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

AUG 29 2005

JANETTE M. BLOOM
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DEPUTY CLERK

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 OPENING BRIEF

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05-17169

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues before the Court in this appeal are:

1. Whether the district court properly denied discovery and an evidentiary hearing on the issues of actual innocence, prosecutorial misconduct, and ineffective assistance of counsel, among others, and denied relief on all claims

2. Whether the district court properly denied discovery and relief on the narrow issue of ineffective assistance of counsel arising out of a conflict between co-counsel for Petitioner during his third penalty hearing.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant Dale Edward Flanagan ("Flanagan") appeals the denial of his petition for a writ of habeas corpus regarding his convictions and death sentence for murders committed in November 1984. Following his conviction and direct appeals, Flanagan filed a petition, challenging the legality of his convictions and sentences. The District Court, Eighth Judicial District Judge Mark Gibbons, denied discovery on all issues, and denied an evidentiary hearing on all but a narrow portion of one of the 36 claims presented.

B. Procedural History

Flanagan was charged by Information with conspiracy to commit burglary, conspiracy to commit robbery, conspiracy to commit murder, burglary, robbery with the use of a deadly weapon and First Degree murder with the use of a deadly weapon (1 Appellant's Appendix 4, 19, 237 ("AA")). Trial began in September 1985, and on October 11, 1985, the jury convicted on all charges (12 AA 2756-62) and sentenced him to death on October 17, 1985 (13 AA 2967). On May 18, 1988, this Court affirmed Flanagan's convictions, but reversed his death sentence. Flanagan v. State (Flanagan I), 104 Nev. 105, 754 P.2d 836 (1988).

At the retrial, Flanagan was again sentenced to death (18 AA 4198). Although this Court affirmed Flanagan's sentence, Flanagan v. State (Flanagan II), 107 Nev. 243, 810 P.2d 759 (1991), the Supreme Court reversed the judgment. Flanagan v. Nevada (Flanagan III), 503 U.S.

931 (1992). On February 10, 1993, this Court remanded the case for a new penalty trial. Flanagan v. State (Flanagan IV), 109 Nev. 50, 846 P.2d 1053 (1993). At the third penalty trial, Flanagan was again sentenced to death. (25 AA 6000). On December 20, 1996, this Court affirmed the judgment (25 AA 6040). Flanagan v. State (Flanagan V), 112 Nev. 1409, 930 P.2d 691 (1996), cert. denied, Flanagan v. Nevada (Flanagan VI), 523 U.S. 1083 (1998).

On May 28, 1998, Flanagan filed a Pro Per Petition for Post Conviction Relief and requested appointment of counsel (26 AA 6323). On June 5, 1998, counsel was appointed, who file a Supplemental Petition for Writ of Habeas Corpus on November 30, 1999 (26 AA 6345).

On August 16, 2000, the District Court denied Flanagan's Motion for Discovery (30 AA 7282), and on February 14, 2002, the Court held a limited evidentiary hearing (30 AA 7314). By Order dated June 19, 2002, the Court denied the petition (31 AA 7521). On August 8, 2002, the Court entered Findings of Fact, Conclusions of Law and ordered the Petition denied (31 AA 7530). On August 16, 2002, the District Court mailed Notice of Entry of Decision and Order (31 AA 7564). Flanagan timely filed his Notice of Appeal on September 12, 2002 (31 AA 7568).

C. Statement of Relevant Facts

On November 5, 1984, Colleen and Carl Gordon, Flanagan's grandparents, were shot to death in their Las Vegas home. Flanagan and five other teenage boys were charged with their murders (1 AA 237). Flanagan was initially represented by the Clark County Public Defender, but, shortly before the evidentiary hearing, that office developed a conflict (which is entirely unexplained in the record) and was allowed to withdraw (2 AA 252, 254). Randall Pike, an inexperienced attorney, was appointed to represent Flanagan just days before the evidentiary hearing began (2 AA 257-60). Trial immediately followed that hearing. Flanagan was convicted on all counts and the jury found no mitigating circumstances, despite Flanagan's youth and lack of a prior criminal record (12 AA 2756-62; 13 AA 2983).

As explained above, this Court twice has reversed death sentences imposed on Flanagan because of persistent prosecutorial misconduct. Despite the pervasiveness of the prosecution's misconduct, this Court did not reverse the conviction (13 AA 3177).

The facts developed and presented in the post-conviction proceedings demonstrate that Randall Pike was ineffective in every aspect of the case. For example, he conducted no investigation of the underlying facts of the crime, hired no experts, in either the guilt or penalty phase, allowed the court, without challenge, to impose an unusual and unfavorable regime for making evidentiary objections and generally allowed the prosecution to ride roughshod over Flanagan's rights, all of which resulted in his conviction and sentence (30 AA 7148, Pike Aff.).

Had Pike conducted even a minimal investigation, he would have found evidence of Flanagan's actual innocence and would have presented a substantial case in mitigation that almost certainly, given the predilection of the jurors, would have led to a sentence of less than death. For example, in these habeas proceedings, Flanagan presented evidence that Robert Ramirez, who was interviewed several times by the Las Vegas police, told the police that Flanagan was actively trying to prevent the murders (30 AA 7186, Ramirez Dec. ¶13). Not only was that evidence withheld from the defense (2 AA 266-11 AA 2707), but Randall Pike did not discover it and, indeed, did not even look for it (30 AA 7148). Had he done so, the original jury almost certainly would have had a reasonable doubt about Flanagan's guilt.

Moreover, despite evidence of Flanagan's mental illness during his incarceration leading up to trial, and despite overwhelming evidence of his childhood abuse and neglect, his extreme mistreatment at the hands of the victims of this crime, 34 AA [filed under seal] 8034, Holdman Dec. ¶¶ 3, 5, 6; 34 AA 8061, Holdman Dec. ¶¶ 4, 5, 7, his heavy use of drugs and alcohol, including his extreme intoxication on the date of the crime (30 AA 7207, Kriegler Dec. ¶¶ 17-21), Pike did no investigation and presented no defense at the guilt phase and only the most minimal case in mitigation (12 AA 2763-13 AA 2966; 30 AA 7148). Similarly, counsel in the subsequent trials failed to undertake adequate investigation and development of readily available and compelling mitigation (30 AA 7204).

Despite this evidence, the court below denied every request for discovery (27 AA 6537; 30 AA 7282), and limited the scope of the evidentiary hearing, which lasted less than one day, to one extremely narrow issue (30 AA 7282, 7293, 7310).

III. ARGUMENT

In the District Court, Flanagan presented 36 prima facie statutory and constitutional claims in the Supplemental Petition for Writ of Habeas Corpus (26 AA 6345-27 AA 6480). In addition to the detailed factual allegations contained in the Petition, Flanagan documented his entitlement to relief with 487 pages of exhibits accompanying the Petition and various motions (27 AA 6537-30 AA 7229). In response, the State generally denied the allegations in cursory fashion without explanation or factual support (27 AA 6488). Prior to and contemporaneously with the filing of the Reply to the State's response, Flanagan filed extensive requests for funding for investigation and experts and permission to conduct discovery to develop his entitlement to relief (34 AA [filed under seal]). In addition, Flanagan requested an evidentiary hearing on 19 of the 36 claims (30 AA 7230). Rather than permit the orderly and full development of the facts giving rise to his constitutional claims, the court truncated its review by summarily denying Flanagan's motions (30 AA 7282), conducting an unduly restrictive evidentiary hearing (30 AA 7326; 31 AA 7405; 30 AA 7312), and denying the Petition without permitting Flanagan the opportunity to prove his factual allegations (30 AA 7251; 7293, 7296, 7302-11; 7312). Under these circumstances – where the fact-finding and fair adjudicative process has been so distorted – a remand is necessary to permit adequate factual development of each claim.

First, the District Court improperly deprived Flanagan the funds necessary to investigate and present his claims for relief. As demonstrated in his funds requests, Flanagan required state-provided funds to hire investigators and experts to fully develop and present his claims (34 AA [filed under seal]). The District Court's rulings deprived Flanagan of the resources necessary to do so. Due process, equal protection, and the right to access to the courts guaranteed by the federal Constitution require a State to provide the funds necessary for an indigent petitioner to develop his claims and prepare for an evidentiary hearing.[1] This Court has recognized the need

[1] See Ake v. Oklahoma, 470 U.S. 68, 79 (1985) (State may not legitimately maintain "a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the [sentencing] verdict obtained"); Britt v. North Carolina, 404 U.S. 226, 227 (1971) (indigent defendants entitled to "basic tools of an adequate defense."); Bounds v. Smith, 430 U.S. 817, 823 (1970) (access to courts must be adequate, effective, and meaningful); U.S. v. Hartfield, 513 F.2d 254, 258 (9th Cir. 1975), overruled on other grounds, U.S. v. Sneezer, 900 F.2d 177, 179

of providing adequate assistance to indigent criminal defendants. See Pertgen v. State, 105 Nev. 282, 284, 774 P.2d 429 (1989) (approving trial court's authorization of "three psychiatrists to assist [defendant] in determining the viability of the insanity defense in his case").

Second, the District Court improperly denied Flanagan's discovery requests (27 AA 6537; 30 AA 7282). A habeas petitioner is "'entitled to careful consideration and plenary processing of [his claims], including full opportunity for presentation of the relevant facts,' which includes 'the benefit of compulsory process.'" Blackledge v. Allison, 431 U.S. 63, 82, 83, n.26 (1977) (quoting Harris v. Nelson, 394 U.S. 286, 298 (1969)). Without discovery and the opportunity thereafter to develop facts, petitioner cannot satisfy his obligation to "conduct a reasonable and diligent investigation" and completely present his habeas claims. McCleskey v. Zant, 499 U.S. 467, 494 (1991); see also Williams v. Taylor, 529 U.S. 420 (2000) (failure by State to provide discovery requires federal habeas court to authorize appropriate fact-finding).[2]

Nevada law similarly recognizes the importance of affording habeas petitioners reasonable access to discovery. NRS 34.780 provides that "a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so." This provision is virtually identical to Rule 6 of the Rules Governing Section 2254 Cases in the U.S. District Courts. To effectuate petitioners' right to fair adjudication of their claims, the Supreme Court has recognized that courts have the "duty . . . to provide the necessary facilities and procedures for an adequate inquiry" into any potentially viable claims raised by a habeas corpus petition, and into any claim that gives "reason to believe . . . [it] may, if the facts are fully developed . . . demonstrate that [the petitioner] is confined illegally." Harris, 394 U.S. at 300; see also Brown v. Vasquez, 952 F.2d 1164, 1167 (9th Cir. 1991). Using the "good cause" standard, federal courts routinely have

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n. 3 (9th Cir. 1990) ("If the fairness of our system is to be assured, indigent defendants must have access to minimal defense aids to offset the advantage presented by the vast prosecutorial and investigative resources available to the Government."); cf. 21 U.S.C. § 848(q)(4)(B) (federal petitioners challenging state death sentences are entitled to "reasonably necessary services").

[2] For example, although ordered to make its file available for inspection, 31 AA 7578, the State disclosed no police reports or any other investigative materials (33 AA 7827, Newell Aff.).

permitted the discovery sought here. See, e.g., Coleman v. Zant, 708 F.2d 541, 547 (11th Cir. 1986); Warden v. Gall, 865 F.2d 786, 787-88 (6th Cir. 1989).

Without permitting discovery, the District Court's summary adjudication of Flanagan's claims was erroneous. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986) (noting that Federal Rule of Civil Procedure 56(f) provides "that summary judgment [is to] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition"); Klingele v. Eikenberry, 849 F.2d 409, 413 (9th Cir. 1988) ("It was, therefore, an abuse of discretion for the district court to grant summary judgment before permitting discovery"). Indeed, well-established rules preclude premature adjudication of summary judgment motions in federal courts when discovery is necessary for the opposition. Fed. R. Civ. P. 56(f); Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) (permitting discovery prevents non-moving party from being "'railroaded'" by premature summary judgment motions). Third, the District Court improperly dismissed 19 claims without conducting an evidentiary hearing (30 AA 7282). Summary dismissal was inappropriate because the State failed to prove that the evidence, viewed in the light most favorable to Flanagan, established no genuine issue as to any material fact, and that the State was entitled to judgment as a matter of law in light of the undisputed facts. See Anderson, 477 U.S. at 255 (court must view pleadings and other material presented in the light most favorable to petitioner and give him the benefit of all reasonable inferences to be drawn from the facts); Marshall v. State, 110 Nev. 1328, 885 P.2d 603, 606 (1994) ("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."). To meet this burden, the State was required to establish a right to judgment with such clarity as to leave no room for controversy, and to show that Flanagan was not entitled to prevail under any discernable circumstances. See Mann v. State, 118 Nev. 351, 46 P.3d 1228, 1229 (2002) (State failed to establish that petitioner's claim was "belied by the record" and thus the failure to hold a hearing was error). As this Court recognized in Mann, it is insufficient for the State to proffer a differing

version of the facts to avoid an evidentiary hearing: "A claim is not "belied by the record" 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." Mann, 46 P.3d at 1230.[3]

Finally, the District Court abdicated its responsibility as an impartial and fair decision-maker by adopting verbatim the State's proposed Findings of Fact and Conclusions of Law (31 AA 7530-60). These "findings" were not made following the full presentation of facts necessary to resolve the 36 claims. Rather, they consisted entirely of the State's distorted and unsupported allegations. Procedural due process, guaranteed by the Fifth and Fourteenth Amendments, demands that adjudicative proceedings be conducted with "fundamental fairness." Watson v. Patterson, 358 F.2d 297, 298 (10th Cir. 1966). Due process includes the right to have a court independently weigh the evidence.[4] Appellate courts consistently have examined lower courts' findings and the process used to arrive at those facts to determine whether a court satisfied its role as fact finder consistent with due process.[5] Furthermore, appellate courts refuse to apply a deferential standard when the lower court merely adopted the prevailing party's findings, and instead review them under a "greater scrutiny" standard.[6] By failing to arrive at its own factual

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[3] See also Hathaway v. State, 119 Nev. 248, 71 P.3d 503, 508 (2003); Palmer v. State, 118 Nev. 823, 59 P.3d 1192, 1197 (2002) (where record fails to provide need facts "an evidentiary hearing on this issue is therefore necessary").

[4] See, e.g., Beck v. Quiktrip Corp., 708 F.2d 532, 536 (10th Cir. 1983) (analyzing whether "all competent and material evidence [was] received and considered by the court" in determining whether the trial was conducted with "fundamental fairness" under the Due Process clause); Thermo King Corp. v. White's Trucking Service, Inc., 292 F.2d 668, 678 (5th Cir. 1961) (evaluating whether court properly weighed the facts and concluding that "where we are left with the certain conviction, or more often an abiding impression, that a party was not afforded a fair and adequate opportunity to present his cause, we do not hesitate to reverse").

[5] See, e.g., Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 572-73 (1985) (lower court did not "uncritically accept [] findings prepared without judicial guidance by the prevailing party" because the findings of the court "vary considerably in organization and content from those submitted by petitioner's counsel"); L.K. Comstock & Co. v. United Eng. & Constructors, Inc., 880 F.2d 219, 222 (9th Cir. 1989) (applying "careful scrutiny" and finding that because the district court's conclusions deviated from those of the prevailing party, the trial court "did not 'uncritically accept' [its] proposals") (citation omitted).

[6] See, e.g., In Re Alcock v. Small Business Administration, 50 F.3d 1456, 1459 n.2 (9th Cir. 1995) ("Findings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge."); L.K. Comstock & Co., 880 F.2d at 222 ("When

findings, the court below neither independently weighed the factual issues nor determined the findings. Rather, it copied verbatim the State's findings of fact, most of them on matters for which no hearing was held. Given the court's abdication of its fact-finding role, the remedy is for this Court to remand for proper resolution of the disputed facts. See, e.g., In re Marriage of Jovel, 49 Cal.App.4th 575, 589 (1996) (remand necessary where finding was insufficient and "provides an inadequate basis for reviewing the exercise of the trial court's discretion").

Claim 1

Without permitting discovery or conducting an evidentiary hearing, the District Court improperly denied Flanagan's claim that the prosecutors in each trial engaged in pervasive and egregious misconduct and systematically engaged in campaigns to deprive Flanagan of any semblance of a fair trial or reliable guilt and penalty determinations. Mr. Seaton and Mr. Harmon, who, throughout their careers, have displayed a callous disregard for a fair judicial process and have engaged in innumerable instances of misconduct, orchestrated the State's case and witness testimony that tainted each of the three trials. The misconduct included witness intimidation, coerced and false testimony influenced by promises of cash payments or other benefits, withholding of critical, material information, and government overreaching that deprived Flanagan of his constitutional rights during each trial. Indeed, the prosecutors' pervasive and egregious misconduct during the three trials resulted in convictions and sentences based not on a dispassionate and fair application of the law, but rather on false testimony, religious fervor, bias, misinformation, non-record information, and improper and erroneous legal standards, all in violation of Flanagan's First, Fifth, Sixth, Eighth, and Fourteenth Amendments rights to freedom of speech, rights to association, separation of church and state, a fair, reliable, and rational determination of guilt and individualized determination of penalty. Flanagan did not have a jury that considered and weighed only materially accurate, non-prejudicial, relevant evidence of which Flanagan had notice and a fair opportunity to refute, nor did it give full effect

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the district court's conclusions are adopted from the prevailing party's suggestions, ... the appellate court is to engage in 'careful scrutiny'").

to all evidence in mitigation of penalty, to the privilege against self-incrimination, to the effective assistance of counsel, due process, or equal protection.

A. Flanagan's convictions were obtained with pervasive prosecutorial misconduct.

Seaton's pattern of prosecutorial misconduct is all too familiar to this Court: He has a "history of persistent disregard for established rules of professional conduct regarding improper argument before the jury," Howard v. State, 106 Nev. 713, 722 n.1, 800 P.2d 175 (1990) (citing seven other cases involving egregious and unprofessional action.). Similarly, the Court has found that Harmon has engaged in misconduct and flouts his professional and constitutional obligations. See, e.g., Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996); D'Agostino v. State, 112 Nev. 417, 915 P.2d 264 (1996). Rather than reform their conduct, Seaton and Harmon have publicly joked about which of them holds the record for prosecutorial misconduct (30 AA 7148, Pike Aff. ¶4). Indeed, the numerous instances of prosecutorial misconduct in this case demonstrate that Seaton and Harmon have disregarded this Court's warnings. Their misconduct includes witness intimidation, the presentation of coerced and false testimony, government over-reaching, withholding of exculpatory information, and repeated instances of improper attempts to distort Flanagan's right to a fair trial. See Claim 1.B.-F, Claim 2, Claim 3.[7]

The U.S. Constitution requires that prosecutors refrain from improper methods calculated to produce a wrongful conviction. See U.S. v. Young, 470 U.S. 1, 7 (1985); Viereck v. U.S., 318 U.S. 236, 248 (1942). The Supreme Court has recognized that the prosecutor's duty is to ensure "that justice shall be done." Viereck, 318 U.S. at 248; see also Darden v. Wainwright, 477 U.S. 168 (1986); Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104 (1990). Flanagan is entitled to a new trial in light of the egregious and cumulative effects of misconduct, and because this Court

[7] The continued pattern of recidivism by these prosecutors provides a firm basis to infer that their misconduct is intentional, or at least knowing, and to treat that conduct more severely. Moreover, recidivist prosecutors underscore that past and current sanctions are not adequate to prevent future misconduct. Indeed, this Court previously has sanctioned prosecutors who engaged in repeated misconduct despite previous warnings, including Mr. Seaton. See Howard, 106 Nev. at 722-23; McGuire v. State, 100 Nev. 153, 154-55, 677 P.2d 1060 (1984).

cannot state "without reservation that the verdict would have been the same in the absence of error." Ross, 106 Nev. at 928; Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153 (1988).

Despite the presentation of numerous affidavits supporting this claim (30 AA 7135-99, 7202-29), the court below refused repeated requests for discovery and the opportunity to prove these allegations at an evidentiary hearing (27 AA 6537; 30 AA 7282; 30 AA 7293; 30 AA 7310). Instead, the court, at the urging of the State, incorrectly assumed that this Court previously addressed this claim in Flanagan I, and that it was thus barred by the law of the case (31 AA 7532 ¶17; 31 AA 7538 ¶15). In Flanagan I, this Court addressed whether – based solely on the appellate record – the prosecutor's conduct during the presentation of evidence and argument during the guilt trial warranted reversal. 104 Nev. at 107. The Court was neither presented with, nor purported to resolve, the pervasive prosecutorial misconduct presented here.

