, they fail to demonstrate that, but for his counsel's allegedly deficient performance, the result of his trial would have been different. Therefore, we conclude that the district court did not err in summarily dismissing these claims.

Flanagan next claims that the district court erred in dismissing his claim that his counsel was ineffective for failing to file a motion in limine to exclude evidence of witchcraft proffered by codefendant Lockett. In Flanagan's appeal after his third penalty hearing, we concluded that the witchcraft evidence presented by Lockett was admissible to support Lockett's defense.<sup>12</sup> Therefore, there is no

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<sup>12</sup>Flanagan IV, 112 Nev. at 1417-20, 930 P.2d at 696-98.

reasonable probability a motion in limine would have been successful even had counsel filed one. Moreover, the other evidence presented by the State overwhelmingly proved that Flanagan and his codefendants planned and executed the murder plot for financial gain, not because of the influence of witchcraft. Therefore, the district court did not err in summarily dismissing this claim.

Flanagan argues that the district court erred in dismissing his claim that his counsel was ineffective for failing to object to the presence of armed guards and the jury's observation of him in shackles. Based on our review of the record and Flanagan's submissions in support of this claim, however, we conclude that his claims fail to establish a reasonable probability that the result of his trial would have been different had counsel objected. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan further contends that the district court erred in dismissing his claim that his counsel was ineffective for failing to secure a proper record of several bench conferences. He neglects, however, to explain any prejudice resulting from the absence of a record of these conferences.<sup>13</sup> Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan also complains that the district court erroneously dismissed his claim that counsel was ineffective for failing to challenge the vagueness of the information on the ground that it did not provide him adequate notice respecting the State's theory of liability in Carl Gordon's death. He argues that although the information charged him as an aider and abettor in Carl's murder, the State proceeded to trial on the theory

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<sup>13</sup>See Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003).

that he acted as a principal. NRS 195.020 provides, however, that one who aids or abets in the commission of a crime “is a principal and shall be proceeded against and punished as such.” Further, the record shows that the State’s theory throughout the proceedings was that Flanagan shot Colleen Gordon and that he aided and abetted Moore in Carl’s shooting. No evidence was adduced suggesting that Flanagan shot Carl Gordon. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan also asserts that the district court erred in dismissing his claim that his counsel was ineffective for failing to object to the district court’s requirement that all defense counsel agree on the exercise of peremptory challenges. NRS 175.041 provides: “When several defendants are tried together, they cannot sever their peremptory challenges, but must join them.” As we have long upheld the constitutionality of this mandate,<sup>14</sup> there was no reasonable basis upon which counsel should have objected. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan further contends that the district court erred in dismissing his claim that counsel failed to investigate his mental state and prove that he was under the influence of powerful psychotropic drugs on the night of the crime, which combined with his preexisting mental condition rendered him incapable of formulating any plan or intent to kill. Flanagan also asserts that counsel should have requested a competency hearing and reviewed his jail records.

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<sup>14</sup>See, e.g., White v. State, 83 Nev. 292, 297, 429 P.2d 55, 58 (1967) (concerning NRS 175.015, the predecessor to NRS 175.041).

To support these claims, Flanagan produced several affidavits and other documentation during post-conviction proceedings. In one affidavit, a psychologist described Flanagan's alleged troubled childhood, abuse by his stepfather and Carl Gordon, and Flanagan's drug abuse. However, the psychologist did not indicate that Flanagan was legally incompetent when he committed the charged crimes or was otherwise unable to form the intent necessary to kill.

Flanagan also produced an affidavit from Angela Saldana, an acquaintance of all the codefendants and Flanagan's former girlfriend, wherein she stated that Flanagan and Akers told her that Flanagan ingested "acid" on the night of the murders. She also averred that Flanagan often drank alcohol, smoked marijuana, "took speed, and acid, and sometimes took mushrooms." However, Flanagan does not allege that he ever advised counsel that he was under the influence of LSD on the night of the murders or at any other time. And trial counsel's affidavit is silent as to whether he was aware of Flanagan's alleged LSD abuse.

