

ORIGINAL

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**FILED**

MAR 12 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

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

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**DALE EDWARD FLANAGAN,**

**Appellant,**

**v.**

**THE STATE OF NEVADA, and E.K.  
McDANIEL, Warden, Ely State Prison,**

**Respondents.**

Case No. 40232

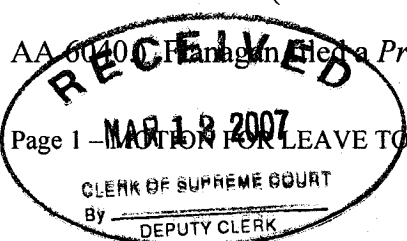
Death Penalty Case

**APPELLANT'S MOTION  
FOR LEAVE TO FILE A  
SUPPLEMENTAL BRIEF  
AND ISSUE**

Appellant Dale Flanagan hereby requests permission to file a supplemental brief and issue. Flanagan filed Appellant's Opening Brief in this case in 2005.

**FACTS**

Flanagan was convicted and sentenced to death in 1985. (12 Appellant's Appendix 2756-62, 2967.) His death sentence was reversed on appeal, *Flanagan v. State*, 104 Nev. 105, 754 P.2d 836 (1988), and he had two penalty retrials, after each of which he was sentenced to death. (18 AA 4198, 6000.) This Court affirmed the final judgment in 1996. (25 AA 60400.) Flanagan filed a *Pro Per* Petition for Post Conviction Relief in 1998. (26 AA 6323.)



Page 1 - MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND ISSUE

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07-05756

1 In 1999, counsel for Flanagan filed a Supplemental Petition for Writ of Habeas Corpus. (26 AA  
2 6345.) The Court denied the petition in June 2002 (31 AA 7521), and in August 2005 counsel  
3 filed Appellant's Opening Brief.

#### 4 ARGUMENT

5 In *Sharma v. State*, 118 Nev. 648 (2002), this Court ruled that to be held  
6 accountable for the specific intent crime of another under an aiding or abetting theory of  
7 principal liability, the aider or abettor must have knowingly aided the other person with the intent  
8 that the other person commit the charged crime. In *Mitchell v. State*, 122 Nev. Adv. Op. No. 107  
9 (Dec. 21, 2006), this court found that its holding in *Sharma* applied retroactively to cases that  
10 were final when *Sharma* was decided. Because Flanagan's case was final when *Sharma* was  
11 decided, Mr. Flanagan merits relief for the trial court's erroneous instructions on aider and  
12 abettor liability.

13 A petitioner may overcome a bar to an untimely or successive petition by showing  
14 good cause and prejudice, or by demonstrating that a constitutional violation has probably  
15 resulted in the conviction of one who is actually innocent. *Mitchell v. State*, *supra*, 122 Nev.  
16 Adv. Op. No. 107. Mitchell's successive petition was untimely; nevertheless, the court  
17 concluded that because Mitchell could demonstrate actual innocence of aiding or abetting  
18 attempted murder with a deadly weapon, he was able to overcome the procedural bars to his  
19 claim.

20 Flanagan filed Appellant's Opening Brief in August 2005. At that time, the rule  
21 in *Sharma* had not been held to apply retroactively to cases that were final at the time *Sharma*  
22 was decided. For that reason, Flanagan did not argue that he merited relief under *Sharma*.  
23 Because of the rule announced in *Mitchell*, Flanagan now asks for this Court's permission to  
24 amend his claims to include a request for relief under *Sharma* and *Mitchell*. As with Mitchell,  
25 Flanagan can demonstrate that "a constitutional violation has probably resulted in the conviction  
26 of one who is actually innocent." *Mitchell*, *supra*, citing *Murray v. Carrier*, 477 U.S. 478, 496

1 (1986). In the alternative, Flanagan can demonstrate good cause for his failure to brief the issue  
2 of the aiding and abetting instruction in his habeas corpus petition, as well as prejudice if this  
3 Court does not hear the claim. A proposed supplemental brief is submitted with this motion.

4 DATED this 8 day of March, 2007.

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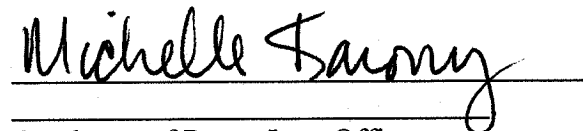
19 Attorneys for Appellant Dale Flanagan

1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 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 MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND  
5 ISSUE addressed to:

6 Steven S. Owens  
7 Nevada Bar #004352  
8 Chief Deputy District Attorney  
9 Office of the Clark County District Attorney  
200 Lewis Avenue, Third Floor  
Las Vegas, NV 89101

10 Dated this 8 day of March, 2007.

11  
12   
13  
14 Employee of Potter Law Offices