The "law of the case" doctrine does not bar a petitioner's claim that was not previously presented or, if so, is supported by new facts. See, e.g., Clem v. State, 81 P.3d 521, 525 (2003) (law of the case doctrine applies to "subsequent appeals in which the facts are substantially the same"). As amply demonstrated by the Petition and exhibits, the court was required to consider Flanagan's claim of pervasive prosecutorial misconduct because it relied upon particularized claims and facts not before this Court during the previous proceedings.[8]

The court also characterized the allegation that the State unlawfully induced witnesses to testify and shaped their testimony through offers of leniency as a "naked" allegation (31 AA 7533 ¶18). The court was in error, as the record is replete with instances of such misconduct. These instances of prosecutorial misconduct violated Flanagan's constitutional rights to a fair trial, and the court erred in resolving this issue without affording discovery and an evidentiary hearing to develop fully the facts in support of the claim. Under these circumstances, a remand is necessary to ensure resolution of this claim after full and fair fact-finding.

B. The State manufactured critical and false testimony against Flanagan by

[8] Moreover, as demonstrated by the exhibits filed below, the State's misconduct in securing Flanagan's convictions and sentence amounts to outrageous government conduct requiring reconsideration of any prior decisions to prevent a "manifest injustice." Clem, 81 P.3d at 525.

intimidating and bribing witnesses.

From the moment that the crimes were discovered, law enforcement officials engaged in a campaign of witness intimidation and coercion to create a case against Flanagan and his co-defendants. Several witnesses were threatened with prosecution if they did not cooperate with law enforcement and were coerced into testifying. John Lucas, a critical prosecution witness, was threatened with prosecution if he did not cooperate (30 AA 7138, Lucas Dec. ¶6). Rusty Havens recounts the fear that he experienced when police questioned him, despite his having been in custody at the time of the crimes (30 AA 7145, Havens Dec. ¶8). Similarly, police threatened Wayne Wittig with "charges of contempt and withholding information" and confined his "answers to their version of the crime." (30 AA 7170, Wittig Dec. ¶¶32, 34).

Law enforcement improperly elicited incriminating statements and physical evidence from Flanagan by employing Saldana as a police agent, who had had sexual relations with Las Vegas Metropolitan Police Department officers (8 AA 1794-99; 30 AA 7168, Samples-Smith Dec. ¶¶10, 11; 30 AA 7194, Saldana-Ficklin Dec. ¶¶5, 8, 9. 10). To obtain information for law enforcement, Saldana engaged in sexual relations and began living with Flanagan (8 AA 1819). In exchange for her assistance as a police agent, Saldana was not prosecuted for prostitution and other crimes (30 AA 7191, Thayer Dec. ¶¶9, 10; 30 AA 7168, Samples-Smith Dec. ¶¶2, 11). Neither Saldana's status nor the benefits she received were disclosed to the defense.

Similarly, the prosecution improperly and unconstitutionally induced the testimony of critical prosecution witnesses, including Lucas, Havens, and Saldana, with promises of cash payments, immunity from prosecution, and other benefits (30 AA 7138, Lucas Dec. ¶¶6, 11, 12; 30 AA 7194, Saldana-Ficklin Dec. ¶5; 7 AA 1708; 8 AA 1848; 30 AA 7158, McDowell Dec. ¶10; 30 AA 7145, Havens Dec. ¶¶8, 9). The prosecution then coached and influenced the testimony of numerous witnesses, encouraged witnesses to shape their testimony to conform with others' accounts, and instructed witnesses not to reveal exculpatory or impeachment evidence to the defense (30 AA 7138, Lucas Dec. ¶¶8, 9; 30 AA 7145, Havens Dec. ¶¶8, 9; 30 AA 7170, Wittig Dec. ¶40; 30 AA 7158, McDowell Dec. ¶14; 30 AA 7191, Thayer Dec. ¶11; 7

AA 1679). Thus, the State improperly and unconstitutionally presented false testimony regarding the "planning" of the crime, including false evidence that Flanagan discussed killing his grandparents to obtain an inheritance (8 AA 1756-57; 30 AA 7194, Saldana-Ficklin Dec. ¶2; 30 AA 7138, Lucas Dec. ¶23; 30 AA 7170, Wittig Dec. ¶36).

These coercive law enforcement tactics rendered the witnesses' testimony fundamentally unfair and unreliable and deprived Flanagan of his constitutional rights to due process and the right to present a defense. See, e.g., Wilcox v. Ford, 813 F.2d 1140 (11th Cir. 1987); People v. Douglas, 50 Cal.3d 468, 268 Cal. Rptr. 126 (1990). Moreover, the prosecution's knowing use of this material, false evidence violated Flanagan's Fourteenth Amendment right to due process. See Giglio v. U.S., 405 U.S. 150, 153 (1972) ("deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'"). This same rationale applies even when the State, although not soliciting false evidence, does not correct false or misleading evidence. See Napue v. Illinois, 360 U.S. 264, 2269 (1959); see also Tejada v. Dugger, 941 F.2d 1551, 1556 (11th Cir. 1991). A new trial is required if the false testimony could "in any reasonable likelihood have affected the judgment of the jury." Giglio, 405 U.S. at 154. But the "reasonable likelihood" standard for a new trial does not require that Flanagan demonstrate that the outcome would in fact have been different. See Kyles v. Whitley, 514 U.S. 419, 434 (1995).[9] The need for heightened reliability in capital proceedings, which are protected by due process and the Eighth Amendment mandates reversal of a conviction and death sentence obtained on the basis of false and unreliable evidence.[10]

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[9] Even good faith presentations of false or misleading evidence will not immunize the government from a due process violation. U.S. v. Young, 17 F.3d 1201 (9th Cir. 1994). This Court has further held that, regardless of the prosecution's knowledge or conduct, if a conviction is based upon materially false evidence, the truth-seeking function of the trial is corrupted, and due process is denied under both the Fourteenth Amendment of the U.S. Constitution and Article 6 § 4 of the Nevada Constitution. See Riley v. State, 93 Nev. 461, 462, 567 P.2d 475 (1977).

[10] See Simmons v. South Carolina, 512 U.S. 154 (1994) (due process requires defendant be permitted to inform jury of parole ineligibility to correct misleading prosecutor argument that he will present a danger if not sentenced to death); Johnson v. Mississippi, 486 U.S. 578 (1988) (Eighth Amendment requires reversal of death sentence based in part on felony conviction subsequently set aside); Caldwell v. Mississippi, 472 U.S. 320 (1985) (Eighth Amendment violated where jury given inaccurate information regarding availability of appellate review of decision to impose a death sentence); Gardner v. Florida, 430 U.S. 349 (1977) (due process

Similarly, Saldana's role as a police agent and the benefits she received were not disclosed to the defense (30 AA 7194). The failure of the prosecution to disclose these facts violated Flanagan's statutory and constitutional rights.[11] Had her status and the benefits been disclosed, Saldana's testimony would have been excluded, or, if admitted, would have been thoroughly discredited.

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

The federal Constitution has required prosecutors to disclose all evidence favorable to the defendant that is material either to guilt or punishment. See Brady v. Maryland, 373 U.S. 83, 86-87 (1963) (prosecution's failure to disclose material evidence favorable to defendant violates due process); Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (prosecution obligated by due process to disclose material exculpatory evidence on its own motion, without request). In determining whether certain evidence is material, the reviewing court must take into consideration the cumulative effect of the evidence suppressed by the prosecution. Kyles, 514 U.S. at 436-37. The evidence is material when the result of the proceeding would have been different had the prosecutor disclosed the evidence to the defense. Id. at 434-35.

Flanagan conclusively has demonstrated that the State failed to disclose relevant, material, and exculpatory evidence. During its investigation and prosecution, State officials interviewed numerous individuals who provided critical information contrary to the State's theory. In each instance, law enforcement unconstitutionally withheld such material information. For example, John Lucas's statement that the killings were not planned was never disclosed to Flanagan (30 AA 7138, Lucas Dec. ¶23). The State similarly did not disclose the statements of

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violated where death sentence is based in part upon false information contained in probation report that defendant had no opportunity to rebut).

[11] See, e.g., Kyles, 514 U.S. at 433 (due process requires prosecutor to disclose any material, exculpatory evidence); Brewer v. Williams, 430 U.S. 387, 399 (1977) (Sixth Amendment right to counsel prohibits statements deliberately elicited from the defendant by the government or its agent in the absence of counsel after adversarial proceedings have been initiated); Massiah v. U.S., 377 U.S. 201 (1964) (deliberate elicitation of statements by government agents after adversarial proceedings have been initiated violates the Sixth Amendment).

Robert Ramirez, whom law enforcement interviewed numerous times and who provided evidence of Flanagan's actual innocence (30 AA 7186, Ramirez Dec. ¶19). Like Ramirez, a number of other witnesses described to law enforcement Flanagan's good character, his inability to harm anyone, and his domination by others (30 AA 7170, Wittig Dec. ¶¶34, 35, 36; 30 AA 7138, Lucas Dec. ¶23). The prosecution, nonetheless, repeatedly portrayed Flanagan as the ringleader of the conspiracy (5 AA 1176-93; 11 AA 2491-2560, 2676-2706; 12 AA 2882, 2936).

Other violations include the numerous instances in which the prosecution shaped the testimony of critical prosecution witnesses and concealed information favorable to Flanagan (see Claim 1.A. supra). The prosecution did not disclose the existence of Flanagan's will until the first penalty phase, thus precluding the defense from preparing for its use (12 AA 2855). In addition, the prosecution did not reveal to Flanagan's counsel, nor did Flanagan independently understand the significance of the fact that he met over a period of several days with agents of the State from an agency called PROBE to assist in a program designed to discourage youth from participation in witchcraft (30 AA 7148, Pike Aff. ¶5). Such evidence would have been highly material at Flanagan's sentencing hearing. Instead of revealing this information to defense counsel, the State portrayed Flanagan as a black-hearted devil worshipper, intent on murder and theft (11 AA 2492; 12 AA 2927; 30 AA 7148, Pike Aff. ¶13).

All of the withheld evidence would have been favorable to Flanagan's defense, both individually and cumulatively. The withholding of this material exculpatory and impeachment evidence invalidates Flanagan's judgment of conviction and sentence because the jury's verdicts were based on incomplete and false information. Had the information withheld by the prosecution been revealed, defense counsel could have used it to cast serious doubt on the prosecution's case, cross examine prosecution witnesses, and secure a more favorable result for Flanagan. There is a reasonable probability, sufficient to undermine the confidence in the outcome, that had this evidence been disclosed, the result would have been different. The suppression of this crucial evidence substantially and injuriously affected the process and rendered the convictions and sentence fundamentally unfair and unconstitutional.

Without permitting discovery (30 AA 7282), as expressly requested by Flanagan (27 AA 6537), the court below found that the State's misconduct did not constitute a Brady violation in part because Flanagan was aware of some withheld exculpatory evidence (31 AA 7530 at 7535, ¶24; at 7538, ¶16). The court's order was erroneous for two reasons. First, the court was wrong on the law. There is no "defendant knowledge" exception to a prosecutor's obligation under Brady.[12] Second, the court was wrong on the facts, since the State withheld material exculpatory evidence unknown to Flanagan. At the very least, the court erred in reaching its conclusion without allowing discovery and conducting an evidentiary hearing. Mann, 46 P.3d at 1230.

D. The prosecution's misconduct included the misuse of peremptory challenges.

During jury selection , the prosecution utilized its peremptory challenges in an intentionally gender-discriminatory manner by excluding all but one woman from the jury panel.[13] Such use of peremptory challenges violated Flanagan's federal constitutional right to equal protection and mandatory state law rights to a jury drawn from a representative cross-section of the community. See, e.g., J.E.B. v. Alabama, 511 U.S. 127 (1994).[14]

E. Numerous other instances of prosecutorial misconduct deprived Flanagan of his constitutional right to a fair trial.

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[12] See, e.g., Belmontes v. Woodford, 350 F.3d 861, 881-82 (9th Cir. 2003) (prosecutor has duty to correct false testimony regardless of defense knowledge); Benn v. Lambert, 283 F.3d 1040, 1061 (9th Cir. 2002) (defense knowledge does not dispose of prosecutor's Brady obligations to disclose expert impeachment); Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995) (prosecution's obligation to disclose Brady evidence independent of defendant's knowledge).

[13] Three of the peremptory challenges utilized by the prosecution were used to exclude Laura J. Jacobs (15 AA 3612), Joleen J. Melton (15 AA 3655), and Alverta N. Colonna (15 AA 3672).

[14] The District Court held that this claim was moot because Flanagan received a third penalty hearing (31 AA 7530 at 7534 ¶20). The court's conclusion, however, is erroneous. Where, as here, pervasive government misconduct has required Flanagan to undergo three capital prosecutions, during which the prosecution has tailored its case with greater precision to address the defense, fundamental fairness requires this Court to impose a life sentence without a retrial. See, e.g., Oregon v. Kennedy, 456 U.S. 667 (1982) ("retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is 'motivated by bad faith or undertaken to harass or prejudice' the defendant"); Green v. U.S., 355 U.S. 184, 187-88 (1957) ("the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty").

Prosecutors Seaton and Harmon committed numerous other acts of prosecutorial misconduct that violated Flanagan's constitutional right to a fair trial. For example, during voir dire, Seaton admitted that he had run a "police scope" on prospective juror Youngberg, without disclosing the results with defense counsel, contrary to his prior agreement with them. Seaton explained his action as follows: "And simply out of curiosity I did run that one name. Didn't tell defense counsel because I knew it was really a waste of time because he was one of our first peremptories." (5 AA 1138). The prosecution's improper and unlawful use of law enforcement resources to investigate the backgrounds of potential jurors, and the prosecution's failure to inform Flanagan of that action, distorted the adversarial process and deprived Flanagan of his constitutional rights. See, e.g., Banks v. Dretke, 124 S.Ct. 1256, 1275 (2004).

1. Injection of irrelevant and prejudicial information.

At every turn, the prosecution sought to inflame the jury's passions with irrelevant and prejudicial information, inject personal evaluations of the case, and deprive Flanagan of a fair guilt determination.[15] The record is replete with such misconduct. For example, in an obvious attempt to condemn all four defendants because of their associations, Harmon argued during the guilt phase: "Four men charged with these crimes. Four men who had as their friends gang members. These people were school dropouts. They were drug users. They were devil worshippers." (11 AA 2492). None of those characteristics are criminal, yet they were used by the prosecution to portray Flanagan as evil and therefore worthy of condemnation. He later referred to Flanagan's "devil worshipping buddies." (11 AA 2501). Seaton also commented on Flanagan's motive and speculated that he intended to "divvy it up [the estate] in the middle of a coven proceeding or something." (11 AA 2511). He discussed Flanagan's role in the conspiracy, saying "they didn't only lead the coven, they let their black and their white magic spill over into this conspiracy and it was they who did all of the planning of the things that we have talked

[15] See, e.g., Darden, 477 U.S. at 181 (due process violated when behavior "'so infected the trial with unfairness as to make the resulting conviction a denial of due process'") (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Berger v. U.S., 295 U.S. 78, 88 (1935) (prosecutors must avoid "improper suggestions, insinuations, and especially assertions of personal knowledge."); Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983).

about before." (11 AA 2519). And again, "These people were one and the same. They were buddies and partners as well as conspirators. And they did everything together. They shared drugs, they partied, they shared beer, they shared witchcraft." (11 AA 2549). All of these comments were made by the State during closing argument in the guilt phase.

Seaton and Harmon also injected their personal opinions (see, e.g., 11 AA 2523, 2525, 2546), in violation of state and federal law and ethical rules. U.S. v. Necoechea, 986 F.2d 1273, 1278 (9th Cir. 1993) (vouching violated due process and requires reversal). Further, Seaton argued evidence that was not in the record (11 AA 2533).[16]

Harmon made blatant attempts to appeal to the passion and prejudice of the jury by emphasizing the evil of the defendants and the benevolence (kindly grandparents) of the victims (11 AA 2492, 2501, 2511, 2518, 2549, 2677, 2684; 12 AA 2876, 2882). See, e.g., Cunningham v. Zant, 928 F.2d 1006, 1019-1202 (11th Cir. 1991) (Sixth and Fourteenth Amendments prohibit prosecutor from appealing "to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law"); Thomas, 83 P.3d at 826 (prosecutor argument to treat the defendant mercilessly improper). Harmon similarly violated Flanagan's right to a fair trial by calling on the authority of his office and his experience in attempting to sway the jury with his personal opinion that "I can't think of a case which more clearly establishes that it was First Degree murder, because of the felony murder rule and also because of the clear plan and design to murder two human beings." (11 AA 2698-99).

2. Comments on Flanagan's right to remain silent.

The prosecutor intentionally, improperly, and prejudicially penalized Flanagan for exercising his right to remain silent by commenting on his failure to testify during the guilt phase. The prosecutor argued, "[a]nd the last point to be made about whether or not conspiracies

[16] See, e.g., Thomas v. State, 120 Nev. 37, 83 P.3d 818, 825-26 (2004) (prosecutor may not refer to facts not in the record); Thomas v. Hubbard, 273 F.3d 1164, 1175-76 (9th Cir. 2001) (due process violated where prosecutor introduced inadmissible evidence); Gomez v. Ahitow, 29 F.3d 1128, 1136 (9th Cir. 1994) ("The prosecutor may not, consistent with a defendant's Due Process rights and Sixth Amendment right to confrontation, 'seek to obtain a conviction by going beyond the evidence before the jury.'").

occurred is that the conspiracies, the agreements, the meetings go uncontradicted. No one has taken the stand in this case that I remember, no one has taken the stand and said, 'wait a minute. Those people are lying. Those meetings didn't take place.'" (11 AA 2513-14). Judge Mosley, without justification or even explanation, ignored the violation when it was called to his attention (11 AA 2514). This *per se* violation of the Constitution mandates relief.[17]

3. Reliance on biblical dogma.

The prosecutor intentionally misled the jury to convict and impose a death sentence based on capricious considerations of biblical dogma and pedantic exploitation of divine law, thereby interjecting unconstitutionally impermissible factors into the sentencing decision. Specifically, Harmon invoked the Bible in exhorting the jury to condemn Flanagan during the guilt trial (11 AA 2703). The prosecutor's biblical arguments were calculated to exploit the emotions and scruples of jurors schooled in the Christian religion to disregard their duty to weigh the evidence before them and render a fair and impartial decision.

The prosecutor's reliance on biblical law and invocation of the word of God to argue that the jury was required to convict and impose a death sentence conflicts with case law requiring that verdicts be based solely upon the evidence and the relevant law. See, e.g., Chandler v. Florida, 449 U.S. 560, 574 (1981) ("[t]rial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law"). Reliance on religious dogma is completely inappropriate in capital cases, given the normative decision to be made. See Jones v. Kemp, 706 F. Supp. 1534, 1559-60 (1989). A prosecutor's reliance on biblical law also lessens the jury's decision-making burden by shifting responsibility for their decision from the jury to God. See Sawyer v. Smith, 497 U.S. 227, 244 (1990). Because of these constitutional issues raised by arguments based in biblical dogma,

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[17] See, e.g., Wainwright v. Greenfield, 474 U.S. 284, 291 (1986) (Fifth Amendment recognizes "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial"); U.S. v. Schuler, 813 F.2d 978, 981 (9th Cir. 1986) (prosecutor's comments on non-testifying defendant's courtroom demeanor violated Fifth Amendment right not to testify and not to be convicted except upon the basis of evidence introduced at trial).

virtually every federal and state court to consider religious arguments has condemned them.[18]

These longstanding principles recently were applied in Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000), in which the Ninth Circuit concluded that the petitioner "was denied a fair penalty phase trial by the prosecutor's closing argument that invoked divine authority and paraphrased a well known biblical passage as support for imposition of the death penalty." Id. at 769. In this case, because the prosecutor's use of religious authority formed the basis, framework, and authority for his entire argument that Flanagan was guilty, the egregious misconduct necessarily prejudiced Flanagan. The prosecutor delivered no less than a religious sermon, urging the jury to make its decision based on religious fervor and obedience to the word of God as delivered by the prosecutor, thus violating the principle that a prosecutor's comments must not be "'directed to passion and prejudice rather than to an understanding of the facts and of the law.'" Lesko v. Lehman, 925 F.2d 1527, 1545 (3rd Cir. 1991) (quoting U.S. ex rel. Perry v. Mulligan, 544 F.2d 674, 680 (3rd Cir. 1976)).