Flanagan also included correctional-facility medical records listing the medication he was receiving during 1985. Although these records show that Flanagan was administered a number of drugs prior to trial, none were specifically identified as psychotropic. Further, Flanagan failed to identify which psychotropic drug he was allegedly taking that rendered him incompetent to stand trial. And although Flanagan claims that he was forced to take psychotropic drugs, his documentation does not bear that out. Moreover, nothing in the trial transcripts suggests that Flanagan was incompetent. In addition, a psychiatrist with the Southern Nevada Adult Mental Health Services stated in a psychiatric examination report dated approximately three months before Flanagan's original trial

commenced that Flanagan was “fully competent to stand trial as he understands exactly the court procedures.”

Nothing in Flanagan’s submissions indicates that counsel had any reason to suspect that Flanagan was under the influence of psychotropic drugs at any time or that he was incompetent. And considering the evidence presented at trial and Flanagan’s submissions, we conclude that the record repels his claim that he was legally incompetent or otherwise unable to form the requisite intent to kill. Moreover, even if counsel had discovered and produced at trial Flanagan’s desired evidence, he failed to demonstrate that the absence of it prejudiced him in light of the overwhelming evidence that he was instrumental in devising the murder plot and the killings were planned over the course of several weeks. Therefore, we conclude that the district court did not err in summarily dismissing this claim.<sup>15</sup>

Flanagan contends that his trial counsel was ineffective for failing to object to the aiding and abetting instructions on the ground that they failed to inform the jury of the specific intent necessary to hold him liable as an aider and abettor in Carl Gordon’s murder under Sharma v. State.<sup>16</sup> However, even assuming counsel should have objected to the

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<sup>15</sup>To the extent Flanagan argues that the district court should have ordered a competency hearing, this claim was appropriate for direct appeal. As he failed to show good cause for failing to raise this claim previously and prejudice, we conclude that the district court did not err in summarily dismissing this claim. See NRS 34.810(b)(2).

<sup>16</sup>118 Nev. 648, 56 P.3d 868 (2002); see Mitchell v. State, 122 Nev. \_\_\_, 149 P.3d 33, 38 & n.25 (2006) (holding that Sharma clarified existing law and did not apply retroactively).

challenged instructions, Flanagan cannot demonstrate prejudice here. The State presented overwhelming evidence that Flanagan and his cohorts planned and executed the murders expressly so that Flanagan would receive life insurance and inheritance proceeds. Murdering both Carl and Colleen was necessary to effectuate this objective. Flanagan, Moore, and the others devised the murderous plot at least one month prior to the killings, discussing in detail who would shoot Carl and Colleen and in what manner, how the men would gain entry into the Gordon residence, and the types of weapons to be used. The men also agreed that the murders would be made to look like a robbery or burglary gone wrong. The evidence overwhelmingly supports a finding that Flanagan had the intent necessary to be held liable for Carl's murder under an aiding or abetting theory of liability. Consequently, we conclude that Flanagan has not demonstrated a reasonable probability that the result of his trial would have been different had counsel objected to the aiding and abetting instructions.<sup>17</sup> Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Finally, Flanagan asserts that the district court erroneously dismissed his claim that the cumulative impact of counsel's deficient performance mandates reversal of his conviction. Based on the foregoing discussion, we conclude that there was no cumulative error and that the district court did not err in summarily dismissing this claim.

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<sup>17</sup>To the extent Flanagan argues that the district court's instructions respecting aiding or abetting do not comport with Sharma, We conclude that this claim is procedurally barred absent a showing of good cause and actual prejudice, which Flanagan has failed to demonstrate. See NRS 34.810(1)(b), (3).

Penalty hearing

Flanagan argues that the district court erroneously denied his claim that the breakdown in the relationship between his two counsel, as well as institutional decisions made by the Clark County Public Defender's Office, adversely affected his interests. He states generally that the Public Defender's Office was overloaded with cases and was unable to devote necessary resources to his case. As noted above, this was the sole claim upon which the district court granted an evidentiary hearing. Both counsel testified at the evidentiary hearing that their relationship was strained at times. The district court ruled that Flanagan had failed to show that the personality conflict and lack of communication between counsel rose to the level of ineffective assistance under the Strickland standard.

"Generally, this court will defer to the district court's factual findings concerning claims of ineffective assistance of counsel."<sup>18</sup> However, these claims are subject to this court's independent review because they present mixed questions of law and fact.<sup>19</sup> Although the record reveals that tension existed between counsel, we conclude that Flanagan failed to show that the counsel's personal conflicts were so detrimental as to deny him the effective assistance of counsel. Therefore, we conclude that the district court did not err in denying this claim.

Flanagan also contends that counsel inadequately prepared the defense psychologist by failing to provide him with necessary background material and arranging an examination of Flanagan only days

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<sup>18</sup>McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999).

<sup>19</sup>Id.

before the penalty hearing. He suggests that given sufficient time, the psychologist would have discovered that Flanagan suffered from major mental disorders such as post-traumatic stress disorder and depression; that he was intoxicated at the time of the offense; that he was remorseful; that he was chronically abused by his parents and grandparents; that he acted under the domination of others; and that he lacked the capacity to conform his conduct to the law. The record shows, however, that counsel presented evidence of Flanagan's drug abuse and neglect and abuse by his parents. Flanagan's claims and submissions fail to establish that his counsel were ineffective in their preparation of the psychologist or the presentation of his testimony. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan further contends that counsel were ineffective for failing to move for severance of his penalty hearing from codefendant Moore and that this omission precluded the defense from presenting an individualized mitigation case. However, Flanagan does not adequately explain how he was prejudiced by this omission. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan next contends that his counsel were ineffective for failing to hire a mitigation expert, performing no psychological or psychiatric investigation, and conducting very little investigation of his adaptation to prison life. First, Flanagan fails to explain what a mitigation expert would have contributed to his case had such an expert been secured. Second, counsel retained an expert psychologist; therefore, his claim that counsel conducted no psychological or psychiatric investigation is belied by the record. Finally, counsel called several prison chaplains and a prison guard who testified about Flanagan's conduct in prison. Flanagan fails to identify what additional testimony he desired

counsel to present. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan also argues that his counsel were ineffective for failing to object to several jury instructions, including the antisympathy instruction and an instruction he claims advised the jury that it must return a death sentence if the aggravating circumstances outweighed the mitigating circumstances. We conclude that Flanagan failed to demonstrate that the instructions were improper.<sup>20</sup> Flanagan also contends that his counsel were ineffective for failing to object to an instruction respecting the Pardons Board's power to modify his sentence. However, Flanagan neglects to provide any legal authority supporting his contention that the instruction misled the jury. Therefore, we conclude that counsel were not deficient for failing to object to the challenged instructions. Accordingly, the district court did not err in summarily dismissing this claim.

Flanagan complains that his counsel were ineffective for failing to challenge three jurors for cause. The record reveals, however, that his counsel did successfully challenge one of these jurors for cause. The remaining two jurors were not empanelled, and Flanagan did not argue that any juror actually empanelled was unfair or biased. We conclude that Flanagan failed to adequately explain how his counsel were

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<sup>20</sup>See Leonard v. State, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001); Geary v. State, 114 Nev. 100, 103-04, 952 P.2d 431, 432-33 (1998).

ineffective in this regard. Thus, the district court did not err in summarily dismissing this claim.<sup>21</sup>

Flanagan also raised a number of claims related to his first and second penalty hearings. We conclude that these claims are moot as Flanagan received a third penalty hearing. Therefore, the district court did not err in summarily dismissing them.