The District Court's failure to address this issue in its Order denying the habeas petition was erroneous (31 AA 7530). The prosecutor's exhortation to the jury based on religious grounds violated Flanagan's constitutional rights and requires relief.

F. The trial court failed to exercise its authority to control the prosecutorial misconduct in this case.

Intentional wrongdoing by critical members of the State's law enforcement team – the prosecutors – calls into question the fairness and integrity of the trial and demands effective judicial supervisory action to prevent or deter such behavior. The power to take such action was within the trial court's discretion. Indeed, this Court has explicitly held that not only do prosecutors have a duty to insure that the defendant receives a fair trial, but also "our District Courts have a duty to insure that every accused shall receive a fair trial. This duty requires that

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[18] See Coe v. Bell, 161 F.3d 320, 351 (6th Cir. 1998); Bennett v. Angelone, 92 F.3d 1336, 1346 (4th Cir. 1996); Cunningham, 928 F.2d at 1019-20; U.S. v. Giry, 818 F.2d 120, 133 (1st Cir. 1987); Com. v. Chambers, 599 A.2d 630, 644 (1991); People v. Eckles, 404 N.E.2d 358, 365 (1980); State v. Wangberg, 136 N.W.2d 853, 854-55 (1965).

trial courts exercise their discretionary power to control obvious prosecutorial misconduct *sua sponte."* Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1128 (1985). Despite the prosecutors' repeated and intentional misconduct, the trial court failed to undertake any steps to protect Flanagan's statutory and constitutional rights.[19]

The resulting deprivations of Flanagan's fundamental federal constitutional rights was prejudicial, had a substantial and injurious effect or influence on the jury's determination of the verdicts at the guilt and penalty phases, and require the granting of habeas corpus relief from the convictions and sentence of death.

Claim 2

Flanagan's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as the result of the State's payment of money and other inducements to key witnesses. To secure Flanagan's conviction, 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 (30 AA 7138, Lucas Dec. ¶9; 7 AA 1696; 8 AA 1848). The State did not fully disclose its agreements with the witnesses to the jury or to Flanagan in violation of Brady, Giglio, and Napue, and no cautionary instruction regarding the testimony was given. The inherently unreliable testimony rendered the guilt and sentencing determinations fundamentally unfair and unconstitutional.

At the time of Flanagan's prosecution, this Court's decision in Franklin v. State, 94 Nev. 220, 577 P.2d 860 (1978), overruled by Sheriff, Humboldt County v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991), was controlling. In Franklin, this Court held that a defendant is denied due process of law guaranteed by the Nevada and federal constitutions 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 at 221. Here, two witnesses (Lucas and Saldana) testified that they

[19] To the extent that trial and/or appellate counsel should have raised these claims of misconduct earlier, their failure to do so constitutes deficient and prejudicial representation that deprived Flanagan of his constitutional rights to effective representation and timely and effective review of this misconduct. See, e.g., Evitts v. Lucey, 469 U.S. 387 (1985); Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001) (counsel's failure to object constitutes deficient performance).

expected to receive additional money after the completion of their testimony (7 AA 1708; 8 AA 1848). The State's withholding was particularly egregious in the case of Mr. Lucas, who admitted that the testimony he gave at the preliminary hearing and trial was inconsistent with his previous statements to police (7 AA 1696-97). The State paid Lucas $1,000 before the evidentiary hearing and an additional $1,000 after trial (Id.; 7 AA 1708). Lucas' testimony changed as a result of these payments (7 AA 1714). As Franklin was controlling at the time of Flanagan's conviction, the State's withholding of full payment to the witnesses until after they completed their testimony violated Flanagan's constitutional rights.

In Sheriff, Humboldt County, this Court abrogated the rule in Franklin in 1991, long after the State's actions in this case, concluding that the State may withhold the benefit, including payment, until after the witness testifies, but only when the State bargains in good faith for testimony represented to be factually accurate. 107 Nev. at 669. The State may not bargain for testimony so particularized that it amounts to following a script, or require that the testimony produce a specific result. Id. at 669; see also U.S. v. Vavages, 151 F.3d 1185 (9th Cir. 1998) (due process violated by prosecution's coercion of witness). Here, the State even violated the rule in Sheriff, Humboldt County, and thus violated Flanagan's due process rights, by bargaining for Lucas' particularized testimony.

Lucas testified that he was given a copy of his statement, put in a room by himself, and directed to memorize it (30 AA 7138, Lucas Dec. ¶8). Lucas also was required to rehearse his testimony (Id. at ¶9). Lucas received his $2,000 in two payments, once after he testified at the evidentiary hearing and once after he testified at trial. Id. Based on the timing of these payments, the change from Lucas's prior statements, and the State's actions forcing Lucas to memorize his testimony, the testimony was particularized and coerced.

The record establishes that the State also did not bargain in good faith for Saldana's testimony. Saldana admitted that she had sex with Flanagan to elicit information from him (8 AA 1819). During this time, Saldana gave police officers information she allegedly retrieved from Flanagan (8 AA 1842-43). When Saldana testified that the case investigators did not ask

her to exchange sex for information, the prosecution knew that she was living with Flanagan as his girlfriend (8 AA 1846). Based on Saldana's using sex to get information from Flanagan, the subsequent favorable treatment of her outstanding charges, and the State's knowledge of these exchange, Flanagan's due process rights were violated.

Sheriff, Humboldt County also requires that the terms of any agreement, including an agreement for payment of money, must be fully disclosed to the jury and that the defendant or his counsel must be allowed to fully cross examine the witness regarding the terms of the bargain. Id. at 669. This directive was violated when the State did not disclose to the jury the details of its agreement with Saldana, Lucas, and Havens. During its initial examination of the witnesses, the State did not question Lucas, Saldana, or Havens at all regarding the State's payment or promise of payment or favorable treatment for testimony (6 AA 1238-53; 7 AA 1595-1635; 8 AA 1746-79). While two of the witnesses were cross-examined to some extent regarding the State's payments, the details of the State's agreements were never fully disclosed to the defense or the jury. The admission of this testimony, without disclosure, violated Flanagan's constitutional rights. See Sheriff, Humboldt County, 107 Nev. at 669.

Finally, Sheriff, Humboldt County requires that a cautionary instruction be given to the jury where the State promises consideration in exchange for testimony. Id. at 669. During Flanagan's trial, the jury was not given a cautionary instruction regarding the weight to assign to testimony for which the State paid the witnesses. Indeed, the trial court allowed only a general instruction regarding witness credibility (12 AA 2749). The trial court refused to give requested instructions relating to witness credibility where the witness has an interest in the outcome (12 AA 2755b-d). The failure to give the required instruction, where the key witnesses were paid for their testimony, violated Flanagan's constitutional rights. Franklin, 107 Nev. at 669.

Flanagan's federal due process rights were similarly violated. Testimony for which the State pays or offers a more lenient sentence is admissible only where the defense and the jury is informed of the nature of the agreement, defense counsel is permitted to cross examine the witness, and the jury is instructed to weigh this testimony with care. See Morris v. Woodford,

273 F.3d 826, 835-36 (9th Cir. 2001) (challenge to conviction based on argument that plea agreements induced witnesses to give false testimony). As set forth above, the jurors were not informed of the full nature of the State's agreements with Lucas and Saldana, and no cautionary instruction was given to the jury regarding the testimony. Accordingly, Flanagan's federal constitutional rights were violated. See Gallego v. McDaniel, 124 F.3d 1065, 1078 (9th Cir. 1997) (jury needs sufficient information to appraise the biases and motivations of the witness).

Claim 3

Flanagan's conviction and death sentence are invalid under state and federal constitutional guarantees of freedom of speech, freedom of religion, due process of law, equal protection, trial by an impartial jury, and a reliable sentence because the State used his actions, statements and writings regarding witchcraft, alleged satanic writings, abstract philosophy and other constitutionally-protected materials at trial even though such evidence was irrelevant.

A. The guilt phase was structurally marred by the admission of irrelevant and highly prejudicial evidence regarding Flanagan's abstract beliefs.

After Dawson v. Delaware, 503 U.S. 159, 168 (1992), "evidence of a defendant's abstract beliefs" may not be introduced "at a sentencing hearing when those beliefs have no bearing on the issue being tried." This Court (like all the other courts to address the issue) has found this basic principle of First Amendment jurisprudence also applies to the guilt phase. See Flanagan V, 112 Nev. 1409; State of Missouri v. Driscoll, 55 S.W.3d 350, 354 (Sup. Ct. Mo. 2001). Johnny Ray Luckett, a co-defendant, was permitted to introduce highly prejudicial evidence in the guilt phase regarding Flanagan's alleged participation in "black magic" or "Satan worship." Luckett called Wayne Wittig who claimed that Flanagan participated in "what is known as a coven . . . a gathering of people to use, you might say, its basis of Satan to get the most out of life, so to speak . . ." and that Flanagan "was basically – I don't know if the correct word is wizard but he was basically the second in command as far as the coven went. He had actually the first-most power, but there was one power more stronger than his . . . ." Wittig also claimed that Flanagan practiced "black magic" which, was allegedly used to "put a hex" on people so that

"they would feel pain they wouldn't normally feel." (9 AA 2072).

This evidence ostensibly was allowed to support Luckett's claimed defense that his involvement was due to fear of Flanagan and Moore.[20] Luckett never introduced any evidence, however, to show how Flanagan's alleged participation in this "coven" had any connection to this defense. In fact, Luckett presented no evidence that he had any knowledge of Flanagan's alleged "devil worshiping" activities, or that he was aware of any of the information offered by Wittig (9 AA 2214). Moreover, at the outset of the guilt trial – before any testimony was introduced – Luckett's counsel announced his intention to portray Flanagan "as, quite frankly, [a] very savage, amoral individual[]." (4 AA 840). There can be no doubt that Luckett's introduction of the "devil worship" evidence was part of that alternative defense strategy – the exact use rejected in Dawson as impermissible. See Dawson, 503 U.S. at 167 (evidence of defendant's religion or associations may not be introduced "simply because the jury would find these beliefs morally reprehensible"). Thus, the court erred in permitting Luckett to introduce evidence of Flanagan's abstract beliefs solely for the purpose of prejudicing Flanagan.[21]

Ironically, while Luckett's counsel hardly referred to this "devil worshipping" evidence during argument, the prosecution referred to this evidence extensively in its guilt phase closing, using it to malign Flanagan's character:

> [the victims] didn't ask their grandson Dale to come to them and kill them so they could give him and his devil-worshipping buddies a piece of their estate a little more quickly . . . . [Flanagan] was going to share [what he thought he would gain from the murders] with all of his friends. Probably divvy it up in the middle of a coven proceeding or something. That's the agreement. That's the conspiracy. That's the dark and evil plan that was created over a period of time and put into action and finalized on that fateful night . . . . [Flanagan and Moore] were, in fact, the main co-conspirators. They were the talkers, they were the planners. They led this thing. They didn't only lead the coven, they let their black and their white

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[20] Whatever merit there may be to this defense theory, the only evidence presented to support it – Luckett's testimony that Moore drew him into a closed room and pointed a gun at him while allegedly demanding Luckett's cooperation – tended to establish that Moore, alone, and not Flanagan, coerced Luckett into participating in the crimes charged (9 AA 2214). Indeed, even the prosecution noted in its closing "it was contended that Mr. Moore is the user of white magic . . . the white is important because the one who uses white is the manipulator." (11 AA 2704).

[21] Flanagan's counsel objected to this evidence at several points in the trial by requesting, at the outset, severance of the trials, and then later requesting a mistrial (2 AA 388, 401; 4 AA 837).

magic spill over into this conspiracy . . . . (11 AA 2501, 2511, 2519.)

Indeed, even the prosecution conceded the irrelevance of this evidence: "and then Luckett through his attorney decided to project this notion of white and black magic into the case. I don't know that it has any relevance." (11 AA 2704). Thus, the prosecution's use of this evidence was highly improper, as this Court has already found: "[the coven] evidence was irrelevant to the crimes charged, and the prosecutor improperly used it in the guilt phase simply to demonstrate the appellants' bad character." Flanagan V, 112 Nev. at 1418.

B. The erroneous admission of evidence of Satan-worship during the guilt phase requires relief.

Flanagan's constitutional rights to free expression and due process unquestionably were violated by the trial court admitting irrelevant and highly prejudicial evidence. See, e.g., Dawson, 503 U.S. at 164; Donnelly, 416 U.S. at 643 (reversal required when error "so infected the trial with unfairness as to make the resulting conviction a denial of due process").

Having established the existence of a constitutional violation, the question becomes whether the error was sufficiently prejudicial to require reversal. This Court has already found that "there is no room for a harmless-error analysis" when a Dawson error is committed during the penalty phase of a capital offense. Flanagan IV, 846 P.2d 1053, 1058. Although Flanagan believes that this rationale is equally applicable to the guilt phase, this Court need not revisit its contrary holding in Flanagan IV because the prejudice was manifest.

The improperly introduced evidence is of the most inflammatory type. It is self evident that our society associates satanic worship with evil practices. See State v. Leitner, 34 P.3d 42, 56 (Kan. 2001) ("It seems evident that our culture associates witchcraft with satanic worship and other evil practices. Any mention of a defendant's involvement with witchcraft is highly prejudicial."). Permitting introduction of this evidence not only improperly tainted the jury's impression of Flanagan, but also severely impinged on his right to testify given the great taint to his credibility. Moreover, the fact that the victims of the murders were Flanagan's grandparents placed Flanagan in a different position from his co-defendants. As the prosecutor argued in his

closing, the only thing perhaps more heinous than pre-meditated murder is pre-meditated murder of one's family members (11 AA 2684). When added to this fact, the improperly introduced evidence that Flanagan worshipped Satan virtually sealed his fate in the guilt phase.

Finally, by repeatedly referring to the "devil worshiping" evidence in its closing, the State gave its imprimatur to the evidence, thus encouraging the jury to consider and rely on the evidence. In this way, the State used the evidence to sway the jury to its version of the events. Given the poor quality and obvious bias and reputation for lying of the State's witnesses, the State clearly seized on the devil worship evidence as evidence that placed Flanagan in lower esteem than the prosecution's line-up of convicted criminals, drug users, liars and prostitutes who testified against him. See State v. Kimbrell, 320 N.C. 762, 768, 360 S.E.2d 691 (1987) ("[t]he real effect of questions about devil worship . . . and the like, which in this particular case had little or no probative value, can only have been to arouse the passion and prejudice of the jury."); State v. Tate, 341 N.W.2d 63, 64-65 (Iowa Ct. App. 1983) (defendant denied fair trial where prosecution introduced evidence that could lead the jury to conclude that defendant was a Satan worshipper, such conclusion which "would obviously be highly prejudicial to his case").

Given how highly prejudicial and totally irrelevant to any issue in this case the evidence of devil worship was, it is impossible to find, beyond a reasonable doubt, that the improperly admitted evidence did not affect the outcome of the trial. Indeed, the evidence against Flanagan was almost entirely circumstantial, based on hearsay and introduced through witnesses who were being paid by the prosecutor (either in cash or in reduced sentences) to give the testimony. The evidence of devil worship unfairly buttressed the prosecution's case to Flanagan's detriment.[22]

Claim 4

Flanagan's conviction and death sentence are invalid under the state and federal

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[22] This Court previously has inferred that the jury gave little weight to this evidence and was "aware of the self-serving nature of Luckett's evidence of occult activities and his claim that he was compelled to commit the crimes," from the fact the jury convicted Luckett. Flanagan V, 112 Nev. at 1420. However, this inference does not necessarily support a finding that introduction of the devil worship evidence was not prejudicial to Flanagan. In fact, this evidence was even more harmful and prejudicial to Flanagan because of his relationship to the victims of the crimes.

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.

The Sixth Amendment to the U.S. Constitution and Nevada state counterpart guaranteed Flanagan the right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984). A habeas petitioner establishes entitlement to by demonstrating that counsel's performance was deficient and that prejudice resulted from the deficiencies. See Rompilla v. Beard, 125 S.Ct. 2456, 2005 WL 1421390 (June 20, 2005); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003); Strickland, 466 U.S. at 687. Deficient performance occurs when "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 693-94.

Although Flanagan presented compelling reasons why his Sixth Amendment rights were violated, supported with ample evidence, the court improperly denied this claim without the opportunity to develop and present additional supporting evidence. Instead, the court denied Flanagan's motions for funds (34 AA [filed under seal] 8113), discovery (27 AA 6537, 30 AA 7282), and a full evidentiary hearing (30 AA 7312). The District Court compounded its errors by conducting a restricted and truncated hearing on the narrowest of issues (30 AA 7326) and then adopted verbatim the State's version of the facts (31 AA 7530). Under these circumstances, the court abdicated its responsibility to provide a fair forum, and this Court should remand the case for full development of the claim. See, e.g., Marshall, 885 P.2d at 606.

A. First Trial

The trial court appointed Randall Pike to represent Flanagan just days prior to the evidentiary hearing, after the Clark County Public Defender's Office successfully moved to withdraw, apparently after conducting no investigation or pretrial preparation, due to an alleged conflict of interest which is entirely unexplained in the record (2 AA 252-53). Mr. Pike's

appointment was confirmed on August 7, 1985 (2 AA 260). Mr. Pike was inexperienced, had no time to prepare for that hearing or for the trial, conducted no meaningful investigation despite obvious unresolved issues, missed repeated opportunities to exploit inconsistencies in testimony between the evidentiary hearing and trial, generally offered only the most minimal of defenses, and offered virtually nothing in the way of mitigating evidence in the penalty phase.

1. Inadequate Investigation and Trial Preparation

Mr. Pike's inadequate investigation and trial preparation is demonstrated by a multitude of errors. At the time he was appointed, Mr. Pike had been practicing law for only three years, two of which had been in the District Attorney's Office (30 AA 7148, Pike Aff. ¶1). He had not previously handled a capital case as a defense lawyer (Id. ¶3).

Flanagan has established his entitlement to relief because Pike rendered unconstitutionally deficient representation by failing to investigate and present a credible defense. The Court in Strickland held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.[23] It is axiomatic that defense counsel has an obligation "to investigate all witnesses who allegedly possessed knowledge concerning the defendant's guilt or innocence." Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir.), amended, 939 F.2d 586 (1991). Without conducting an adequate investigation, counsel fails to provide a defendant with effective assistance guaranteed by the U.S. Constitution. See, e.g., Johnson v. Baldwin, 114 F.3d 835 (9th Cir. 1997) (granting relief where trial counsel failed to investigate possible defense); Harris ex rel. Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995) (counsel rendered deficient performance in failing to investigate facts and possible defenses or to investigate petitioner's mental and emotional status).

Flanagan unquestionably established that Mr. Pike rendered deficient performance. Mr.

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[23] See also Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir. 1990) ("The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial."); Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990) (counsel must adequately investigate, consider viable theories, and develop evidence to support those theories); State v. Love, 109 Nev. 1136, 865 P.2d 322, 325 (1993) ("Legal and factual judgments erroneously made because of inadequate investigation may be deemed ineffective assistance of counsel."); Doleman v. State, 112 Nev. 843, 921 P.2d 278 (1996).

Pike made no requests for investigation funds necessary to explore possible defenses. Mr. Pike undertook no investigation other than to meet briefly with Flanagan's father, who was not a witness to the crime and whom Pike believed possessed little relevant information (30 AA 7148, Pike Aff. ¶¶6, 10). Pike only perfunctorily interviewed a few of the State's witnesses (Id. at ¶¶7, 10). In short, he conducted no meaningful investigation.

The most significant inadequacy was Mr. Pike's failure to learn of, interview, and call at trial Robert Ramirez, who would have testified to Flanagan's actual innocence (30 AA 7186, Ramirez Dec. ¶¶12, 13, 19). Ramirez would have testified that, rather than acting as ringleader and trigger man as he was portrayed at trial, Flanagan was actively trying to prevent the murders and put himself at risk of death in doing so. Id. The failure to discover and present this evidence was prejudicial. "Pretrial investigation and preparation are the keys to effective representation of counsel." U.S. v. Tucker, 716 F.2d 576, 581 (9th Cir. 1983).

Mr. Pike's failure to investigate the crime scene and other guilt phase evidence similarly violated Flanagan's Sixth Amendment rights.[24] Although there were inconsistencies at trial between testimony and physical evidence, such as blood spatters, fingerprints, and bullet trajectories (30 AA 7148, Pike Aff. ¶10), Pike did not seek funds for or hire any forensic experts to review this issues. The absence of Flanagan's fingerprints at the crime scene was a significant fact that Pike failed to investigate and exploit at trial (Id. ¶¶7, 8). This fact alone, if properly presented, could have raised significant doubt about the prosecution's case. When coupled with the numerous other weaknesses in the State's case, it is reasonably probable that outcome would have been different. The District Court's failure to permit Flanagan to develop evidence to support this claim and to hold a hearing requires reversal. See Marshall, 110 Nev. 1328, 1331; U.S. v. Schaflander, 743 F.2d 714, 717 (9th Cir. 1984). In such a circumstance, a hearing must be granted. See, e.g., Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994) (evidentiary hearing necessary where petitioner demonstrated counsel's failure to investigate potential guilt defenses).

[24] See, e.g., Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002) (granting relief because defense counsel did not investigate circumstances of the killing); Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996) (granting relief for counsel's failure to examine and challenge physical evidence).

Pike's failures to conduct the investigation necessary to render constitutionally appropriate representation cannot be deemed an informed or strategic decision. Despite all the work that needed to be done, Pike failed to move for a continuance to accomplish the necessary preparation to defend Flanagan (30 AA 7148, Pike Aff. ¶12). The mere failure to seek a continuance when appropriate, even without the exacerbating factors enumerated above, has been held to constitute the basis for a finding of ineffective counsel. See, e.g., Turpin v. Bennett, 525 S.E. 2d 354 (Ga. 2000) (counsel ineffective in capital case for failure to seek continuance when expert defense psychiatrist changed testimony as a result of impaired mental state).

Mr. Pike's performance with respect to Flanagan's mental state at the time of the crime and prior to and during trial required the District Court to hold an evidentiary hearing and grant relief. "Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired."[25] Once this duty arises, counsel's investigation of the issue must be reasonable. See, e.g., Strickland, 466 U.S. at 691; Douglas, 316 F.3d at 1085. Mr. Pike did not investigate or present a diminished capacity defense for Flanagan despite the three-day drug and alcohol binge he had engaged in immediately preceding the crimes (30 AA 7148, Pike Aff.. ¶10). Mr. Pike's failure to conduct such an investigation unconstitutionally deprived Flanagan of a meritorious guilt defense.[26]

Similarly, Mr. Pike had no mental or physical tests performed on Flanagan to determine whether he was competent to stand trial (30 AA 7151, Pike Aff. ¶10). In addition, although Pike occasionally met with Flanagan at the Clark County Detention Center (Id.), he failed to obtain jail medical records which would have revealed to him that Flanagan was receiving substantial

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[25] Douglas v. Woodford, 316 F.3d 1079, 1085 (9th Cir. 2003) (citing Bean v. Calderon, 163 F.3d 1073, 1077 (9th Cir. 1998)); see also Seidel v. Merkle, 146 F.3d 750 (9th Cir. 1998) (counsel rendered ineffective assistance in failing to conduct any investigation into possible ramifications of defendant's psychiatric impairment).

[26] See, e.g., Bloom v. Calderon, 132 F.3d 1267, 1277 (9th Cir. 1997) (counsel's failure to obtain a psychiatric expert until shortly before trial, combined with counsel's failure to adequately prepare and present his expert at trial, constitutes constitutionally deficient representation); Jennings v. Woodford, 290 F.3d 1006, 1013 (9th Cir. 2002) (attorney's failure to investigate may amount to constitutionally deficient performance in either guilt or penalty phase).

psychotropic medications that rendered him incompetent to stand trial (Id. ¶¶7, 10). Pike failed to raise a doubt about Flanagan's competence to stand trial, object to the forced medication of his client, or otherwise ensure that Flanagan participated in his defense.[27]

2. Inadequate Pretrial Motions and Trial Conduct.

Defense counsel in a capital case has the duty to utilize pretrial and *in limine* procedures to ensure a fundamentally fair trial process. See, e.g., Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000) (counsel ineffective for failing to request *in limine* ruling or move to exclude objectionable evidence). The record is replete with instances in which Mr. Pike failed to fulfill this obligation. First, Mr. Pike failed to challenge the vague complaint against Flanagan or the broader charges presented to the Court. Though the complaint charged Flanagan with one murder (1 AA 19), he was convicted of two (12 AA 2761-62). Mr. Pike's implicit consent to this expansion renders his counsel ineffective. See, e.g., Wilcox v. McGee, 241 F.3d 1242 (9th Cir. 2001) (counsel ineffective for failing to move to dismiss indictment).

Second, Mr. Pike failed to object or to move for a motion *in limine* to exclude witchcraft evidence that Luckett proffered (30 AA 7148, Pike Aff. ¶13). Although Mr. Pike did move for severance of Flanagan's trial from that of his co-defendants, he failed to argue that Luckett's defense need not include the witchcraft evidence that proved so prejudicial (Id.). Mr. Pike's failure to exclude this evidence rendered his counsel ineffective.[28]

Third, Mr. Pike failed to ensure Flanagan's right to a fair and impartial jury by failing to object to the trial court's requirement that all defense counsel agree on the exercise of peremptory challenges (5 AA 1136). In addition, he acquiesced in the use of a preemptory

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[27] See, e.g., Hull v. Kyler, 190 F.3d 88, 111 (3rd Cir. 1999) ("when a defendant's own attorney fails to effectively use the procedures to determine competency that are mandated by Supreme Court precedent, we believe that the prejudice to the possibly still-incompetent defendant is manifest"); Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997) (reasonable attorney in a capital case would have undertaken a competency evaluation).

[28] See, e.g., Crotts v. Smith, 73 F.3d 861 (9th Cir. 1996) (counsel's failure to object to prejudicial testimony required relief); Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (counsel held ineffective in murder case for failing to object to inadmissible evidence of devil worship and Mafia membership).

challenge that was not in Flanagan's interest. See, e.g., Harris ex. rel. Ramseyer, 64 F.3d 1432 (counsel rendered deficient performance, *inter alia*, for failing to conduct proper voir dire).

Fourth, Mr. Pike failed to cross examine all key witnesses on prior statements and testimony to exploit the inconsistencies throughout the guilt trial (30 AA 7148, Pike Aff. ¶16).[29] For example, he failed to cross examine or argue about the inconsistencies between different witnesses regarding the method of breaking the window through which entry was allegedly achieved. One witness said the window was broken by a closet pole that was introduced into evidence, yet there were no glass shards or evidence of it having been involved in breaking the window (30 AA 7148, Pike Aff. ¶¶7, 17; 8 AA 1774; 7 AA 1624). Another witness testified that Flanagan himself broke the window with his fist, yet there was no cross examination about wounds to Flanagan's hand (3 AA 609; 6 AA 1440; 30 AA 7148, Pike Aff. ¶¶7, 17; 2 AA 323-24; 9 AA 2043; 9 AA 2076-89; 11 AA 2520).

Similarly, Mr. Pike failed to cross examine Wayne Wittig to illustrate that his testimony contained the same errors as newspaper stories about the case, thus demonstrating his lack of personal knowledge concerning the facts to which he testified (9 AA 2045; 30 AA 7148, Pike Aff. ¶18). Nor did Pike cross examine Wittig about his telephone being out of service at the time of an alleged conversation with Flanagan, which could easily have been bolstered by investigation of telephone records (9 AA 2045; 30 AA 7148, Pike Aff. ¶18).

Mr. Pike failed to investigate Ms. Saldana's criminal record, which should have been apparent since she testified at a pretrial hearing in jail clothing (8 AA 1813-33; 30 AA 7148, Pike Aff. ¶19). The importance of Saldana's testimony would have been diminished by full disclosure of her criminal background and her need to satisfy the prosecution with her testimony.

Finally, Mr. Pike failed to object to the presence of armed guards in the courtroom (30 AA 7148, Pike Aff. ¶19), or to Flanagan being seen in shackles by jurors (30 AA 7137,

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[29] See, e.g., Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995) (counsel ineffective for failing to conduct adequate cross-examination of serologist or to impeach other witness with prior inconsistent testimony); Moffett v. Kolb, 930 F.2d 1156 (7th Cir. 1991) (counsel ineffective for failing to introduce the prior inconsistent statements of two state witnesses).

Buchanan Dec. ¶2), which are inherent violations of Flanagan's constitutional rights.

3. Inadequate Preparation for Penalty Phase.

At the time of Flanagan's three capital trials, reasonably competent counsel recognized that a thorough investigation of the defendant's background and family history, including his medical, mental health, academic, and social history, was essential to the adequate preparation of a potential penalty phase defense.[30] The U.S. Supreme Court recently reaffirmed the duty to investigate, even when the initial questioning of the defendant and family members fail to uncover potential mitigation. Rompilla, 2005 WL 1421390 *3 ("We hold that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.").

Mr. Pike failed 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. Had he done so, he would have discovered that Flanagan suffered extreme abuse at the hands of his parents and grandparents and suffers from significant mental impairments, as discussed more fully below.[31] Without a sufficient investigation, a capital defense attorney cannot make reasoned tactical decisions "precisely because counsel did not even know what evidence was available." Silva, 279 F. 3d at 847.

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[30] See, e.g., Wiggins, 123 S.Ct. at 2537 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"); Williams, 529 U.S. 362 (counsel deficient for failing to prepare for sentencing hearing until a week before trial and failing to conduct an investigation that would have uncovered extensive records "graphically describing [petitioner's] nightmarish childhood").

[31] See, e.g., Caro v. Woodford, 280 F.3d 1247, 1249-50 (9th Cir. 2002) (counsel ineffective for failing to prepare and present evidence of history of exposure to toxic pesticides, head injuries, and child abuse); Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) (counsel ineffective for failing to prepare and present evidence of abuse and neglect, possibility of Fetal Alcohol Syndrome, Post-Traumatic Stress Disorder, drug use, and amphetamine-induced organic mental disorders).

Mr. Pike failed to object to improper jury instructions (12 AA 2726, 2734, 2755, 2744). See Thomas, 83 P.3d at 823-24 (granting penalty phase relief for trial counsel's failure to object to inappropriate instructions). Mr. Pike also failed to object to the use of the "great risk" aggravator or request instructions that would have required a nexus between the burglary and robbery that were used by the State as aggravators to support the death sentence. See Claims 12, 14, and 15, infra. Finally, he failed to object to the improper double counting of the felony murder aggravator. See Claim 16, infra.

B. Second Trial

1. Conflicts of Interest

In the second trial, Flanagan was represented by the Clark County Public Defender's office (14 AA 3191). However, as stated above, at the first trial, the Public Defender's office had successfully moved to withdraw due to a conflict of interest (2 AA 252, 254). Although no explanation appears on the record for this conflict, neither does any explanation appear for its resolution. Without a resolution, the ethical conflict must be presumed to continue.

In Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980), the Court held that prejudice is presumed under the Sixth Amendment when the counsel had an actual conflict of interest that adversely affected performance. Subsequently, in Wood v. Georgia, 450 U.S. 261 (1981), the Court held that the mere possibility of a conflict of interest was sufficient to impose a duty on the trial court to inquire further and characterized Cuyler as mandating a reversal when the trial court has failed to make an inquiry under these circumstances. 450 U.S. at 271, n.18. In addition, defense counsel has an obligation to inform the trial court of the existence of a conflict of interest. Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978).

Here, both defense counsel and the trial court violated their respective obligations to address and resolve this issue in all subsequent proceedings. The trial court made no such inquiry in Flanagan's second trial (14 AA 3191-18 AA 4197), notwithstanding the admitted conflict of interest by the Clark County Public Defender's office in the first trial (2 AA 252-53). The existence of the conflict at the first trial was more than sufficient to require the trial court to

inquire further about it at the second trial. The trial court's failure to do so requires the automatic reversal of Flanagan's sentence. See note 14, supra. Furthermore, as stated below, the District Court committed the error at the third trial.

2. Inadequate Investigation and Trial Preparation

Just as in the first trial, Flanagan's counsel in the second trial, Mr. Dahl, devoted inadequate resources to the task, failed to conduct an adequate investigation and did virtually nothing to avoid the imposition of the death penalty. Mr. Dahl failed to move to sever Flanagan's trial from his co-defendant, Randolph Moore (14 AA 3196-16 AA 3700). Without such a motion, the jury was permitted to misuse evidence of Moore's participation in the crimes against Flanagan. See, e.g., Hernandez v. Cowan, 200 F.3d 995 (7th Cir. 2000) (counsel ineffective for failure to move for severance from a co-defendant with antagonistic defenses). Mr. Dahl unreasonably failed to secure a fair and impartial jury by objecting to the prosecutor's improper use of peremptory challenges. See Claim 1.D, supra; Gov't. of Virgin Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989) (counsel ineffective for failure to object to prosecutor's use of peremptory challenges to excuse Caucasian jurors). Mr. Dahl similarly did not conduct any substantial mitigation investigation, failed to hire a mitigation expert, did no psychological or psychiatric investigation and hired no such experts (14 AA 3191-18 AA 4197).

C. Third Trial

1. Inadequate Investigation and Trial Preparation.

In the third trial, Flanagan was once again represented by the Clark County Public Defender's Office (19 AA 4534). For the reasons stated above, without a resolution of the ethical conflict that existed in the first trial, the conflict must be presumed to continue to exist and counsel again must be deemed ineffective *per se*.

Once again, the Public Defender's Office devoted inadequate resources to Flanagan's case (30 AA 7204, Blaskey Aff. ¶3). Although two counsel were assigned to the case, Rebecca Blaskey and David Wall, they kept separate files and did not communicate in preparation for trial (Id.). The Public Defender's Office was overloaded with cases and was unable to devote

adequate resources to Flanagan's case (Id. ¶7). For example, Mr. Wall was appointed just 90 days before the trial and spent virtually no time with Flanagan before the trial began (Id. ¶¶6, 7). Mr. Wall opted not to meet Flanagan at Ely State Prison on the day selected for such a meeting and chose instead to play golf (Id. ¶6). Wall waited until just before the trial to meet Flanagan and thus was inadequately prepared for the trial.

The inadequate preparation proved devastating to the defense. Although counsel recognized the need to employ a mental health expert, they failed to provide that expert with an appropriate referral question, necessary background material and information, and sufficient time to evaluate Flanagan and render an opinion about his mental functioning and possible mitigation. Indeed, the expert was able to examine Flanagan very briefly and just days before trial began (Id. ¶4).[32] They hired no mitigation expert and did virtually no mitigation investigation (Id. ¶3).

Counsel also failed to move to sever Flanagan's case from that of Randolph Moore, thus failing to present an individualized case in defense of Flanagan. The failure to seek severance made counsel ineffective. See Claim 4.B.2, supra.

2. Inadequate Pretrial Motions and Trial Conduct

Flanagan's Sixth Amendment rights were further violated by conflicts that developed as a result of the breakdown in the working relationship between Blaskey and Wall and as a result of institutional decisions made in the Clark County Public Defender's Office that were adverse to Flanagan's interests (Id. ¶¶3, 8, 10). The breakdown between Blaskey and Wall created a hostile defense team environment that precluded any cooperation between the attorneys and adversely affected Flanagan's defense. Similarly, the institutional conflict of interest impaired Flanagan's attorneys' ability to make independent decisions regarding strategy, the availability of resources, the ability of counsel to seek continuances, and the preparation of a defense, all of which adversely affected Flanagan's defense at trial. As a result of this breakdown, Flanagan was

[32] Counsel compounded their failure to prepare their expert by voluntarily turning over the expert's raw data and materials to the prosecution, thus enabling the prosecution to conduct a devastating cross examination of the expert (Id. ¶4). See, e.g., Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2002) (counsel ineffective for eliciting damaging testimony); U.S. v. Villalpando, 259 F.3d 934 (8th Cir. 2001) (counsel ineffective for eliciting damaging testimony).

deprived of a fair trial. When a key witness for Flanagan could not be present for the trial (Id. ¶8), Ms. Blaskey's request for permission from her superiors to seek a continuance was denied (Id.), a result that deprived Flanagan of effective assistance of counsel.

3. Inadequate Preparation for Penalty Phase.

Counsel did not conduct any substantial mitigation investigation, failed to hire a mitigation expert, did no psychological or psychiatric investigation, did very little investigation of Flanagan's adaptation to prison life, and presented minimal evidence on that point (Id. ¶¶3, 4, 10). See, e.g., Karis v. Calderon, 283 F.3d 1117, 1133 n.9 (9th Cir. 2002) (penalty phase counsel is "required to find and try to interview (either directly or through an investigator) all persons who were material witnesses to the client's genetic heritage, social history and life history").

D. Trial Counsel's Deficiencies Caused Prejudice.

1. Guilt Phase Prejudice.

First, had Mr. Pike done even a modicum of investigation, he would have learned that Robert Ramirez was a leader of the Aces gang, to which some defendants belonged. He would further have learned that Ramirez could testify that Flanagan did not participate in the murders, and actively tried to prevent them, to the point of placing his own life in jeopardy (30 AA 7186, Ramirez Dec. ¶¶12, 13). This evidence would have created reasonable doubt that may well have led to a not guilty verdict for Flanagan (30 AA 7137, Buchanan Dec.).

Second, an adequate investigation by Mr. Pike would have demonstrated that Flanagan was extremely unlikely to have participated in the crime. Witnesses routinely described him as a follower, a quiet person, someone unlikely to participate in such a crime (30 AA 7138, Lucas Dec. ¶¶25, 26; 30 AA 7168, Samples-Smith Dec. ¶4; 30 AA 7170, Wittig Dec. ¶¶3-7, 10-12; 30 AA 7191, Thayer Dec. ¶3).

Third, trial counsel unreasonably failed to examine the crime scene evidence, interview potential crime witnesses, and obtain expert assistance in assessing the prosecution's case (30 AA 7204, Blaskey Aff. ¶¶3, 10; 30 AA 7145, Havens Dec. ¶10; 30 AA 7170, Wittig Dec. ¶44; 30 AA 7138, Lucas Dec. ¶24; 30 AA 7186, Ramirez Dec. ¶19). Had trial counsel undertaken

even a rudimentary investigation and prepared for the guilt trial, he would have been able to demonstrate that the State's version of the crime was inconsistent with the physical evidence obtained at the crime scene and the accounts of those present. In addition, trial counsel would have disproved the State's theory that Flanagan participated in planning the crime or that he was motivated by any inheritance. Indeed, trial counsel would have been able to demonstrate the opposite (30 AA 7194, Saldana-Ficklin Dec. ¶¶2-12; 30 AA 7170, Wittig Dec. ¶¶34-36; 30 AA 7158, McDowell Dec. ¶13). But for counsel's unprofessional errors, the result of the proceedings would have been different.

Fourth, had trial counsel rendered constitutionally adequate representation, he would have been able to prove that Flanagan was under the influence of powerful psychotropic drugs on the night of the crime, which, combined with his pre-existing mental condition, rendered him incapable of formulating any plan or intention to kill (30 AA 7194, Saldana-Ficklin Dec. ¶¶11-12). Had trial counsel properly developed and presented the testimony of readily available experts, the jury would have heard compelling evidence concerning, *inter alia*, Flanagan's multiple mental dysfunctions, the debilitating physical and psychological effects of his traumatic and violent childhood and his deteriorating psycho-social functioning at the time of the crime (30 AA 7207, Kriegler Dec. ¶¶37-42).