#### Miscellaneous claims

Flanagan alleges that the district court erred in improperly depriving him of the funds necessary to investigate and present his claims and denying his discovery request. Attorneys Robert D. Newell and Cal J. Potter represented Flanagan in the instant post-conviction proceeding below. They secured two orders from the district court in July 1998 and February 1999 granting investigative fees not to exceed \$1,000 and \$15,000, respectively. In December 1999, counsel filed a motion in the district court seeking reimbursement for investigative fees in the amount of \$128,774.89. Counsel filed another motion on August 3, 2000, seeking reimbursement in the amount of \$105,275.38 expended in securing additional investigative services. On August 29, 2000, the district court denied these two motions, concluding that the \$234,050.27 requested was excessive. The record also shows that the district court granted counsel's motions for neuropsychological examination funds in the amount of \$7,500 and social historian investigation funds in the amount of \$17,550.

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<sup>21</sup>To the extent that Flanagan argued that his appellate counsel was ineffective for failing to raise all the claims he alleged in his petition, we conclude that he did not establish that these claims had a reasonable probability of success on appeal. See Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004). Therefore, we conclude that the district court did not err in summarily dismissing these claims.

We conclude that Flanagan has failed to demonstrate how he was prejudiced by the district court's action on this issue. The record shows that although counsel was not reimbursed for the total amount, Flanagan received the benefit of \$275,100.27 in investigative services. He has not sufficiently explained what additional funds were necessary to adequately investigate his claims or how he was prejudiced by the denial of his discovery request.<sup>22</sup> Therefore, we conclude that the district court did not err in this regard.

Flanagan claims that his conviction and sentence were invalid because the trial and appellate judges responsible for the rulings in his case were elected and beholden to the electorate and, therefore, these tribunals could not be impartial. He neglects, however, to substantiate this claim with any specific factual allegations demonstrating actual prejudice. Therefore, we conclude that the district court did not err in summarily dismissing this claim.

Flanagan next argues that this court failed to conduct fair and adequate appellate review pursuant to NRS 177.055(2)(c)-(e), which requires this court to determine whether sufficient evidence supports any aggravating circumstance, whether the death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor, and whether the death sentence is excessive. The nature of Flanagan's complaint is unclear. To the extent he complains that this court on direct appeal failed to explicitly discuss the three inquiries mandated by NRS 177.055(2)(c)-

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<sup>22</sup>To the extent that counsel complains that the district court improperly denied their motions for reimbursement, we conclude that such a claim is inappropriately presented in the context of this appeal.

(e), we conclude that Flanagan fails to demonstrate that he was prejudiced. The evidence sufficiently supported the four aggravating circumstances the jury found. There is no indication that the death penalty was imposed under the influence of passion, prejudice, or any arbitrary factor. Finally, this court has stated that the death penalty was not excessive in this case.<sup>23</sup> Consequently, we conclude that the district court did not err in summarily dismissing this claim.

Application of *McConnell v. State*

Flanagan argues that his death sentence is unconstitutional under *McConnell v. State*<sup>24</sup> because the State used the same felony to support his conviction on a felony-murder theory and to support one of the aggravating circumstances. In the guilt phase of the trial, the State proceeded on theories of premeditated, deliberate murder and felony murder, alleging that both murders were committed during the perpetration of a robbery and burglary. The jury's guilt phase verdict, however, simply finds Flanagan guilty of first-degree murder, without specifying the theory or theories upon which the jury may have based its verdict.

During the penalty hearing, the jury found four aggravating circumstances: that Flanagan knowingly created a great risk of death to more than one person; that the murders were committed while he was engaged in the commission of a robbery; that the murders were committed while he was engaged in the commission of a burglary; and that the murders were committed to receive money or any other thing of monetary

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<sup>23</sup>*Flanagan IV*, 112 Nev. at 1423-24, 930 P.2d at 700.

<sup>24</sup>120 Nev. 1043, 102 P.3d 606 (2004).

value. The jury found three mitigating circumstances: that Flanagan had no significant history of prior criminal activity; his youth at the time of the murders; and “[a]ny other mitigating circumstances.”