2. Penalty Phase Prejudice.

During each penalty phase, trial counsel presented some evidence about Flanagan's background, childhood, and mental functioning (12 AA 2769-71, 2774-76; 17 AA 3953-59; 24 AA 5669-92; 30 AA 7207, Kriegler Dec. ¶¶7-42). Rather than a compelling and corroborated case in mitigation, however, the jury heard a misleading and incomplete view of Flanagan's life and character. The jury did not hear testimony from those who witnessed the debilitating effects of the abuse and strife on Flanagan as an infant, toddler, and child, as discussed below. Numerous witnesses could have testified that Flanagan suffered severe, protracted, and sadistic physical and psychological abuse, often at the hands of his grandparents. In addition, the jury never learned that Flanagan's family history was fraught with alcoholism, mental illness, mental

disturbance, and domestic violence (30 AA 7207, Kriegler Dec. ¶¶9-12, 18-20 and 34). Had this evidence been presented, the sentence almost certainly would have been less than death (30 AA 7135, Nosal Dec. ¶3; 30 AA 7137, Buchanan Dec. ¶3; 30 AA 7184, Martinez Dec. ¶¶3 and 4; see generally, 30 AA 7207, Kriegler Dec.).

At the third penalty hearing, the court-appointed defense expert testified that Flanagan was "not able to give the kind of in depth information about himself" that the expert needed, that it was difficult to "get a strong idea" of Flanagan's childhood experiences and family relationships, and that Flanagan was not able to answer questions commensurate with his intelligence (24 AA 5743). The expert further testified that it would have been helpful to know the details of the offense but was not provided the autopsy and police reports (24 AA 5780, 5783). Had the expert been provided the kind of information detailed above, the expert would have testified that Flanagan was severely and chronically abused by his parents and grandparents, that as a result of the abuse he suffered major mental disorders including post traumatic stress disorder, depression, and chemical dependency, that he was intoxicated at the time of the offense, that he was extremely remorseful for his actions and those of his friends, that he acted under the domination of others, that he lacked the capacity to conform his conduct to the law, and his actions had to be viewed against his background as a child and adolescent, all of which would have led to a sentence less than death (30 AA 7207, Kriegler Dec.).

Trial counsel was ineffective for failing to secure for the court appointed expert sufficient time to conduct a reliable and competent assessment of Flanagan's mental status. Trial counsel scheduled the mental status examination of Flanagan for three days before trial, a time frame too short to allow the expert to conduct the kind of clinical interviews critical to determining the role of trauma in Flanagan's life (30 AA 7204, Blaskey Aff. ¶4). Had the expert been given sufficient time to conduct the clinical interviews with Flanagan, he would have concluded that Flanagan suffered from major mental disorders including post traumatic stress disorder and

depression and would have discovered the facts detailed above.[33]

Trial counsel unreasonably and prejudicially failed to retain and present experts to review, synopsize, and explain Flanagan's social history and to provide a context within which the jury could evaluate the mitigation presented. Employing an expert with qualifications in family dynamics and child abuse would have resulted in a complete investigation into Flanagan's family history, mental illness, and psychological disorders. Moreover, the presentation of such an expert would have permitted the jury to understand the mitigating social dynamics and influences that shaped Flanagan's life and behavior and would have provided a context for understanding penalty phase witnesses' testimony, thereby leading to a sentence less than death.

Claim 5

Flanagan's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury, reliable sentence and effective assistance of counsel because he was incompetent to stand trial. Moreover, trial counsel's failure to invoke a formal competency hearing, and the District Court's failure to order such a hearing, violated Flanagan's constitutional guarantees.

The record amply established Flanagan's entitlement to relief on this claim. There is a wealth of information relating to Flanagan's functioning, including medical evaluations, witness accounts, and documents to establish his major mental dysfunctions and which put the trial court and defense counsel on notice that he was incompetent to stand trial. Flanagan's mental difficulties, beginning from early childhood, up to and including his psychotic behavior at the time of the crime and his multiple suicide attempts, his subsequently documented mental illness while incarcerated awaiting trial, his medication regimen prescribed by jail psychiatric staff,

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[33] Trial counsel's failure to secure adequate facilities for a competent mental health evaluation similarly prejudiced Flanagan. At the 1995 penalty phase the court-appointed defense expert testified that sheriff's deputies interfered with his evaluation of Flanagan by limiting the amount of time he had for the clinical interview and tests to just a few hours (24 AA 5785; 30 AA 7204, Blaskey Aff. 4). Had trial counsel provided sufficient time for the evaluation or the sheriff's deputies not interfered, the expert would have been able to conduct a complete evaluation necessary to determine the nature, severity, and effect of the trauma Flanagan experienced. The State's interference with the expert interview with Flanagan deprived Flanagan of his rights to develop and present a defense, due process, and a reliable death sentencing process.

which included powerful anti-psychotic and other psychiatric medications, and his impaired functioning and demeanor during trial, all indicated Flanagan's inability to competently attend to the proceedings, cooperate with counsel, and testify effectively on his own behalf.

While being held in the Clark County Detention Center awaiting trial, Flanagan received substantial doses of psychotropic medications in an attempt to treat his mental illness symptoms and suicidal tendencies (29 AA 7082-7134,). Flanagan's deteriorating mental condition prior to and during trial, coupled with the debilitating effects of the State-prescribed psychotropic medications rendered him unable to assist and consult rationally with counsel at trial and incapable of understanding the proceedings (30 AA 7148, Pike Aff. ¶11).

These facts give rise to several state and federal constitutional violations. First, Flanagan is entitled to relief because he has established his incompetence at the time of trial. A criminal defendant is mentally incompetent to stand trial if, as a result of a mental disorder or developmental disability, he is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. See Dusky v. U.S., 362 U.S. 402 (1960); Morales v. State, 992 P.2d 252, 254, 116 Nev. 19, 22 (2000); NRS 178.400. A substantive incompetence claim does not require "a showing of error on the part of the trial judge, or any other state actor." James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992).

Second, Flanagan was deprived of his constitutional rights when the trial court failed to conduct an appropriate inquiry into his competence to stand trial. The U.S. Constitution imposes a duty on a trial court to inquire *sua sponte* into competence where there is a reason to doubt it. See Drope v. U.S., 420 U.S. 162, 181 (1975); Pate v. Robinson, 383 U.S. 375 (1966); see also NRS 178.405. In Williams v. Warden, 91 Nev. 16, 17, 530 P.2d 761 (1974), this Court granted habeas relief on the ground that "the record before the court contained sufficient evidence to raise serious doubts about [defendant's] competency to stand trial." The record demonstrates that Flanagan's flat affect, appearing in a fog, and inability to follow the proceedings were apparent at trial (30 AA 7148, Pike Aff. ¶11). In the face of this evidence, the court's failure to institute competency proceedings, or even raise the issue with counsel, violated Flanagan's

fundamental constitutional rights. See, e.g., Pate, 383 U.S. at 384; Cooper v. Oklahoma, 517 U.S. 348, 354 & n.4 (1996) (due process requires *sua sponte* inquiry).

Third, Flanagan was denied his state and federal constitutional rights because trial counsel failed to alert the court of his deteriorating mental functioning and his inability to assist counsel and understand the proceedings. Mr. Pike unreasonably and prejudicially failed to request that the court inquire into Flanagan's competence to stand trial. Although aware of Flanagan's mental difficulties, Mr. Pike never raised the issue (2 AA 266-11 AA 2707; 30 AA 7148, Pike Aff. ¶11). Had he done so, and had the court held a competency hearing, Flanagan would have been found incompetent to stand trial.

Fourth, Flanagan's convictions and sentence of death are unconstitutional because he was involuntarily medicated during his trial, which affected his cognitive functioning and his appearance to the jury (29 AA 7082-7128). In Riggins v. Nevada, 504 U.S. 127 (1992), Justice Kennedy wrote, "absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial." Id. at 139 (Kennedy, J., concurring). The Supreme Court clarified the Riggins standard in Sell v. U.S., 539 U.S. 166 (2003), holding that a defendant has a liberty interest to be free from unwarranted intrusions on bodily integrity, including the intrusion of unwanted or inappropriate anti-psychotic medication. Id. at 2183-84. The administration of anti-psychotic medications is never sanctioned where it is not medically appropriate, and the administration of involuntary medications may be considered under only the most limited conditions, where (1) the treatment is medically appropriate; (2) the treatment must be substantially unlikely to have side effects that undermine the trial's fairness; (3) no less intrusive alternatives are available; and, (4) important governmental interests are at stake. Id. at 2184-85. The State's involuntary medication of Flanagan met no part of this four-part test.

The prejudice from these constitutional violations is clear. Flanagan was forced to stand trial while incompetent, a *per se* violation of the Constitution, requiring relief. Flanagan's prosecution, conviction, and sentencing, while incompetent, were prejudicial *per se*. Medina v.

California, 505 U.S. 437, 448 (1992); Pate, 383 U.S. at 378. Moreover, the prejudicial effect of forced medication impeded his ability to assist and cooperate with counsel, rendered him incompetent, and precluded the jury from observing Flanagan in his actual, undrugged state. The prejudice to a capital defendant from being administered antipsychotic drugs "can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness." Riggins, 504 U.S. at 144.

Rather than recognize the importance of these constitutional claims, the District Court denied relief without affording Flanagan the opportunity to discover additional information, funds necessary to employ experts, and an evidentiary hearing to develop the full extent of his lack of competence. At the very least, the District Court's failure to permit factual development of this claim and to conduct an evidentiary hearing requires a remand.[34]

Claim 6

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 of the unfairly prejudicial atmosphere in which his trial took place and the court's failure to change the venue to a location where a fair trial would have been possible.

The record demonstrates that Flanagan's trial and sentencing hearing in 1985 took place in an unduly prejudicial atmosphere, saturated by media coverage that included commentary on the "satanic" nature of the crimes, and with a jury biased by having been subjected to voir dire questioning regarding such publicity.[35] Although Flanagan sought a change of venue to ensure a

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[34] In Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975), this Court remanded for the "purpose of affording [petitioner] an evidentiary hearing on the question of his mental competency [at the time of trial]." Id. at 772. This Court remanded that case even after the District Court had concluded that there was "no doubt in the mind of the [District Court] as to [petitioner's] sanity at the time of the homicide – and at trial." Id. at 769. A remand is necessary because whenever "factual allegations are made which, if true, could establish a right to relief, a convicted person must be allowed an evidentiary hearing on such issue, unless the available record repels such allegations." Id. at 771; see also Bracy v. Gramley, 520 U.S. 899 (1997).

[35] 1 AA 3, 7-17, 233-36, 244-47a, 248-2551, 263; 3 AA 736-37, 744-45; 4 AA 916-17, 919, 922, 924, 929, 931, 933, 934, 936, 937, 939, 940; 5 AA 1027, 1029, 1031, 1032, 1034, 1035, 1038, 1040, 1107, 1111, 1113, 1146, 1148; 13 AA 3001-3002; 16 AA 3697-98.

fair and impartial jury (2 AA 388), the court erroneously refused to rule on the motion and compounded the prejudice by failing to conduct voir dire in a manner constitutionally sufficient to insure seating of an impartial jury. The court below incorrectly denied relief on this claim by applying an incorrect legal standard (31 AA 7546) and by refusing Flanagan the opportunity to conduct discovery of facts that would have demonstrated actual bias and prejudice of the jury that convicted and sentenced him in 1985 (27 AA 6537; 30 AA 7282).

"The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961). To protect this important interest, NRS 13.050 permits a change the location of a trial "when there is reasonable belief that an impartial trial cannot be had therein." It is well settled that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado, 205 U.S. 454, 462 (1907). A defendant is entitled to a change of venue "where there exists a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Moreover, "appellate tribunals have the duty to make an independent evaluation of the circumstances," Sheppard, 384 U.S. at 362, setting aside the trial court's findings of impartiality where prejudice is "manifest," Irvin, 366 U.S. at 724.

In Kaplan v. State, 96 Nev. 798, 800, 618 P.2d 354, 356 (1980), this Court stated that "[u]nder certain circumstances . . . prejudice will be presumed, i.e., where the influence of the news media is so outrageous that it pervades the proceedings and utterly corrupts the trial atmosphere." The Court concluded that the court properly denied Kaplan's change of venue motion because all of the jurors eventually seated assured the court that they could render a fair verdict based in the evidence presented in court. 96 Nev. at 801; Sonner v. State, 112 Nev. 1328, 1336, 930 P.2d 707 (1996) (Court has "upheld the denial of other motions for change of venue based upon such assurances [of impartiality] even where pretrial publicity has been pervasive"). Thus, the issue is whether the constitutional right to an impartial jury requires the trial court to conduct voir dire of any jurors who have been exposed to prejudicial pretrial publicity in an

individual and sequestered manner. Here the trial court did not seek any final assurances after the jurors were exposed to other venirepersons discussing prejudicial pretrial publicity, their inability to be impartial, and their certainty of the defendants' guilt.

The media coverage focused heavily on the "satanic" nature of the killings and so-called "witchcraft" of the defendants. Voir dire revealed that virtually all the jurors were aware of the crimes and most had been exposed to news, television, or radio reports.[36] From the record, it appears that most were deemed impartial merely on their word that they could be so. Several were not able to answer definitively when first asked about their ability to remain impartial, and only when pressed, in front of others, stated that they could (4 AA 917-18, 920, 921, 926, 930, 935; 5 AA 1108). These jurors were not questioned further by defense counsel or the court.[37] Significantly, two prospective jurors had to be excused after their admissions in the presence of the venire that they could not be impartial and believed the defendants were guilty (4 AA 924-27; 5 AA 1107-09).

Citing the extensive pretrial publicity, Flanagan's trial counsel filed a Motion for Change of Venue on September 9, 1985, prior to voir dire (2 AA 388). The court did not rule on the motion at that time, presumably because "the preferred procedure is to reserve ruling on a pretrial motion to change venue until the jury panel is subjected to examination." Hanley v. State, 80 Nev. 248, 250, 391 P.2d 865, 866 (1964). However, even after voir dire revealed that many potential jurors had been exposed to extensive media coverage and two jurors made prejudicial statements in front of the venire, the court failed to rule on the motion.

Defense counsel inexplicably and unreasonably failed to pursue or renew the motion or otherwise protect Flanagan's rights. See Claim 4, supra. Defense counsel also failed to pursue individual sequestered voir dire, which could have prevented prejudice to the remaining jurors

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[36] 4 AA 917, 919, 922, 924, 925, 929, 931, 933, 934, 936, 937, 939, 940; 5 AA 1027, 1029, 1031, 1032, 1034, 1035, 1038, 1040, 1107, 1111, 1146, 1148.

[37] 4 AA 918, 921, 930, 932, 935, 937, 940, 950, 951, 955, 958, 963, 971, 978; 5 AA 986, 997, 980, 1000, 1005, 1009, 1011, 1048, 1059, 1063, 1067, 1074, 1078, 1081, 1085, 1092, 1095, 1101, 1120, 1124, 1130, 1133, 1154, 1158.

from these statements. Fundamental fairness required some procedure to avoid the risk of prejudicial effects inherent in joint questioning on otherwise impartial jurors. 47 Am. Jur. 2d § 199 (2001). In light of the prejudicial publicity, questions to the jurors should have been asked individually and sequestered, or at the least, the court should have issued a curative instruction to the remaining jurors and re-questioned them to ensure that they remained impartial.

Claim 7

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, the right to an impartial jury drawn from a fair cross section of the community, and a reliable sentence due to his trial, conviction, and sentencing by an all-white jury from which African Americans were systematically excluded and unrepresented. Moreover, the failure of Flanagan's counsel to object to these constitutional violations deprived Flanagan of his right to effective assistance of counsel. See Claim 4, supra.

The Sixth Amendment to the U.S. Constitution guarantee the selection of a petit jury from a representative cross-section of the community. See, e.g., Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975). A *prima facie* violation of the cross-section requirement is established by a three-pronged test: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Duren, 439 U.S. at 364; see also Evans v. Nevada, 112 Nev. 1172, 1186 (1996). This requirement applies regardless of the defendant's race, and defendants have standing to challenge the exclusion of a distinctive group, regardless of whether they are a member of the group. Duren, 439 U.S. at 359 n. 1.

According to the 1990 census, African Americans comprised approximately 8.3 percent of the population of Clark County, Nevada, yet there were no African Americans present in the jury pool for any of Flanagan's trials. A *prima facie* case of systematic under-representation is established because an all-white jury and an all-white venire in a community where 8.3 percent

of the population is African American is not representative of the community as a whole. Flanagan offered evidence below that the computer program used to select jury pools in Clark County does not create randomly generated lists. As a result, the lists do not contain a fair cross-section of the community and systematically discriminate on the basis of race. The District Court erred by denying Flanagan's motions for discovery and an evidentiary hearing on this issue, which are necessary in order for Flanagan to further substantiate his claims.

Claim 8

Flanagan's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, and trial before an impartial jury because counsel for Flanagan was forced to agree with counsel for the co-defendants on the exercise of a limited number of peremptory challenges to prospective jurors despite the fact that they could not agree on which jurors to challenge peremptorily and had conflicting interests.

The trial court failed to ensure that Flanagan could freely exercise his peremptory challenges. Rather, the court required the defendants to agree upon the jurors against whom eight peremptory challenges would be exercised (5 AA 1136).[38] Counsel agreed on seven peremptory challenges, but disagreed on the final juror to be challenged (Id. 1135-36). Flanagan's counsel had "strong tactical reasons" for wanting a former parole officer on the jury (Id.). Because of the court's ruling, however, counsel was forced to accede to other counsel and the final peremptory challenge be used on a former parole officer[39] (Id. 1136-37).

A denial of the full complement of peremptory challenges violates NRS 175.051. See Morales, 992 P.2d at 253. By depriving Flanagan of his final challenge, the court committed

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[38] In 1985, Nevada law guaranteed criminal defendants in capital cases the right to exercise eight peremptory challenges. NRS 175.051. However, in cases with multiple defendants, all defendants must agree in the exercise of such challenges. See NRS 175.041; Doyle v. State, 82 Nev. 242, 415 P.2d 323 (1966). This Court has rejected constitutional challenges to the unanimity requirement in Anderson v. State, 81 Nev. 477, 480, 406 P.2d 532 (1965), but Flanagan urges this Court to reconsider the issue in light of the arguments presented here.

[39] To the extent that defense counsel failed to exercise independent judgment in determining whether to exercise the final peremptory challenge, Flanagan was deprived of his federal constitutional right to effective assistance of counsel guaranteed by the Sixth Amendment.

reversible error. An infringement on a defendant's rights pursuant to § 175.051 constitutes *per se* error. Id. at 253; U.S. v. Brooklier, 685 F.2d 1208, 1223 (9th Cir. 1982). At the very least, the court should have granted the defense an additional peremptory to ensure selection of a fair and representative jury. See U.S. v. McClendon, 782 F.2d 785, 787 (9th Cir. 1986).[40]

Claim 9

Flanagan's conviction is invalid under state and federal constitutional guarantees of due process, equal protection, a public trial, the effective assistance of counsel, and a reliable sentence because the trial judge directed that defense objections and motions be made directly to the court reporter, rather than to the judge, and outside the presence of the jury and Flanagan.

During the 1985 trial, Judge Mosley required defense counsel to make objections and motions during recesses to the court reporter, not in open court and not in the presence of the judge, jury, or Flanagan (6 AA 1234-36; 8 AA 1895; 9 AA 2215). Defense counsel were not allowed to make objections contemporaneous with the testimony or event at issue, but instead were required to communicate those objections off the record directly to the court reporter at a break in the proceedings. The trial court did not make rulings on the defense objections and motions made in this manner (8 AA 1895-96; 9 AA 2114-16, 2215). In fact, by instituting this bizarre procedure, the judge indicated that he intended to deny all defense objections and motions. By contrast, the State was not required to follow this procedure on any issue, but rather was allowed to make timely objections on the record, before the jury, and obtain a ruling. The court failed to articulate any reasons for requiring the defendants to follow this objection procedure, and no such reasons exist (6 AA 1234-36; 8 AA 1895-96; 9 AA 2114-16, 2215).

The objection procedure prejudiced Flanagan, and that prejudice was not neutralized by the trial judge because he did not rule on the defense objections and motions in open court or

[40] The District Court's failure to enforce state law also violated federal Due Process. See U.S. v. Martinez-Salazar, 146 F.3d 653, 658 (9th Cir. 1998) ('[D]ue process would be violated if a trial court permitted a defendant to exercise fewer than the number of peremptory challenges authorized by law."). The right to peremptory challenges is a state-created liberty interest protected by the Constitution. A state's failure "to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir. 1993).

otherwise address defense objections when the subject of those objections was before the jury. Flanagan also was deprived of due process and his right to trial before an impartial tribunal because the trial judge pre-judged certain defense objections and motions instead of considering and ruling upon each objection and motion in turn.

The objection procedure imposed by the trial judge improperly established a trial structure in which defense counsel could not prevent inadmissible evidence from being suggested to the jury at the time any such evidence was presented, or request timely instructions to the jury to disregard or limit the consideration of evidence. See U.S. v. Galin, 222 F.3d 1123, 1127 (9th Cir. 2000). Furthermore, because only defense counsel were subject to that limitation, the jury likely inferred not only that Flanagan had no meaningful defense to certain evidence, but also that the presentation of the prosecution was entitled to more weight.[41]

These constitutional violations were prejudicial *per se*, creating the impression that the lack of defense objections and motions indicated that there was no defense and eliminating possible bases for reasonable doubt. Coupled with the judge's prejudging defense motions, Flanagan's absence from critical proceedings, and Flanagan's inability to direct his counsel in the conduct of his defense with respect to objections and motions, infected the entire conduct of the trial, and thus constituted a structural defect in the trial not subject to harmless error analysis.

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. See Evitts v. Lucey, 469 U.S. 387 (1985).

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[41] Flanagan's absence from certain proceedings involving motions and objections made on his behalf necessarily deprived him of the basic right to defend and to assist counsel (12 AA 2812; 18 AA 4375; 19 AA 4523; 25 AA 6036; 30 AA 7148, Pike Aff. ¶9). A criminal defendant is entitled "to be present from the time the jury is impaneled until its discharge after rendering the verdict." Shields v. U.S., 273 U.S. 583, 589 (1927); see also Kentucky v. Stincer, 482 U.S. 730, 745, (1987). The right of the accused to be present during all critical stages of a trial against him is "fundamental," U.S. v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996), and derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Campbell v. Wood, 18 F.3d 662, 671 (9th Cir. 1994).

A. Conflicts of interest

As discussed above in Claim 4, the Clark County Public Defender's office successfully moved to withdraw from representing Flanagan just days prior to the evidentiary hearing in the first trial, due to the existence of a conflict of interest (2 AA 252). The nature of the conflict of interest is not explained in the record, nor is there any indication that it was ever resolved. Without a resolution, the ethical conflict must be presumed to continue to be in existence. Nevertheless, the Clark County Public Defender's office represented Flanagan during the first (13 AA 3048, 3064) and third (19 AA 4536) appeals. As discussed above, both the courts and Flanagan's counsel were independently obligated to address and resolve this conflict. Notably, a court's obligation to inquire about the existence of an ethical conflict when it knows or should know that one exists applies equally to an appellate or reviewing court.

B. Failure to Assert All Issues

Flanagan's appellate counsel unreasonably failed to raise on appeal or to completely assert all available arguments supporting constitutional issues. Specifically, Flanagan's counsel failed to raise the issues asserted in this brief as Claims 1 through 3, 5 through 9, 11 through 27, and 29 through 36 (13 AA 3064-3120, 3149-69). Failure to raise these issues is sufficiently prejudicial to justify a finding that Flanagan was denied effective counsel on appeal and that his conviction, therefore, should be reversed. See, e.g., Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995) (failure to raise ineffective counsel claim when trial counsel had failed to challenge prosecution's failure to disclose exculpatory material); U.S. v. Cook, 45 F.3d 388 (10th Cir. 1995) (failure to raise obvious conflict of interest issue).

Claim 11

Flanagan's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the failure of this Court to conduct fair and adequate appellate review. This Court had a duty to determine (a) whether the evidence supports aggravating circumstances; (b) whether the sentence of death was imposed under the influence of passion, prejudice, or any arbitrary factor; and (c)

whether the death sentence is excessive considering the crime and the defendant. NRS 177.055. Such review was also required by the Constitution to ensure the fairness and reliability of the death sentence. This Court has rejected these arguments in Evans v. State, 28 P.3d 498 (2001), but Flanagan urges this Court to revisit the issue.

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.

A. Reasonable Doubt Jury Instruction

Jury instruction number 35, given in accordance with NRS 175.211, unconstitutionally lessened the State's burden of proof. Its principal defect is the analogy in the second sentence between reasonable doubt and "doubt as would govern or control a person in the more weighty affairs of life." (12 AA 2743.) This inappropriate analogy, combined with the instruction's requirement that reasonable doubt "be actual and substantial," constitutes reversible error.[42] The jury's findings are thus vitiated and its verdict should be vacated. See Harmon v. Marshall, 69 F.3d 963, 965 (9th Cir. 1995) (constitutionally deficient reasonable doubt instruction "vitiates all of the jury's findings."). This Court has upheld the definition of reasonable doubt in NRS 175.211. See, e.g., Bollinger v. State, 111 Nev. 1110, 1114, 901 P.2d 671, 674 (1995). The Court, however, has called on the Legislature to discontinue the instruction, thus indicating its constitutional infirmity. Bollinger, 111 Nev. at 1115, n.2. Because the standard of reasonable doubt in NRS 175.211 is unconstitutional, the verdict in Flanagan's case must be vacated.[43]

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[42] See, e.g., Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (reasonable doubt instruction containing terms "grave uncertainty," "actual substantial doubt" and "moral certainty" constitutes reversible error); Victor v. Nebraska, 511 U.S. 1, 41 (1994) ("the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard.").

[43] In Ramirez v. Hatcher, 136 F.3d 1209, 1213-14 (9th Cir. 1998), the Ninth Circuit discussed the problems inherent in this instruction, but concluded that, in light of the entire instructions given in that case, the charge was not unconstitutional. In contrast, the argument and instructions, taken as a whole, did not alleviate the infirmity of this reasonable doubt instruction.

B. Premeditation and Deliberation Instruction

The conviction and death sentence are invalid under federal and state constitutional guarantees of due process, equal protection, trial before an impartial jury, and a reliable sentence because the trial court improperly instructed the jury concerning the meaning of "premeditation and deliberation" and because the court imposed an unconstitutional mandatory presumption of malice (12 AA 2726, 2734).

The jury instruction on the meaning of "deliberation and premeditation" created a likelihood that the jury convicted Flanagan of first degree murder, rather than second degree murder, because of inadequate explanation of the distinction between the two offenses. The same instruction was held to be an inadequate definition of "premeditation and deliberation" because it blurred the distinction between first and second degree murder. Byford v. State, 116 Nev. 215, 994 P.2d 700, 713-14 (2000).[44]

Furthermore, the "implied malice" instruction pursuant to NRS 200.020(2) created a mandatory and unconstitutional presumption. Jury instruction number 17 improperly shifted the State's burden of proof to Flanagan by requiring that "[m]alice shall be implied" (emphasis added) (12 AA 2725). This Court has recognized the possibility that the instruction raises the issue of mandatory presumption. Cordova v. State, 116 Nev. 664, 6 P.3d 481, 483 (2000) (indicating that the use of "may," rather than "shall," is preferable). Such mandatory presumptions are unconstitutional because of their "tendency to shift the burden of proof on malice from the prosecution to [the accused]." Yates v. Evatt, 500 U.S. 391, 402 (1991); see also Sandstrom v. Montana, 442 U.S. 510, 513 (1979) (presumption that "a person intends the

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[44] Byford should be applied retroactively to the jury instruction given at Flanagan's trial because it ruled on an issue of substantive, rather than procedural, law. This Court's decisions holding that Byford does not apply retroactively are erroneous and should be overruled. See, e.g., Garner v. State, 116 Nev. 770, 6 P.3d 1013, 1024-25 (2000); Leonard v. State, 117 Nev. 53, 17 P.3d 397, 410 (2001). When a court decides the meaning of a criminal statue, its ruling is one of substantive law that is to be applied retroactively. Bousley v. U.S., 523 U.S. 614, 620-21 (1998). Byford holds that first degree murder as provided in NRS 200.030(1) requires proof beyond a reasonable doubt separately as to each of the three elements of *mens rea*: willfulness, deliberation, and premeditation. Because it announces a rule of substantive law that must be applied retroactively. Thus Byford requires vacation of Flanagan's conviction and sentence.

ordinary consequences of his voluntary acts" violated the Due Process Clause); Francis v. Franklin, 471 U.S. 307, 316 (1985) (presumption that a person intends "the natural and probable consequences of his acts" unconstitutional). The "implied malice" instruction here similarly constitutes reversible error, requiring vacation of the conviction and sentence.

C. Premeditation and Deliberation Instruction

Similarly, instruction number 47 requiring the jury to provide "equal and exact justice between the defendant and the State of Nevada" improperly quantified the proportion of "justice" to be allocated between Flanagan and the State and created a reasonable likelihood that the conviction and sentence were based on a lesser and unconstitutional standard of proof (12 AA 2755). Although this Court has upheld this instruction in Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998), Flanagan nevertheless urges this Court to revisit that holding.

Instruction number 36 stated: "You are not called upon to return a verdict as to the guilt or innocence of any other person." (12 AA 2744). This instruction created a reasonable likelihood that the jury would not properly apply the presumption of innocence in favor of Flanagan, and would thus convict and sentence based on a lesser standard of proof than constitutionally required. Although this Court apparently upheld the instruction in Guy v. State, 108 Nev. 770, 778, 839 P.2d 578, 583 (1992), without a discussion of the particular claim raised by the appellant, Flanagan urges this Court to reverse its prior holding.

The instructional errors identified above had a substantial and injurious effect or influence on the jury's verdict at the guilt phase of Flanagan's trial. See Evans, 28 P.3d at 524 (2001) ("The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."); see also Byford, 994 P.2d at 717. The verdict and sentence are therefore unreliable and should be vacated.[45]

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[45] Failure to challenge these instructions earlier constitutes ineffective counsel under Strickland, 466 U.S. at 694. If counsel had effectively responded to these errors, there was a reasonable probability that he would not have been convicted of first-degree murder. See Evans, 28 P.3d at 524. The conviction and sentence resulting from such deficient and prejudicial representation deprived Flanagan of his Sixth Amendment rights and should be vacated. See Claim 4, supra.

Claim 13

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, because the finding of the aggravating circumstance that the killing was committed by someone who "knowingly created a great risk of death to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person" is invalid.[46]

In each of Flanagan's penalty hearings, the jury found as an aggravating factor that the killing was committed by someone who "knowingly created a great risk of death to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person." (13 AA 2983; 17 AA 4089; 25 AA 5972). This factor is unsupported by sufficient evidence and its application violates Flanagan's constitutional rights.

Flanagan is entitled to a narrow construction of this factor. Where a criminal statute is ambiguous, the statute must be construed in favor of the defendant. Rewis v. U.S., 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). Aggravating factors, which are essential to the constitutionality of any death penalty scheme, must "genuinely narrow the class of death-eligible persons" in a way that reasonably "justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); see Lewis v. Jeffers, 497 U.S. 764, 774 (1990) (aggravating circumstances must permit the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not").[47]

This Court has recognized that the "course of action" language of this aggravating factor

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[46] To the extent these challenges were not properly raised in prior proceedings, that failure constitutes ineffective assistance of counsel, thus depriving Flanagan of his Sixth Amendment rights and his conviction and sentence should therefore be vacated.

[47] See also Richmond v. Lewis, 506 U.S. 40, 46 (1992) ("a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty"); Clemons v. Mississippi, 494 U.S. 738, 758 (1990) (invalid circumstance provided "no principled way to distinguish the case in which the death penalty is imposed, from the many cases in which it was not "); Maynard v. Cartwright, 486 U.S. 356 (1988) ("[t]he construction or application of an aggravating circumstance is unconstitutionally broad or vague if it does not channel or limit the sentencer's discretion in imposing the death penalty").

is ambiguous and, in some cases, has adopted a construction of NRS 200.033(3) that confines its reach to singular events that endanger many people.[48] In Jimenez, the Court reasoned that the aggravator did not apply to successive stabbing because "[u]nder such a scenario, even a rock could have been used to kill both victims and thus improperly claimed to constitute a basis for aggravating circumstance under NRS 200.033(3)." 105 Nev. at 342. Jimenez properly identified an essential element of this aggravating factor: "Our cases reflect the view that the employment of a weapon, device or course of action that is intrinsically hazardous to more than one life is a necessary predicate to a finding under NRS 200.033(3)." Id. Under Nevada law, firing a gun at a single intended victim is not intrinsically hazardous to more than one life. Moran, 103 Nev. 138. In fact, this Court has held that the firing of a gun at multiple victims does not satisfy NRS 200.033(3) if the shots were separate and discrete acts. Lane, 114 Nev. at 305.

Under the interpretation of "course of action" espoused in Lane, Jimenez, and Moran, the "great risk of death" aggravating circumstance is not present in this case. Flanagan was alleged to have fired a weapon at one victim at a distance of less than three feet. There is no evidence that Flanagan fired at the other victim, who was upstairs when Flanagan allegedly fired his weapon. Flanagan's discrete act, as in Lane and Moran, endangered only one victim. Thus, any application of NRS 200.033(3) in this case denies Flanagan equal protection and a sufficiently narrow capital sentencing scheme as guaranteed by the U.S. Constitution.

In addition, a finding of the aggravator in this case unconstitutionally broadens NRS 200.033(3) by reading "knowingly create a great risk of death" out of the statute. In Flanagan V, 112 Nev. at 1421, this Court relied on Hogan v. State, 103 Nev. 21, 24-25, 732 P.2d 422, 424 (1987) (aggravator includes a course of action "consisting of two intentional shootings closely related in time and place"), to find sufficient evidence for the aggravator in Flanagan's

[48] See, e.g., Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998) (shooting "spree" did not constitute "course of action" sufficient to satisfy NRS 200.033(3) where defendant shot three individuals at different locations in the span of an hour); Jimenez v. State, 105 Nev. 337, 775 P.2d 694 (1989) (successive stabbing of two persons in the same room by a single defendant was not a course of action that would normally be hazardous to the lives of more than one person); Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987) (aggravator did not apply where defendant's shooting of victim placed no other persons in apartment or neighbors within immediate risk of death).

case. The Hogan approach, however, is only appropriate where the defendant's course of action actually consists of two intentional shootings. Otherwise, the Hogan approach ignores the plain language of the statute requiring "great risk of death" to a second person. Flanagan's alleged course of action consisted of shooting a single victim without actual risk to any other person, and a finding of the aggravator in his case contravenes the plain language of the statute.

Because Nevada is a weighing state, the error resulting from inclusion of an invalid aggravating factor demands reversal where the courts have not afforded Flanagan a new sentencing proceeding or re-weighing or other correction under applicable state procedures. Jimenez, 105 Nev. at 343. Flanagan was denied the constitutional right to a fundamentally fair sentencing proceeding and to a reliable sentence.

Claim 14

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, because the finding of the aggravating circumstance that the killing was committed "in the commission of a burglary" (13 AA 2976) is unconstitutionally vague and applies to all killings that occur indoors. Thus, the aggravating factor fails to sufficiently narrow the category of murders eligible for a death sentence. See, e.g., Zant, 462 U.S. at 877; Maynard, 486 U.S. at 361. In addition, trial and appellate counsel were ineffective for failing to present this issue. This Court has rejected these arguments in analogous cases. E.g., Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990). Flanagan, however, respectfully submits that this Court should revisit this issue.

Claim 15

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, because the finding of the aggravating circumstance that the killing was committed "in the commission of a robbery" (13 AA 2976) is unconstitutionally vague and requires no connection between the robbery and the killing. Indeed, the facts here demonstrate that the killings did not occur during the course of a robbery; the perpetrators did not formulate any intent to commit a robbery, did not kill in furtherance of a

robbery, and retrieved items from the Gordon home after the killings only as a pretext. In addition, trial and appellate counsel were ineffective for failing to present this issue. Although this Court has rejected these arguments, see Bennett, 106 Nev. 135, Flanagan respectfully submits that this Court should revisit this issue on the authority cited in Claim 14.

Claim 16

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, the prohibition against double jeopardy, and a reliable sentence due to the state's use of the same felony charges both to support his conviction on a felony murder theory and to support one of the aggravating factors. The duplicative use of the felonies as the basis for capital murder (12 AA 2726) and as independent factors for imposing a death sentence (13 AA 2976), together with the prosecutor's argument (see Claim 1), violated Flanagan's right to a reliable penalty determination in violation of the Eighth and Fourteenth Amendments to the Constitution. See, e.g., Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

In McConnell v. State, 102 P.3d 606 (2004), this Court explicitly recognized the constitutional infirmity of the State's duplicative use of felonies as the basis for capital murder and as the bases to warrant a death sentence. This Court concluded that "the felony aggravator fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies."). Id. As in McConnell, the remedy for such a violation is to vacate Flanagan's death sentence.

Claim 17

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because of the trial court's failure to properly instruct the jury during the sentencing hearing, and counsel's failure to properly raise them constitutes ineffective assistance of counsel.

A. The Anti-Sympathy Instruction

The jury was instructed during each sentencing hearing that "[a] verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of

sincere judgment and sound discretion in accordance with these rules of law" (12 AA 2751; 13 AA 2980; 17 AA 4084; 25 AA 5961).

This instruction forbade the jury from taking sympathy into account and violates the constitutional mandate that all mitigating evidence be considered. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) ("'[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death.'") (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). By precluding the jury from considering evidence concerning Flanagan's character and background, this instruction denied him the individualized sentencing determination the Constitution requires. Lockett, 438 U.S. at 604.

This instruction did not appropriately limit its prohibition, but rather precluded consideration of all sympathy. The Supreme Court has held that an instruction that the jury was not to rely on "mere sympathy" struck a balance between the need for sentencers to consider all relevant mitigating evidence and impermissible, unfettered discretion. California v. Brown, 479 U.S. at 544 (O'Connor, J., concurring). The Court relied on the qualification of "mere" when it upheld the instruction as not violating the Eighth and Fourteenth Amendments. "We think a reasonable juror would reject [an impermissible] interpretation, and instead understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." Id. at 542.

In contrast, the jury here was instructed to never consider sympathy. It is reasonably likely that the jury understood the instruction to mean that when making a moral judgment about his culpability, it was forbidden to consider any evidence that evoked a sympathetic response and thus, the instruction violated the Constitution. Eddings, 455 U.S. at 105 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence but may not give it no weight by excluding it from their consideration."). The giving of the unconstitutional "anti-sympathy" instruction substantially and injuriously affected the process to such an extent as to render Flanagan's sentence fundamentally unfair and unconstitutional. The State accordingly cannot

show beyond a reasonable doubt that this instruction did not affect the sentence.[49]

B. Failure to Instruct as to Lack of Unanimity Requirement for Mitigating Circumstances.

The instructions impermissibly suggested unanimity was required in considering mitigating circumstances, thus preventing the jury from considering all constitutionally relevant evidence. The instructions given to Flanagan's sentencing juries in 1985 and 1989 directed that a death sentence was permissible if the jury "finds . . . there are no mitigating circumstances sufficient to outweigh the aggravating circumstances found." (13 AA 2973; 17 AA 4075). The juries were also instructed that "[y]our verdicts must be unanimous. When you have agreed upon your verdicts, they should be signed and dated by your foreman." (13 AA 2982; 17 AA 4086). The juries were also instructed that "[i]t will be the jury's duty to select one appropriate verdict pertaining to the punishment which is to be imposed and one appropriate special verdict pertaining to the jury's findings with respect to aggravating and mitigating circumstances." (13 AA 2981; 17 AA 4085, emphasis added).

The instructions failed to advise that a mitigating circumstance could be considered by individual jurors in determining the appropriate penalty regardless of what the other jurors thought about the existence of that circumstance. Because the jury received no instruction that verdicts regarding mitigating circumstances differed from the verdict on ultimate punishment, the jury would have had to disregard the instruction that the "verdict be unanimous" to properly complete the special verdict regarding mitigating factors (13 AA 2982; 17 AA 4086). The prosecutor's argument reinforced the idea that the same deliberative and unanimity processes applied to mitigating and aggravating factors. The prosecutor explained that it was the jury's "duty to determine (a) whether an aggravating circumstance is found to exist . . . The next thing

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[49] This Court has previously upheld this instruction when an anti-sympathy instruction was coupled with instructions that fully advised the jury of the range of mitigating circumstances to consider. See, e.g., Leonard, 117 Nev. 53. In this case, however, the instructions regarding mitigating factors impermissibly suggested that unanimity was required for mitigating circumstances. As a result, the jury was not properly instructed on the range of mitigating circumstances to be considered.

is (b), whether a mitigating circumstance or circumstances are found to exist. You do exactly the same thing with the mitigating circumstances that defense counsel will tell you about." (17 AA 4104). No instruction was given instructing the jury what to do if some but not all considered a factor regarding Flanagan's background or character as a mitigating factor.[50] It is reasonably likely that the jurors in this case believed they were precluded from considering any mitigating evidence unless they all agreed on a particular mitigating circumstance.

By permitting a single juror to block consideration of a mitigating factor and consequently require the jury to impose the death penalty, the instructions taken as a whole, established an arbitrary and capricious capital punishment scheme. See McKoy v. North Carolina, 494 U.S. at 438. Such a "freakish" scheme violated Flanagan's constitutional right to a reliable sentencing determination. See e.g., Franklin v. Lynaugh, 487 U.S. 164, 181 (1988); Hollaway v. Nevada, 116 Nev. 732, 744 6 P.3d 987 (2000) (failure to instruct jurors about to independently assess all mitigating evidence violates Eighth Amendment).

The failure to instruct the jury as to the lack of unanimity requirement for mitigating circumstances substantially and injuriously affected the process to such an extent as to render Flanagan's sentence fundamentally unfair and unconstitutional. The State cannot show, beyond a reasonable doubt, that this instructional error did not affect the sentence.[51]

C. Failure to Instruct as to Unanimity Requirement for Aggravating Circumstances.

The juries in the 1985 and 1989 sentencing hearings were equally unguided regarding the unanimity requirement in Nevada law for the finding of aggravating circumstances. See NRS

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[50] The prosecution's argument distinguishes this case from Jimenez, 112 Nev. 610. In Jimenez, this Court upheld instructions that were silent regarding mitigating factors because the jury was not constrained to unanimity through the instruction and "of course the State did not make the mistake of suggesting a requirement of unanimity regarding evidence in mitigation." Id. at 624.

[51] The constitutional deficiencies of sentencing instructions in 1985 and 1989 were not cured by more explicit instructions in 1995 regarding individual rather than unanimous consideration of mitigating factors. See note 14, supra. The 1995 penalty hearing would not have been necessary if the 1985 or 1989 hearings had been conducted in accordance with constitutional requirements. Moreover, the errors in the 1985 and 1989 hearings may have prevented Flanagan's only opportunity to receive a sentence other than death.

175.554(2). The jury instructions failed to specify that the jurors were required to unanimously agree as to the existence of aggravating circumstances. Instead, the instructions merely stated that "[t]he burden rests upon the prosecution to establish any aggravating circumstance beyond a reasonable doubt" (13 AA 2974; 17 AA 4078), and that the jury's ultimate "verdict" must be "unanimous" (13 AA 2982; 17 AA 4086).

By failing to require jury unanimity as to aggravating factors, the instructions violated Flanagan's constitutional right to a jury determination of his eligibility for an enhanced sentence and a reliable capital sentencing determination. "A properly instructed jury is imperative in the capital sentencing process." Geary v. State, 114 Nev. 100, 952 P.2d 431 (1998) (quoting Geary v. State, 112 Nev. 1434, 1449, 930 P.2d 719 (1996)). A capital jury must be instructed that the presence of an aggravating circumstance must be found unanimously. Geary, 114 Nev. at 105. The absence of an express instruction as to the need for unanimity for aggravating circumstances rendered Flanagan's sentence fundamentally unfair and unconstitutional. The State cannot show, beyond a reasonable doubt, that the lack of a unanimity instruction did not affect the sentence.

D. Failure to Instruct that the Jury is Never Required to Impose a Death Sentence.

Flanagan's sentencing juries were not instructed that they had unlimited discretion to return a life sentence.[52] The instructions thus failed to convey to the jury its discretion to impose a life sentence under any and all circumstances, in violation of the constitutional guarantee to a reliable sentencing determination. Furman v. Georgia, 408 U.S. 238 (1972).

This Court acknowledged in Bennett v. Nevada, 111 Nev. 1099, 901 P.2d 676 (1995), that this instruction may be technically accurate, but still does not fully convey to the jurors their

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[52] The instructions given to each of Flanagan's sentencing juries read:

> The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds there are no mitigating circumstances sufficient to outweigh the aggravating circumstances found.
>
> Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole. (13 AA 2973; 17 AA 4075; 25 AA 5950.)

ability to render a life sentence. This Court noted that the instruction accurately described the jury's prerogative to decide if the defendant would live regardless of whether aggravating circumstances outweighed mitigating circumstances but found no reason to withhold explicit instructions that the jury still has the discretion to return a penalty other than death. Id. at 1109. This Court instructed that the death penalty is only a sentencing *option.* Id. (emphasis in original). "Because of the unique gravity of the death penalty, there is no sound reason why juries should not be fully advised of their constitutional prerogatives with respect to capital cases." Id. A jury that is not fully advised of its sentencing options is not accurately instructed. U.S. Const. Amend. VIII; Nev. Const. Art I., §§ 3, 6, and 8; Nev. Const. Art. IV, § 21.

Although the instruction was upheld in Bennett, this Court later found a similar instruction impermissibly misleading although the prosecutor told the jury that it is not required to return death and other jury instructions explained that the weighing process is qualitative and not quantitative. In Geary v. State, the instructions and argument served only confuse and "the process by which the jury arrived at its verdict was irreversibly tainted." 112 Nev. at 1450.

In the instant case, the lack of instruction on the jury's scope of discretion is the same and the irreversible taint is the same. Moreover, the error was compounded when the prosecutor told the jury during argument that the imposition of the death penalty was the jury's "legal duty" and "moral duty" in this case (12 AA 2881). It is virtually certain that Flanagan's jury understood the instructions as requiring it to impose a death sentence whenever the aggravating circumstances outweighed the mitigating circumstances. The jurors were led to believe they were required to impose a death sentence unless they could articulate a mitigating circumstance or other "reason" why the death penalty should not be imposed. This failure to adequately instruct the jury rendered Flanagan's sentence fundamentally unfair and unconstitutional.[53] The

[53] See, e.g., Boyde v. California, 494 U.S. 370, 381 (1990) (under the Eighth Amendment, "[t]here is . . . a strong policy in favor of accurate determination of the appropriate penalty in a capital case."); Graham v. Collins, 506 U.S. 461, 468 (1993) ("[S]tates must confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case.").

State accordingly cannot show beyond a reasonable doubt that the instruction did not affect the conviction and sentence.

E. The Commutation Instruction

The jury was misled by the instruction that the State Board of Pardons Commissions has the power to modify Flanagan's sentence.[54] The instruction inadequately stated the law as applied to this case because it did not apprise the jury of how remote Flanagan's chances were of ever benefiting from the possibility of executive clemency (see Claim 30). The instruction violated the constitutional guarantees of due process of law and a reliable sentence. U.S. Const. Amends. V, VII, XIV, Nev. Const. Art. 1, § 8; see also Thomas, 83 P.3d at 823-24 (granting penalty phase relief because trial counsel failed to object to commutation instruction).

Instructing juries to consider commutation when deciding sentences has been rejected by nearly every jurisdiction that has considered the question including Nevada. California v. Ramos, 463 U.S. 992, 1025 (1983) (Marshall, J., dissenting); Sonner v. Nevada, 114 Nev. 321, 955 P.2d 673 (1998). The jury instruction here followed the language prescribed in Petrocelli v. Nevada, 101 Nev. 46, 692 P.2d 503 (1985), that this Court later invalidated. Sonner, 114 Nev. at 327. The instruction was standardized in Petrocelli because this type of instruction was not always "totally accurate or suitable." Petrocelli, 101 Nev. at 56. Ultimately, in Sonner, this Court concluded that is best to eliminate that portion of the instruction regarding sentence modification because the Pardons Board's powers have become more limited and the "possibility that a jury can occasionally be misled" in some circumstances. Sonner, 114 Nev. at 327.

An instruction may provide accurate information on the Parole Board's authority, but still be misleading when applied to the facts of the case. See, e.g., Geary, 112 Nev. 1434 (Petrocelli instruction unconstitutionally applied given defendant's prior criminal conduct, alcohol abuse

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[54] In each sentencing hearing the jury was instructed in part as follows:

> Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date. (13 AA 2972, Instruction 5; 17 AA 4074, Instruction 5; 25 AA 5949, Instruction 5.)

and a failed parole that would most likely make him ineligible for parole); Gallego, 124 F.3d 1065 (instruction on Board of Pardon's ability to modify sentences violated Eighth Amendment when defendant was ineligible for parole).

As applied to Flanagan, the Petrocelli instruction was misleading because if he had been given a sentence of life without possibility of parole, Flanagan stood no possibility of ever being released from prison. The Nevada Pardons Board has never commuted a sentence in a high profile murder case such as this one. Even if Flanagan had been able to obtain a commutation of the jury's first-degree murder sentence, he still would require commutations of the additional sentences he received for the other convictions. Thus, although Flanagan has virtually no chance of pardon, this reality was not conveyed to the jury. "The Due Process Clause does not allow the execution of a person" on the basis of information which he had no opportunity to deny or explain. Gardner v. Florida, 430, U.S. 349, 362 (1977). This failing was exacerbated by the prosecutor's emphasis during closing argument on Flanagan's alleged future dangerousness, which implied that he might get out of prison and back into society unless he was sentenced to death. The prosecutor described the defendants as "night-stalking terrorists" and "moral amputees" (24 AA 5887, 5897), and emphasized that society is "at the mercy of criminals" who are not put to death (25 AA 5939). The prosecutor's argument unconstitutionally presented the jury with the choice between finding itself "at the mercy" of Flanagan at a future time and issuing a death sentence. Simmons v. South Carolina, 512 U.S. 154, 171 (1994) ("The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time preventing the jury from learning that the defendant never will be released on parole."). A reasonable likelihood exists that the instruction prompted the jury to make erroneous speculations about the sentence Flanagan might serve, and created a false choice between sentencing to death or incarceration that eventually could lead to pardon.

F. Failure to Instruct the Sentencing Jury to Find the Elements Required for Eligibility for Capital Murder Beyond a Reasonable Doubt.

Flanagan's death sentence is unconstitutional under the reliability guarantee of the Eighth

Amendment and under due process guarantee of the Fourteenth Amendment, because the jury did not find the elements required for capital eligibility beyond a reasonable doubt. The factors necessary to support eligibility for the death penalty in Nevada, in addition to conviction on all the elements of first degree murder, are (1) the existence of one or more aggravating factors, and (2) that the aggravating factors are not outweighed by the mitigation. Nev. Rev. Stat. § 200.030(4); Johnson v. State, 118 Nev. 787, 802-03, 59 P.3d 450 (2002). Those factors must be proved to and found by a jury beyond a reasonable doubt.

Flanagan's juries were instructed that aggravating factors must be proved beyond a reasonable doubt (13 AA 2974; 17 AA 4078). The juries, however, were not instructed that they had to find that aggravation was not outweighed by mitigation beyond a reasonable doubt, or by any standard at all, in order to find Flanagan eligible to receive the death penalty (12 AA 2708-55e; 13 AA 2968-82; 17 AA 4070-87; 25 AA 5945-65).

Although this Court previously rejected the argument that in cases in which the aggravation and mitigation were evenly balanced, the jury could not impose a death sentence, Ybarra v. State, 100 Nev. 167, 173-74, 679 P.2d 797 (1984), the law is now clear that every fact necessary to imposition of an increased punishment must be proved to and found by a jury beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584, 589, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 483 (2000); Johnson, 118 Nev. at 802-03. Flanagan's sentence must be reversed because the error is structural. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993).

This rule must be applied to Flanagan, because the principle that elements of an offense must be proved beyond a reasonable doubt is fully retroactive. In Cage v. Louisiana, the Court emphasized the vital role of the reasonable doubt standard in avoiding convictions based on factual error. 498 U.S. 39, 39-40 (1990); see also In re Winship, 397 U.S. 358, 364 (1970). The Supreme Court has repeatedly recognized that the rules in Winship and Mullaney v. Wilbur, 421 U.S. 684 (1975), enhance accuracy. In Ivan V. v. City of New York, 407 U.S. 203, 205 (1972), the Court gave the Winship rule retroactive effect, because "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to

overcome an aspect of a criminal trial that substantially impairs the truth-finding function." Subsequently, in Hankerson v. North Carolina, 432 U.S. 233, 240 (1977), the Court relied applied Mullaney retroactively, because "the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.'" Id. at 242.

The Supreme Court's recent retroactivity analysis in Schriro v. Summerlin, 124 S.Ct. 2519 (2004), supports Flanagan's position. In Schriro, where the Court considered whether the Ring should be applied retroactively to cases on collateral review, the Court analyzed whether the rule satisfied the test for exceptions to non-retroactivity enunciated in Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opn.), for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of criminal proceedings," Schriro, 124 S.Ct. at 2524 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)), and establishing "bedrock procedural elements essential to the fairness of a proceeding." Sawyer, 497 U.S. at 242 (internal citation, and emphasis omitted). The Court held that, while the right to jury trial was fundamental, the evidence is "simply too equivocal" to establish that judicial factfinding "so 'seriously diminishe[s]' accuracy" that it justifies retroactive application of Ring, Schriro, 124 S.Ct. at 2525, because there were equally compelling arguments favoring jury or judge sentencing.

With respect to the proof beyond a reasonable doubt standard, however, the rule is a "bedrock procedural element" that increases accuracy, as Winship and its progeny demonstrates. Accordingly, Schriro requires that the Apprendi rule, requiring that all elements of the capital offense be found beyond a reasonable doubt, apply retroactively. U.S. v. Sanchez-Cervantes, 282 F.3d 664, 669 (9th Cir. 2002). This Court's test of retroactivity is broader than the rule of Teague and focuses on whether "accuracy is seriously diminished without the rule . . . ." Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002); and since the rule of Apprendi and Ring, with respect to the reasonable doubt standard, satisfies the Teague standard, it must also satisfy the Colwell standard. As the instructions did not require the jury to find the weighing element of capital eligibility beyond a reasonable doubt, the penalty judgment must be reversed.

Claim 18

Flanagan's sentence is invalid under state and federal constitutional guarantees of due process of law, equal protection of the laws, an impartial jury and a reliable sentence because the court refused to grant cause challenges against jurors who could not be impartial. During the second penalty hearing, prospective juror Jordan unequivocally indicated that he was unable to consider imposing a sentence less than death (14 AA 3247-48). The court denied Flanagan's motion to have Mr. Jordan excused for cause (14 AA 3251-58), forcing him to use a peremptory challenge (15 AA 3606). During the third penalty hearing, prospective juror Jacintho repeatedly stated that he would impose death unless there were some overwhelming mitigating circumstances, the nature of which were beyond his comprehension (19 AA 4662-63; 20 AA 4671-75). The court denied a motion to excuse Mr. Jacintho for cause (20 AA 4670, 4673).

Due Process requires excusing for cause prospective jurors who will automatically vote for death regardless of aggravating or mitigating evidence. See Walker v. State, 113 Nev. 853, 866, 944 P.2d 762, 771 (1997); Morgan v. Illinois, 504 U.S. 719, 729 (1992). Given Mr. Jordan's statements that death should be imposed in any intentional killing, he failed to meet constitutional standards for impartiality. Similarly, Mr. Jacintho's inability to articulate any scenario in which mitigation would warrant a sentence less than death disqualified him as a juror.

The loss of peremptory challenges resulting from an erroneous ruling on challenges for cause is sufficient to establish prejudice. See Walker, 113 Nev. at 866. The loss of a peremptory challenge was especially prejudicial during the second penalty hearing because Judge Mosley's rulings impermissibly skewed the jury selection process.[55] Similarly, Flanagan was prejudiced

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[55] Judge Mosley, who was ultimately removed from the case because of bias against the defendants (19 AA 4497-4501), used Mr. Jordan – the first juror questioned – to establish an unreasonably high burden for excluding jurors. In denying the motion to remove Mr. Jordan, Judge Mosley repeatedly exhibited disdain for removing biased jurors. In applying an unconstitutional standard, Judge Mosley forced Flanagan to use "one of the valuable [peremptory challenges] for a guy that is so obvious everyone in the courtroom knows he has to go" (14 AA 3297). Such disregard reflects the lack of fairness afforded to Flanagan.

The court's error with respect to Juror Jordan was not remedied by the third penalty hearing. See note 14, supra. The error cost Flanagan what could have been his only chance to avoid death, and a subsequent penalty hearing cannot cure such an error. See Beets v. State, 107 Nev. 957,

by the court's failure to remove Mr. Jacintho during the third trial.

Claim 19

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process of law, equal protection of the laws, effective assistance of counsel, trial by an impartial jury, and a reliable sentence due to the removal of a prospective juror based on her views concerning the death penalty, even though those views could not have substantially impaired that juror's ability to follow Nevada law. During the second penalty hearing, prospective juror Anne Cassidy stated that she believed that "there are many, many things that deserve the death penalty" and that she could impose a death sentence in connection with eleven other jurors, although the decision would be difficult (14 AA 3294-95). Based upon this questioning, the Court excluded Ms. Cassidy for cause (14 AA 3295). The removal of Ms. Cassidy violated Flanagan's constitutional right to an impartial jury. The Sixth Amendment prohibits the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). A court may exclude a juror only when her belief "prevents or substantially impairs members of this group from performing one of their duties as jurors." Aesoph v. State, 102 Nev. 316, 319, 721 P.2d 379, 381 (1986).

Ms. Cassidy's responses indicated only general reservations as to the application of the death penalty, not convictions so strong as to preclude her from following the law. In fact, Ms. Cassidy stated she could impose a death sentence if the other jurors favored the death penalty and she felt that the jurors were not biased (14 AA 3294-95). Ms. Cassidy's insistence on a unanimous, unbiased jury comports with constitutional protections and does not provide sufficient grounds for removal. The erroneous exclusion was prejudicial and requires relief from the death sentence. See Gray v. Mississippi, 481 U.S. 648, 665 (1987).[56]

961, 821 P.2d 1044, 1047 (1991) (discussing errors in capital sentencing by jury despite subsequent penalty hearing by three-judge panel).

[56] Flanagan's third penalty hearing did not cure this error. See note 14, supra. By erroneously excluding Ms. Cassidy from the panel at his second penalty hearing, Flanagan lost what could

Claim 20

Flanagan's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, a fair tribunal and a reliable sentence due to the lack of an impartial tribunal. Flanagan was denied a fair trial and sentencing because of judicial bias. A judge has a "duty of examining the facts for himself when if true as alleged they make the trial absolutely void." Moore v. Dempsey, 261 U.S. 86, 92 (1923). The court erroneously denied the judicial bias claim and the requests for discovery and a hearing.

"[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Bracy v. Gramley, 520 U.S. 899, 908-09 (1997). Similarly, Flanagan's numerous specific allegations of significant bias establish cause for discovery and an evidentiary hearing.[57] Porter v. State, 723 So.2d 191, 195-96 (1998) (evidentiary hearing warranted on impartiality claim).

Petitioner has met the standard for sustaining a claim of judicial bias. From the beginning, Judge Mosley displayed an apparent bias against the defense. He told defense lawyers he would not hear *defense* objections and instead required them to make their objections to the court reporter during a recess (6 AA 1234-36; 8 AA 1895; 9 AA 2215; 30 AA 7148, Pike Aff. ¶9). He pressed the case to trial and did not allow adequate resources for the defense (30 AA 7148, Pike Aff. ¶¶6-10). Judge Mosley's prejudice became overt after the second penalty hearing when he refused to stay the execution to allow an appeal and habeas proceedings. He said that Flanagan and Moore, "the convicted murderers in this case, have lived now in excess of six years longer than the two people they killed, so I don't know that we are rushing into anything here. In fact, in my view, we are about five-and-a-half years too late." (18 AA 4382).

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have been his only chance to avoid death. Such an error cannot be cured with a subsequent penalty hearing. See Beets, 107 Nev. at 961.

[57] Moreover, facts alleged here clearly show an "extremely high level of interference by the trial judge" and rise to the level of creating "a pervasive climate of partiality and unfairness." Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995).

Upon defense motion (19 AA 4479), Judge Mosley was disqualified (Id.).

Similarly, in the third penalty phase, Judge Guy addressed all of the jurors (during voir dire) and said "[w]e're asking for the death penalty, the State's asking for the death penalty, life with or life without the possibility, and that's an awesome burden for anybody." (20 AA 4697). The court's identification with the prosecution ("we're asking for the death penalty") signaled to the jury at the outset the result the court wanted to see.

Claim 21

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner. Although this Court has previously ruled otherwise, Flanagan makes this claim to preserve his record.

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. "The State is required to give adequate notice to the accused of the various theories of the prosecution." State v. Eighth Judicial District Court, 116 Nev. 374, 377, 997 P.2d 126, 129 (2000); see also Gardner, 430 U.S. at 357. "An indefinite indictment deprives a defendant of notice of the particular act alleged to have been committed by the accused and deprives the defendant of his ability to defend properly against the accusation" and "denies a defendant his fundamental rights." Wright v. State, 101 Nev. 269, 272, 701 P.2d 743, 744 (1985).[58]

The Information failed to satisfy these standards (1 AA 19-24). Count VII charged Flanagan with aiding and abetting the murder of Carl Gordon. The State never amended the

[58] See also Forgy v. Norris, 64 F.3d 399, 403 (8th Cir. 1995). "Although any prosecutor might well desire the luxury of having an option not to reveal his or her basic factual theories, and wish for the right to change the theory of a case at will, such practices hardly comport with accepted notions of due process." Barren v. State, 99 Nev. 661, 669 P.2d 725, 729 (1983).

Information to charge Flanagan as a principal in Mr. Gordon's death. At trial, however, the State proceeded against Flanagan on multiple theories, including that he acted as a principal. The jury convicted Flanagan of First Degree murder of Mr. Gordon without ever specifying the theory of liability used to convict (12 AA 2761-62). Such proceedings denied Flanagan due process.[59] The State must give the defendant notice of all theories of liability on which the State intends to proceed at trial. In Barren, the Court ordered a new trial when the State charged the defendant as a principal but obtained a conviction of the defendant as an aider and abettor. 669 P.2d at 729; see also Wright v. State, 701 P.2d at 744. Here, the Information charged Flanagan as an aider and abettor but he was convicted as a principal. The principle is the same, but the consequences were far more severe. Flanagan was not apprised of all theories of liability the State pursued at trial and thus was not afforded adequate notice to prepare his defense.[60] Flanagan, therefore, is entitled to a new trial on all counts given the importance of Count VII.

Claim 23

Flanagan's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel and a reliable sentence because of his absence during numerous critical stages of the proceedings. The right to be present is rooted in the confrontation clause and the due process clause of the federal constitution. See, e.g., U.S. v. Gagnon, 470 U.S. 522, 526-27 (1985); note 47, supra.

The court below concluded that this claim is merely another "bare/naked" allegation that cannot withstand scrutiny absent evidentiary support, as contemplated by Hargrove, 100 Nev. 498. However, contrary to this assertion, Flanagan has raised specific factual allegations that, if true, would entitle him to relief. Under Hargrove, factual substantiation does not require factual proof, but only requires that Flanagan set forth factual background and other evidence

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[59] Trial counsel's failure to object to the faulty Information deprived Flanagan of his federal constitutional right to effective assistance of counsel guaranteed by the Sixth Amendment.

[60] See also State v. District Court, 116 Nev. 374, 997 P.2d 126 (2000) (upholding striking portion of amended Information adding allegations of aiding and abetting); Simpson v. District Court, 88 Nev. 654, 659 60, 503 P.2d 1225, 1229-30 (1973) (precluding further proceedings under an indefinite indictment that would enable prosecutor to change theories).

demonstrating entitlement to relief. Furthermore, the requirement for factual substantiation cannot negate Flanagan's right to pursue discovery and an evidentiary hearing to provide additional support for this claim. Moreover, in most of the cited instances, Flanagan's absence is apparent from the record. 6 AA 1462; 8 AA 1758, 1867; 12 AA 2812; 18 AA 4375; 19 AA 4523, 4637; 25 AA 6036. Because the State cannot demonstrate that Flanagan's absence has harmless, he is entitled to relief. Rushen v. Spain, 464 U.S. 114, 117 n.2 (1983).

Claim 24

Flanagan's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, a public trial, freedom of the press, and a reliable sentence because the trial court failed to conduct all proceedings in public and permit Flanagan to be present during trial and failed to ensure creation of a concrete record of the trial by having such proceedings reported or otherwise recorded. Counsel was ineffective for failing to assure that a proper record was made and that each of these rights was preserved.

Numerous portions of the trial were closed to the public and to Flanagan because the court conducted numerous off-the-record bench conferences and unrecorded conferences in chambers. See, e.g., 6 AA 1462; 8 AA 1758, 1867; 12 AA 2812; 18 AA 4375; 19 AA 4523, 4637; 25 AA 6036. The court failed to articulate any reason for holding such conferences and chambers proceedings. Moreover, the off-the-record bench conferences and in-chambers meetings were never transcribed. Likewise, it failed to take any measures to assure that Flanagan was informed of the content of these conferences that were held in his absence.

During these unrecorded conferences, the court took material, substantial actions, including ruling on objections, clarifying evidentiary rulings, and establishing courtroom procedure and scheduling. Such proceedings are integral parts of a criminal trial. The court also failed to seek other measures to effectuate the public interest in the proceedings, such as the delayed release of transcripts. These numerous off the record conferences violated Flanagan's constitutional rights, as well as those of the public to free and open proceedings. His counsel unreasonably and prejudicially failed to object to this deprivation of his constitutional rights.

Similarly, although some proceedings were recorded, the reporter was not obligated, under Nevada rules, to maintain notes of those proceedings for longer than eight years. NRS 656.335. Apparently, trial counsel did not order those transcripts, which constitutes ineffective assistance of counsel, and by the time they were ordered for these habeas proceedings, the reporter's notes had been discarded (31 AA 7571; 33 AA 7938, Newell Aff. ¶4; 33 AA 7971).

Flanagan was entitled to a public trial, be present as the court heard argument from counsel and made important decisions about his case, and a complete record of the proceedings so that his conviction could be meaningfully appealed. See Draper v. Washington, 372 U.S. 487 (1963); Nevada Supreme Court Rule 250; Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999) (SCR 250 mandates that all proceedings in a capital case be reported and transcribed).

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. See Butler v. State, 102 P.3d 71, 85-86 (2004) (granting relief on cumulative errors); Duckett v. Mullin, 306 F.3d 982, 992 (10th Cir. 2002).

Claims 26 and 27

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments and because the death penalty is cruel and unusual punishment. The Eighth Amendment forbids the infliction of unnecessary pain in carrying out a death sentence.[61] Nevada's lethal injection protocol violates the Eighth Amendment because it will subject Flanagan to an unreasonable and unacceptable

[61] See Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) (Reed, J, opinion.). Further, "[p]unishments are cruel when they involve . . . a lingering death." In re Kemmler, 136 U.S. 436, 447 (1890); see also Furman v. Georgia, 408 U.S. 238, 273 (1973).

risk of unnecessary physical and psychological pain and involves execution procedures that offend contemporary norms and standards of society. See Atkins v. Virginia, 536 U.S. 304 (2002). The recent medical controversy surrounding lethal injection executions warrants a closer analysis of the process and substances used by of Nevada. See, e.g., Nelson v. Campbell, 541 U.S. 637 (2004). Moreover, the denial of discovery and an evidentiary hearing foreclosed any decision in favor of the constitutionality of lethal injection as it is administered in Nevada.

Claim 28

Flanagan's sentence is invalid under state and federal constitutional guarantees of due process, equal protection and a reliable sentence because Flanagan may become incompetent to be executed. Although petitioner is not subject to immediate execution, this claim is raised to ensure future federal review of the claim. See Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997), aff'd, 118 S.Ct. 1618 (1998).

Claim 29

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's failure to sever his trial from his co-defendants resulted in the jury's use of inadmissible evidence to convict Flanagan. Moreover, the trial court compounded this error by refusing to allow Flanagan's counsel to seek severance during trial and by not addressing the severance motions when they were raised during the trial.

Under Nevada law, a severance is required when "it appears that a defendant of the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together." NRS 174.165. A severance is required upon good cause, which exists when "the evidence proposed to be introduced as to one must be inadmissible as to the other, and of such a nature as to afford reasonable ground for the belief that the other will be prejudiced by a joint trial." State v. Lewis, 255 P. 1002, 1005, 50 Nev. 212 (1927). Federal law also requires courts to grant severances when joinder creates prejudice. See, e.g., Zafiro v. U.S., 506 U.S. 534, 539 (1993) (severance should be granted "if there is a serious

risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence").

Flanagan was deprived of his Sixth Amendment right to an impartial jury because the jury was allowed to consider prejudicial evidence as a result of the court's refusal to sever the trial. See, e.g., U.S. v. Tootick, 952 F.2d 1078, 1083 (9th Cir. 1991). A severance was required because Flanagan and co-defendant Luckett had antagonistic defenses and Luckett's coercion defense necessarily prejudiced Flanagan. U.S. v. Sherlock, 962 F.2d 1349, 1362-63 (9th Cir. 1989) (severance required when defenses are mutually exclusive and "the acceptance of one party's defense will preclude the acquittal of the other party"). As explained above, evidence of devil worship and gang activity played a prominent role at trial. See Claim 3, supra. This type of evidence is highly prejudicial as well as inadmissible. Dawson, 503 U.S. at 168. As a result of this prejudicial information, the jury was improperly biased against Flanagan.

Moreover, the trial court failed to ameliorate the prejudicial evidence by properly instructing the jury. Zafiro, 506 U.S. at 326 ("less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice."); Lewis, 50 Nev. at 222 (jury instructed to disregard evidence as to one defendant). The jury was not instructed to disregard the devil worship and gang evidence when determining Flanagan's guilt; instead, the jury was instructed to consider "all of the evidence." (12 AA 2745). Flanagan suffered undue prejudice.

Claim 30

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, trial by an impartial jury and a reliable sentence because Nevada effectively has no mechanism to provide for clemency in capital cases. As the Court noted in Gregg, a capital punishment system without clemency "would be totally alien to our notions of criminal justice." 428 U.S. at 199 n.50; see also Herrera v. Collins, 506 U.S. 390, 411-12 (1993). Likewise, clemency is an integral part of Nevada's criminal justice system. See Ex parte Janes, 1 Nev. 319 (1865); Nev. Const. Art. 5, § 14. The Supreme Court has held that "some minimal procedural safeguards apply to clemency proceedings." Ohio Adult Parole

Authority v. Woodard, 523 U.S. 272, 289 (1998). Moreover, having established a clemency process, Nevada must ensure such procedures comport with due process. Evitts, 469 U.S. at 393; Goldsworthy v. Hannifin, 86 Nev. 252, 256, 468 P.2d 350, 353 (1970)

Flanagan is afforded no such procedural due process under Nevada's clemency statute, NRS 213.005-213.100, and its corresponding administrative code, NAC §§ 213.010 – 213.210. First, there is no right to a hearing. See, e.g., Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (due process requires the right to be heard). While Flanagan may ask for one, the final authority to approve the application rests with the executive secretary of the Board of Pardon Commissioners. NAC 213.090(2). Second, the composition of the Board precludes an unbiased proceeding. See Daniel T. Kobil, Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency, 27 U. Rich. L. Rev. 201, 224-25 (1993). Other than the governor, the Board consists of the Justices of the Supreme Court and the Attorney General, NRS 213.010, all of whom will have previously participated in the capital proceedings. Finally, if the hearing results in a denial, the Board would not issue a reasoned opinion since hearings are "informal in nature and regular rules of evidence or other formalities do not apply." NAC 213.190. Consequently, there is no way of ensuring that Flanagan will receive meaningful consideration.[62]

Claim 31

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 jurors viewed him in shackles and were aware of armed guards in the courtroom during trial. The Supreme Court has identified three "inherent disadvantages and limitations" in using shackles: (1) physical restraints may cause jury prejudice, reversing the presumption of innocence; (2) shackles may impede the communication between the defendant and his lawyer, thus violating the Sixth Amendment; and (3) shackles may detract from the

[62] Since 1973, 139 individuals have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 2002 (November 2004 NCJ 206627). The Board has commuted only one death sentence through the clemency process since the reinstatement of the death penalty. As a practical matter, Nevada's practice of denying commutation amounts to an arbitrary denial of "any access to its clemency process." Woodard, 523 U.S. at 289.

dignity and decorum of the judicial proceedings. Illinois v. Allen, 397 U.S. 337, 344 (1970); see also Deck v. Missouri, 125 S.Ct. 2007 (2005). The Ninth Circuit similarly has found that visible shackling may "mark [a defendant] as an obviously bad man [,] . . . suggest that the fact of his guilt is a foregone conclusion" (Stewart v. Corbin, 850 F. 2d 492, 497 (9th Cir. 1988)) and "create[s] an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy." Rhoden v. Rowland, 172 F.3d 633, 636 (9th Cir. 1999).

"Because visible shackling during trial is so likely to cause a defendant prejudice," the Ninth Circuit "only permits it when justified by an essential state interest specific to each trial." Rhoden, 172 F.3d at 636. To demonstrate this "essential state interest," courts must engage in a two-step analysis before permitting shackling. First, the trial court must "be persuaded by compelling circumstances that some measure is needed to maintain security of the courtroom." Second, the trial court must consider "less restrictive alternatives" before deciding upon shackling. Duckett v. Godinez, 67 F.3d 734, 748 (9th 1995). It is a "denial of due process if a trial court orders a defendant shackled without" first engaging in this two-part analysis. Id.

Neither criterion was properly applied here. There was no evidence that Flanagan had threatened to escape or threatened to injure. Nor were there any incidents of disruption to justify shackling him in front of the jury. Indeed, in "all cases" in which shackling has been approved, evidence existed of "disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities." Id. at 749. None of those circumstances existed here.

Without engaging in the required analysis, the court required Flanagan to wear shackles throughout the trial, except while court was in session. This resulted in the jury seeing Flanagan in chains (30 AA 7137, Buchanan Dec. ¶2). The jurors returned before the guards had removed the shackles from Flanagan, the guards removed the shackles in full sight of the jury (Id.). Flanagan thus is entitled to relief because his improper shackling was visible to the jurors, and this error substantially influenced the jury's verdict, particularly in light of the continuous and

unjustified presence of armed guards in the courtroom. Rhoden, 172 F.3d at 636.[63]

Claim 32

Petitioner's conviction and sentence of death are invalid under state and federal constitutional guarantees of due process, equal protection and a reliable sentence because he the trial and appellate judges responsible for rulings in his case were elected, subject to re-election and therefore beholden to the electorate and could not be impartial. Nev. Const. Art. 6 §§ 3, 5. see also Claims 11, 19, 20, 21. Conducting a capital trial or direct appeal before a partial tribunal is prejudicial *per se* and requires that Flanagan's capital conviction and sentence be vacated.

When the U.S. Constitution was adopted, the common law definition of due process included the requirement that judges who presided over trials in capital cases have tenure during good behavior, as do appellate judges. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers. Nevada law does not insulate judges from majoritarian pressures. Making unpopular rulings favorable to a capital defendant risks removal from office. See Tumey v. Ohio, 273 U.S. 510, 532 (1927); Aetna Life Ins. v. Lavoie, 475 U.S. 813, 824-25 (1986); In re: Murchison, 349 U.S. 133, 136 (1955).

Flanagan's case involved both massive media attention and intense prosecutorial exploitation of the jurors and potential jurors' knowledge of the case. See Claim 6. A ruling favorable to Flanagan on any dispositive issue, at trial or on direct appeal, would have serious consequences to the re-election of any judicial officer making such a ruling, and at minimum would have required the expenditure of significant resources in time and money to retain office.

Claim 33

Flanagan's death sentence is invalid under state and federal constitutional guarantees of due process of law, equal protection of the laws, effective assistance of counsel, trial by an impartial jury, and a reliable sentence by his attorney's failure to challenge for cause jurors who

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[63] This Court should remand for a hearing to determine the degree of prejudice Flanagan's visible shackling had on the jury's verdict. See, e.g., Parrish v. Small, 315 F.3d. 1131 (9th Cir. 2003) (hearing necessary to determine prejudice); Rhoden, 10 F.3d 1457 (same).

could not be impartial.[64] At the third penalty hearing, Flanagan's counsel unreasonably and prejudicially failed to challenge a juror who stated that she would not consider life with possibility of parole as an option (21 AA 5126). The seating of a juror biased in favor of a death sentence was erroneous and prejudicial. Flanagan's counsel also failed to challenge for cause two other jurors who openly advocated use of the death penalty, including a juror who stated that if he were one of the defendants he would not want someone like himself on the jury "[c]ause nobody wants to die." (19 AA 4614-37; 21 AA 5088-89, 5099). Instead of challenging for cause, Flanagan's counsel used two peremptory challenges to remove these jurors, challenges that could have been used to select a jury more favorably disposed to a penalty less than death. Counsel's actions were unreasonable and prejudicial. See, e.g., Berry v. Gramley, 74 F. Supp. 2d 808 (N.D. Ill. 1999) (failure to challenge two jurors for cause was ineffective).

Claims 34 and 35

Flanagan's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence because the proceedings against him violate international law. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ["UDHR"]; recognize the right to life. G.A. Res. 217, U.N. Doc. A/810, art. 3 (1948). Similarly the International Covenant on Civil and Political Rights, adopted December 19, 1966, art. 6, 999 U.N.T.S. 171 ["ICCPR"] obligates parties to both "respect and ensure to all individuals within its territory . . . the rights recognized in the present Covenant, without distinction of any kind . . . ." ICCPR at Art 2.[65] Therefore, Nevada has an obligation not to take life arbitrarily. In Van Alphen v. The Netherlands, (No. 305/1988), U.N. Doc. A/45/40, Vol. II, p. 108, §5.8, the Human

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[64] The District Court incorrectly found that, the challenges to the jury selection in the second penalty trial were mooted by the granting of the third penalty hearing. The constitutionality of all hearings are properly considered in this proceeding, particularly because had the errors not occurred, the second hearing may have been Flanagan's only opportunity to receive a sentence less than death. See note 14, supra; Claims 18 and 19, supra.

[65] Nevada is bound by the ICCPR because the U.S. has signed and ratified the treaty and is bound by the UDHR because it is a fundamental part of customary International Law.

Rights Committee held that "arbitrariness" includes inappropriateness, injustice, and lack of predictability.[66] Thus, Flanagan's convictions and sentence violation of International Law.[67]

Claim 36

Flanagan's sentence is invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because, as a result of the state's egregious misconduct, he has endured three trials and appeals, and has been on death row for 20 years without finality, which constitutes cruel and unusual punishment. See, e.g., Lackey v. Texas, 514 U.S. 1045, 1047 (1995) Claims 24 and 27, supra.

IV. CONCLUSION

These statutory and constitutional violations, individually and cumulatively, require relief. The facts presented below amply demonstrate that Flanagan is entitled to a new trial. In the alternative, a remand full and fair fact-finding is required.

Dated this 25 day of August, 2005.

Respectfully submitted,

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[66] See also ICCPR, Art. 7, Art. 9, Art. 14, Art. 18, Art. 10, Art. 18; UDHR, Art. 5, Art. 19; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, 1465 U.N.T.S. 85.

[67] These violations include: a) Flanagan is indigent and has supported himself since he was fifteen-years old (30 AA 7207, Kriegler Dec. ¶¶23, 25); b) Flanagan's attorney had no capital defense experience and was ineffective (30 AA 7148, Pike Aff. ¶3); c) persons opposed to the death penalty were excluded from the jury (14 AA 3295); d) a single aggravating action (burglary) was allowed to be used in multiple ways to justify death, while mitigation was not fully considered; e) the prosecutor had discretion in whether to seek the death penalty; f) the trial judge was elected. See, e.g., Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/681 (Add. 3) (1998) ("Report of Special Rapporteur").

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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 25 day of August, 2005.

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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 OPENING BRIEF and CERTIFICATE OF COMPLIANCE** addressed to:

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Dated this 26 day of August, 2005.

Michelle Karony

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