In McConnell this court deemed “it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.”<sup>25</sup> And in Bejarano v. State, this court held that McConnell has retroactive application.<sup>26</sup> Thus, Flanagan can show good cause for failing to raise this claim previously.<sup>27</sup> Pursuant to McConnell, the burglary and robbery aggravating circumstances must be stricken.<sup>28</sup> However, he must still demonstrate actual prejudice resulting from the consideration of the erroneous aggravating circumstances.

After striking the burglary and robbery aggravating circumstances, two remain: Flanagan knowingly created a great risk of death to more than one person, and he committed the murders to receive money or any other thing of monetary value. This court may uphold a death sentence based in part on an invalid aggravator by reweighing the aggravating and mitigating evidence or conducting a harmless-error

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<sup>25</sup>Id. at 1069, 102 P.3d at 624.

<sup>26</sup>122 Nev. \_\_\_, 138 P.3d 265 (2006).

<sup>27</sup>See Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003) (stating that good cause can be shown where the legal basis for the claim was previously unavailable).

<sup>28</sup>Because the robbery and burglary aggravating circumstances must be stricken pursuant to McConnell, Flanagan’s challenge to them on other grounds is moot.

review.<sup>29</sup> If we conclude beyond a reasonable doubt that the jury would have found Flanagan death eligible and imposed a sentence of death despite the erroneous aggravating circumstances, then the error was harmless, and his claim is procedurally barred because he has failed to demonstrate actual prejudice.<sup>30</sup> After reweighing here, we conclude beyond a reasonable doubt that absent the erroneous aggravators the jury would have nonetheless found Flanagan death eligible and imposed a death sentence.

After striking the erroneous burglary and robbery aggravating circumstances, two viable ones remain. The receiving-money aggravating circumstance is especially compelling in this case, as it was the impetus for the murders. And the “creating a great risk of death” aggravating circumstance soundly applies to the multiple murders committed in this case in 1984, prior to the adoption of NRS 200.033(12).<sup>31</sup> We conclude beyond a reasonable doubt that the jury would not have found the three mitigating circumstances—Flanagan’s youth, lack of prior criminal record, and “any other mitigating circumstances”—sufficient to outweigh the two remaining aggravating circumstances. We further conclude that the jury would have imposed a sentence of death. The murders in this case were particularly brutal and disturbing considering the familial relationship between the victims and Flanagan and the evidence establishing that Flanagan shot his grandmother. Moreover, the

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<sup>29</sup>See Clemons v. Mississippi, 494 U.S. 738, 741 (1990).

<sup>30</sup>See Browning v. State, 120 Nev. 347, 364-65, 91 P.3d 39, 51-52 (2004); Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

<sup>31</sup>Flanagan IV, 112 Nev. at 1420-21, 930 P.2d at 698-99.

methodical planning exercised in the plot appreciably raised the level of malevolence displayed in these senseless murders.

Direct appeal claims

Flanagan raised a number of claims that were appropriate for direct appeal. We conclude, however, that Flanagan showed neither good cause for failing to raise these issues earlier nor actual prejudice.<sup>32</sup> Therefore, we conclude that the district court did not err in summarily dismissing these claims. Although these claims are procedurally barred, we elect to comment on two of his allegations.

Flanagan argued that the district court improperly directed defense objections and motions to be made to the court reporter and outside his and the jury's presence. In an effort to streamline anticipated frequent objections related to severance matters, Judge Donald M. Mosely instructed all defense counsel to either wait until there was break in the trial to raise an objection or ask the district court for leave to approach the court reporter and inform her of the nature of the objection counsel desired to be recorded. Although we conclude that Flanagan failed to overcome applicable procedural default rules in raising this claim in his habeas petition,<sup>33</sup> we take this opportunity to express our disapproval of the district court's procedure in this regard. Parties are required to assert contemporaneous objections to preserve alleged errors for appellate review.<sup>34</sup> Judge Mosely's unusual procedure frustrated the defense's ability to comply with this fundamental rule of appellate review.

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<sup>32</sup>See NRS 34.810(1)(b)(2); State v. Williams, 120 Nev. 473, 476-77, 93 P.3d 1258, 1260 (2004).

<sup>33</sup>See NRS 34.810(1)(b)(2), (3).

<sup>34</sup>See McKague v. State, 101 Nev. 327, 330, 705 P.2d 127, 129 (1985).

Additionally, it precluded the defense from securing any cautionary instructions to the jury should such instructions become necessary during the course of the trial. Therefore, we caution the district court to refrain from employing such practices that may impede a party's ability to comply with elemental rules of trial and appellate practice.

Flanagan also argued that he was prejudiced by the district court's instruction to the jury on premeditation and deliberation, commonly known as the Kazalyn instruction.<sup>35</sup> This instruction was later determined in Byford v. State<sup>36</sup> to inadequately explain the distinction between first- and second-degree murder. Flanagan also contends that Polk v. Sandoval,<sup>37</sup> a recent decision by the United States Court of Appeals for the Ninth Circuit, mandates reversal of his first-degree murder conviction. In sum, Polk concluded that in reviewing the Kazalyn instruction in Byford, this court ignored clearly established federal law holding that an instruction omitting an element of the crime and relieving the prosecution of its burden of proof violates the federal Constitution.<sup>38</sup> The Polk court concluded that given the "State's exceptionally weak evidence of deliberation," it could not conclude that the instructional error was harmless in that case.<sup>39</sup> We conclude however, that the evidence adduced at trial overwhelming established that Flanagan and his cohorts methodically planned the murders for pecuniary gain. Considering Polk,

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<sup>35</sup>Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992).

<sup>36</sup>116 Nev. 215, 994 P.2d 700 (2000).

<sup>37</sup>503 F.3d 903 (9th Cir. 2007).

<sup>38</sup>Polk, 503 F.3d at 911.

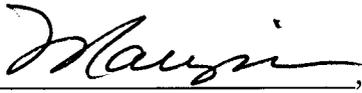
<sup>39</sup>Id. at 913.

we nonetheless conclude that any error in the challenged instruction was harmless beyond a reasonable doubt.

CONCLUSION

Having considered Flanagan's arguments and concluded that the district court did not err in dismissing his habeas petition,<sup>40</sup> we

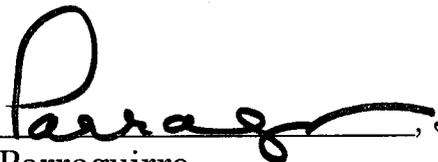
ORDER the judgment of the district court AFFIRMED.<sup>41</sup>

 J.

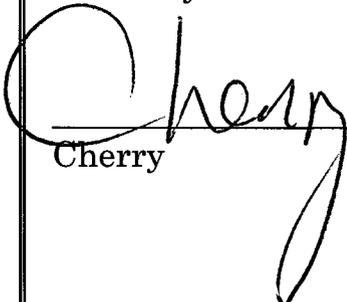
Maupin

 J.

Hardesty

 J.

Parraguirre

 J.

Cherry

 J.

Saitta

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<sup>40</sup>Flanagan also raised the following claims on appeal: he was denied the effective assistance of counsel due to a conflict within the Clark County Public Defender's Office; his counsel was ineffective for failing to seek an instruction informing the jury that it had to find that the aggravating circumstances were not outweighed by the mitigating circumstances beyond a reasonable doubt to find him eligible for the death penalty; and the district court improperly denied his challenge for cause against a prospective juror. However, as he did not present these matters for the district court's consideration below, we decline to consider them here. See Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002).

<sup>41</sup>The Honorable Mark Gibbons, Justice, and the Honorable Michael L. Douglas, Justice, did not participate in the decision of this matter.

cc: Eighth Judicial District Court Dept. 7, District Judge  
Hon. Michelle Leavitt, District Judge  
Hon. Donald Mosley, District Judge  
Davis Wright Tremaine LLP  
Potter Law Offices  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk