ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

ZANE FLOYD,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 44868

FILED

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APPELLANT'S OPENING BRIEF

APPEAL FROM DENIAL OF PETITION FOR
WRIT OF HABEAS CORPUS (POST CONVICTION)

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05-14215

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vs.	)	
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STATEMENT OF ISSUES

1. WHETHER IT WAS AN ABUSE OF DISCRETION TO DENY FLOYD AN EVIDENTIARY HEARING ON HIS PETITION FOR POST CONVICTION HABEAS CORPUS

2. WHETHER FLOYD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

STATEMENT OF THE CASE

On June 8, 1999 FLOYD was charged by way of Criminal Complaint with four counts of Murder With Use of a Deadly Weapon, three counts of Attempt Murder With Use of a Deadly Weapon, five counts of Sexual Assault With Use of a Deadly Weapon, and one count of Burglary While in Possession of a Firearm, and First Degree Kidnapping With Use of a Deadly Weapon. (1 APP 80) FLOYD waived his Preliminary Hearing, and was arraigned on July 6, 1999 before District Court Judge Jeffrey Sobel. (2 APP 290) On the same date the State filed a Notice of Intent to Seek the Death Penalty alleging six different aggravating circumstances, to wit: prior felony conviction, risk of harm to more than one person; during the commission of a burglary, torture or mutilation; random and without apparent motive and more than one count of murder. (1 APP 1-9)

Trial commenced on July 11, 2000 and concluded on July 13, 2000 with the jury returning guilty verdicts on all eleven counts. (2 APP 303-305) FLOYD was represented by Curtis Brown and Doug Hedger of the Clark County Public Defender's Office at trial. The penalty hearing was held before the jury from July 17, 2000 through July 19, 2000 (2 APP 306-308) and on July 21, 2000 the jury sentenced Floyd to death on each of the Murder counts. (2 APP 309) After his conviction, Floyd filed a Motion for New trial based on prosecutorial misconduct which was denied on August 21, 2000. (1 APP 24-41)

FLOYD'S conviction and sentence were affirmed by the Nevada Supreme Court on March 13, 2002. Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002). An Order Denying Rehearing was entered on May 7, 2002. (1 APP 69-70) Floyd filed a Petition for Writ of Certiorari to the United States Supreme Court which was denied on February 24,

2003. Remittitur issued on March 10, 2003. (1 APP 71)

On June 19, 2003 FLOYD filed a Petition for Writ of Habeas Corpus (Post Conviction) (1 APP 72-78) and thereafter on October 6, 2004 appointed counsel filed a Supplemental Petition and Points and Authorities in Support of the Petition. (1 APP 79-117) The State responded in Opposition on December 7, 2004 (2 APP 118-271) and the matter came on for argument on January 18, 2005 at which time the District Court denied the petition without an evidentiary hearing. (2 APP 272-275) Written Findings of Fact, Conclusions of Law and Order were entered on February 2, 2005 (2 APP 276-286) and served on attorney for FLOYD on February 25, 2005. (2 APP 287)

FLOYD timely filed a Notice of Appeal on March 9, 2005. (2 APP 288-289)

STATEMENT OF FACTS

For purposes of this Brief Appellant ZANE FLOYD (hereinafter referred to as FLOYD) will incorporate the Facts from the decision of this Court on the direct appeal:

> "Early in the morning on June 3, 1999, Floyd telephoned an 'outcall' service and asked that a young woman be dispatched to his apartment. As a result, a twenty-year-old woman came to Floyd's apartment around 3:30 a.m. As soon as she arrived, Floyd threatened her with a shotgun and forced her to engage in vaginal intercourse, anal intercourse, digital penetration, and fellatio. At one point he ejected a live shell from the gun, showed it to the woman, and said that her name was on it. Eventually Floyd put on Marine Corps camouflage clothing and said that he was going to go out and kill the first people that he saw. He told the woman that he had left his smaller gun in a friend's vehicle or he could have shot her. Eventually he told her she had 60 seconds to run or be killed. The woman ran from the apartment, and around 5:00 a.m. Floyd took his shotgun and began to walk to an Albertson's supermarket which was about fifteen minutes by foot from his apartment.
>
> Floyd arrived at the supermarket at about 5:15 a.m. The store's security videotape showed that immediately after entering the store, he shot Thomas Michael Darnell in the back, killing him. After that he shot and killed two more people, Carlos Chuck Leos and Dennis Try Sargeant. Floyd then encountered Zachary T. Emenegger, who attempted to flee. Floyd chased him and shot him twice. Floyd then leaned over him and said, 'Yeah, you're dead,' but Emenegger survived. Floyd then went to the rear of the store where he shot Lucille Alice Tarantino in the head and killed her.
>
> As Floyd walked out the front door of the store, Las Vegas Metropolitan Police Department (LVMPD) officers were waiting for him. He went back in the store for a few seconds and then came out again pointing the shotgun at his own head. After a police officer spoke with him for several minutes, Floyd put the gun down, was taken into custody, and admitted to officers that he had shot the people in the store...." (1 APP 45-46)

SUMMARY OF PENALTY HEARING

The Court also summarized the evidence at the penalty phase of the trial as follows:

> "Floyd presented a number of witnesses to testify in

mitigation. A family friend and a coworker both testified that they knew him to be a good person and that the person who committed the crimes in this case was not the Zane Floyd they knew. The coworker and Floyd's stepfather testified respectively that when they met Zane in jail immediately after the crimes he was 'like a zombie' and 'wasn't there.' His stepfather also told of Floyd's difficulties and behavioral problems in school and of how well he later did in the marine Corps. A former Marine who served with Floyd as an instructor in combat training school testified that Floyd was the best instructor, that 'in the field, he would be a perfect marine,' but that 'on his own' he did not do well.

Floyd's close friend testified that he and Floyd began using marijuana and methamphetamine when they were fifteen or sixteen. The friend testified that Floyd's mother was often intoxicated and that on Floyd's sixteenth birthday his stepfather played drinking games with Floyd and his friends. After Floyd returned from the Marines, his friend reintroduced him to methamphetamine, which they sometimes used without sleeping for several days.

Floyd's mother testified about her own drug and alcohol abuse and the loss of her first child, which caused her to drink even more. When she became pregnant with Floyd, her husband was displeased, they separated, and he filed for divorce just before Floyd's birth. She described Floyd's learning and behavioral problems as a child. She also spoke about how he played baseball and loved animals.

A clinical social worker and psychoanalyst conducted a psychosocial evaluation of Floyd and testified to the following. Floyd's mother had used various illegal controlled substances and abused alcohol. Floyd's stepfather also abused alcohol and was sometimes violent towards Floyd's mother. Floyd had difficulties in school and began drinking when he was fifteen and using methamphetamine when he was sixteen. He enlisted in the Marine Corps at age seventeen. After four years he was honorably discharged on condition that he not reenlist because of his alcohol problems. When he was twenty-two, Floyd attempted to contact his biological father, who refused any contact. Returning home from the military, Floyd lived with his parents. He had no driver's license because of a DUI. He worked for a short time at Costco, but was terminated. he then obtained employment as a security guard, but lost that job in May 1999. That same month his cousin was killed, which affected him and other family members deeply.

Psychologist Dr. Dougherty testified and gave his opinion that Floyd

suffers from the mental disease of mixed

> personality disorder with borderline, paranoid, and depressive features. In addition, I confirmed the prior diagnosis of attention deficit hyperactivity disorder....It's my opinion...that Mr. Floyd's reasoning was impaired as to rational thought at times, and at times he did not act knowingly and purposely at the time of the alleged incident. His symptoms were exacerbated by a long history of the ingestion of drugs and alcohol.
>
> Floyd spoke in allocution and took responsibility for what he had done ad said he could not tell why he did it. he said he was sorry and would regret his actions for the rest of his life." (1 APP 65-57)

Floyd v. State, 118 Nev. 156, 162, 42 P.3d 249 (2002)

ARGUMENT

I.

IT WAS AN ABUSE OF DISCRETION TO DENY FLOYD AN EVIDENTIARY HEARING ON HIS PETITION FOR POST CONVICTION HABEAS CORPUS

It has long been the holding of this Court that, if a petition for post-conviction relief contains allegations of facts outside the record, which, if true, would entitle the petitioner to relief, an evidentiary hearing is required. Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983); Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

Oft times in denying requests for post conviction evidentiary hearings the trial court merely bases its decision on the perceived strength of the State's case at trial without considering the allegations of the Petition. Allegations concerning failure to oppose a State's motion have been found sufficient to mandate an evidentiary hearing. For instance in Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992) the Court remanded the case for an evidentiary over the State's objection where counsel had not adequately opposed a Motion in Limine filed by State. The purpose of such a hearing was to determine if counsel had sufficient cause for the noted failure. Drake, 108 Nev. at 527-28.

The District Court abused it's discretion and failed to follow the established guidelines of this Court in denying FLOYD'S request for an evidentiary hearing. The Supplemental Petition filed by FLOYD raised a number of issues concerning the failures of trial counsel and appellate counsel to object and/or raise issues in the direct appeal. Only by holding a evidentiary hearing wherein counsel can explain the reasons, if any, for their failures can this Court examine the claims.

Without such a hearing it would be pure speculation or conjecture to find that there was a strategic basis for the failures. It is respectfully urged that this Court remand the case with direction that the case be reassigned to a different District Court and that an evidentiary hearing be conducted on the allegations of FLOYD'S Petition.

II.

FLOYD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees that a person accused of a crime receive effective assistance of counsel for his defense. The right extends from the time the accused is charged up to and through his direct appeal and includes effective assistance for any arguable legal points. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental right to a fair trial, guaranteed under the Fourteenth Amendment's Due Process Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill the constitutional requirement. The right to counsel is the right to effective counsel, that is, "an attorney who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763 (1970).

Pre-trial investigation is a critical area in any criminal case and failure to accomplish same has been held to constitute ineffective assistance of counsel. The Nevada Supreme Court in Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

> "It is still recognized that a primary requirement is that counsel...conduct careful factual and legal investigations and inquiries with a view toward developing matters of defense in order that he make informed decisions on his client's behalf both at the pleading stage...and at trial."

Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts are in

accord that pre-trial investigation and preparation for trial are a key to effective representation of counsel. U.S. v. Tucker, 716 F.2d 576 (1983). A lawyer who fails to adequately investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999). See also, Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988) holding that a failure to investigate possible evidence could not be deemed a trial tactic where the lawyer did not view relevant documents that were available.

In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in language applicable to this case, stated:

> "Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses and evidence, mere possibility that investigation might have produced nothing of consequences for the defense could not serve as justification for trial defense counsel's failure to perform such investigations in the first place. Fact that defense counsel may have performed impressively at trial would not have excused failure to investigate defense that might have led to complete exoneration of the Defendant."

In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the Nevada Supreme Court found that trial counsel was ineffective where counsel failed to conduct adequate pre-trial investigation, failed to properly utilize the Public Defender's full time investigator, neglected to consult with other attorneys although urged to do so, and failed to prepare for the testimony of defense witnesses. See also, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

To establish ineffective assistance of trial counsel, a defendant must satisfy the two prongs set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under Strickland, a defendant must

first show that his counsel's performance was deficient. To be deficient, counsel's performance must be "outside the wide range of professionally competent assistance" Strickland, 466 U.S. at 690. Upon establishing deficient performance, a defendant must then show that this deficient performance prejudiced his defense. The defendant need not show that the deficient performance more likely than not altered the outcome of the case, but must demonstrate only 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 694.

In his Supplemental Petition for Writ of Habeas Corpus FLOYD alleged that his conviction and death sentence are invalid under the State and Federal constitutional guarantee 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 and appellate counsel to provide reasonably effective assistance of counsel. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21. (1 APP 79-117)

The Petition filed by FLOYD contained numerous specific allegations of deficient performance by trial and appellate counsel, but the District Court refused to grant FLOYD an evidentiary hearing. (2 APP 272-275) Not only should the District Court have granted an evidentiary hearing, FLOYD was entitled to relief. The following grounds mandated that his conviction and sentence be set aside:

A. *Trial counsel failed to make contemporaneous objections on valid issues during trial and appellate counsel failed to raise these*

issues on direct appeal, both failures being in violation of FLOYD'S' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

FLOYD submits that trial counsel was per se ineffective in not preserving the following appellate issues and that therefore only the prejudice prong of the Strickland test remained to be considered. The failure of trial counsel to make contemporaneous objection prevented FLOYD from receiving meaningful review on direct appeal from his conviction and sentence.

(1) Improper argument during the Opening Statement at the Penalty Hearing.

During the Opening Statement at the penalty hearing the prosecutor made the following improper arguments to the jury, telling the jury that mitigating circumstances are nothing more than "excuses":

> "You have mitigating circumstances. Those are not really statutory in nature, although there are a few, but they can be anything -- they can be the age or youth of the offender, the lack of criminal history, psychosis, drinking, drug abuse, poor upbringing, good upbringing, whatever the defense wishes to bring out in the form of, they would say, explanation -- I would categorize as excuses -- for the conduct that was committed on June the 3rd." (7 APP 2013)
>
> . . .
>
> "MR. KOOT: I was discussing the statutory aggravating circumstances, which you will weigh against whatever mitigating excuses that he offers you during the case today and tomorrow." (emphasis added) (7 APP 2014)
>
> . . .

The prosecutor during his opening statement also expressed his personal opinion and that of District Attorney Bell that the death

penalty was the appropriate penalty in the case, stating:

> "By tomorrow -- and I believe it will be tomorrow -- we will end this -- the attorneys will end this portion of the case, they'll be submitted to you, and I trust that you will agree with Mr. Bell and myself that for his crimes he deserves what is in this case a just penalty of death." (7 APP 2018) (Emphasis added)

The failure to object to the above listed statements during the State's Opening and the failure to raise same on direct appeal denied FLOYD of Due Process and a fundamentally fair trial. Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

The prosecutor, without objection, also argued victim impact information during his Opening Statement at the trial phase. Specifically he stated:

> "...the next person he confronted was a fellow by the name of Chuck Leos. Chuck Leos was 41, just celebrated his first anniversary to his wife, Leanne. He was the frozen food man. He shot him on the right side, in the neck and the fact; two shots from that shotgun." (3 APP 1357) (emphasis added)

and further the prosecutor told the jury:

> "He went into the back room area and found the only person that wasn't hiding that didn't realize what was going on. Her name was Lucy Tarantino. She was in her early Sixties. She was a wife, mother of three, grandmother. She was the salad lady. It was her job to get the salad stuff ready. He told the police about that confrontation." (3 APP 1359)

It is well established that victim impact testimony is highly prejudicial and not relevant during the trial portion of a criminal proceedings. Nonetheless trial counsel completely failed to object and prevent the prosecutor from referring to victim impact during his opening statement. Making such statements during opening statement is highly prejudicial and taints receipt of the other evidence in a case. Such information may be admissible at the penalty hearing, but not before. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115

L.Ed.2d 720 (1991); Homick v. State, 108 Nev. 127, 136, 825 P.2d 600 (1992).

In the essence the prosecutor was able to poison the jury against FLOYD from the Opening Statement thereby prejudicing the jury before any evidence was presented. Likewise introducing victim impact at trial allowed the State in essence to present much of it's penalty hearing case before the jury had even returned a verdict of guilt.

(2) The statutory scheme adopted by Nevada fails to properly limit victim impact statements.

At the penalty hearing in the case at bar the State presented testimony from a number of witnesses but was limited by the ruling of the Court that the State could only present one victim witness for each of the victims. FLOYD asserts that despite this ruling from the trial Court, Nevada statutory law does not limit the presentation of victim impact evidence and is therefore unconstitutionally vague and as such results in the arbitrary and capricious imposition of the death penalty.

The Nevada Supreme Court has held that due process requirements apply to a penalty hearing. In Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991) the Court held that due process requires notice of evidence to be presented at a penalty hearing and that one day's notice is not adequate. In the context of a penalty hearing to determine whether the defendant should be adjudged a habitual criminal the court has found that the interests of justice should guide the exercise of discretion by the trial court. Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990). In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980), the United State Supreme Court held that state laws guaranteeing a defendant procedural rights at

sentencing may create liberty interests protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. The procedures established by the Nevada statutory scheme and interpreted by the Court have therefore created a liberty interest and are protected by the Due Process clause.

The Eighth Amendment to the United States Constitution requires that the sentence of death not be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153 (1976). The fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Woodson v. North Carolina, 428 U.S. 280 (1976). Evidence that is of a dubious or tenuous nature should not be introduced at a penalty hearing, and character evidence whose probative value is outweighed by the danger of unfair prejudice, of confusion of the issues or misleading the jury should not be introduced. Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983).

The United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) held that the Eighth Amendment erects no per se bar to the admission of certain victim impact evidence during the sentencing phase of a capital case. The Court did acknowledge that victim impact evidence can be so unduly prejudicial as to render the sentencing proceeding fundamentally unfair and violate the Due Process Clause of the Fourteenth Amendment. Payne, 111 S.Ct at 2608, 115 L.Ed.2d at 735. In Homick v. State, 108 Nev. 127, 136-137, 825 P.2d 600, 606 (1992) this Court embraced the holding in Payne, and found that it comported fully with the

intendment of the Nevada Constitution and declined to search for loftier heights in the Nevada Constitution. In cases subsequent to Homick, the Court has reaffirmed its position, finding that questions of admissibility of testimony during the penalty phase of a capital murder trial are largely left to the discretion of trial court. Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649 (1994). The Court has not however addressed the issue of presentation of cumulative victim impact evidence or erected any rule setting forth any limitation on the scope or quantity of the evidence.

Some State courts have voiced disapproval over the admission of any victim impact evidence at a capital sentencing hearing finding that such evidence is not relevant to prove any fact at issue or to establish the existence of an aggravating circumstance. State v. Guzek, 906 P.2d (Or. 1995). In considering a claim that victim impact testimony violated due process and resulted in a sentence imposed under the influence of passion, prejudice or other arbitrary factors, the Kansas Supreme Court in State v. Gideon, 894 P.2d 850, 864 (Kan. 1995) issued the following warning while affirming the sentence:

> "When victims' statements are presented to a jury, the trial court should exercise control. Control can be exercised, for example, by requiring the victims' statements to be in question and answer form or submitted in writing in advance. The victims' statements should be directed toward information concerning the victim and the impact the crime has on the victim and the victims' family. Allowing the statement to range far afield may result in reversible error."

Trial counsel filed to limit the presentation of victim impact evidence but in order to be effective under the Sixth Amendment, should have objected to the presentation of any victim impact testimony and not just to a limit in order to preserve the claim for appellate and federal review.

(3) The prosecutor committed misconduct during the penalty phase of FLOYD'S trial by appealing to the passions and prejudice of the jurors and by denigrating the proper consideration of mitigating factors.

The direct appeal raised several asserted improper arguments by the prosecutors at the penalty hearing. The Nevada Supreme Court on direct appeal found that the failure of trial counsel to object to some of the remarks precluded appellate review. Floyd v. State, 118 Nev. 156, 173, 42 P.3d 249 (2002). (1 APP 44-68) The one comment that the Supreme Court addressed was not subject to objection until after the jury began deliberation and beyond the ability of the Court to correct due to the failure timeliness. The arguments challenged on direct appeal but not addressed in the opinion were concerning the conditions in prison, the proportionality of the sentence compared to other cases, and concerning what the headlines should read in the newspaper the following day.

The arguments of both prosecutors were replete with references to sending a message to society and with requests to impose the death penalty to convey the message. Not only has Nevada condemned such argument, Courts of other states have specifically disapproved of arguments of counsel that a message should be sent to the community in order to protect society from crime. State v. Ramseur, 524 A.2d 188 (NJ 1987); State v. Rose, 548 A.2d 1058, 1092 (NJ 1988).

It must be remembered that the arguments of the prosecutor's herein were penalty hearing arguments where a heightened standard of review is mandated.

> "At the sentencing phase, it is most important that the jury not be influenced by passion, prejudice, or any other arbitrary factor. Hance v. Zant, 696 F.2d 940, 951 (11th

Cir. 1983) 'With a man's life at stake, a prosecutor should not play on the passion of the jury'. Id."

Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836 (1988).

The Court in Flanagan, supra, went on to express strong disapproval of statements concerning society's view of the penalty citing to Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). In language extremely relevant to the actions and arguments of the prosecutor's in the case at bar, the Flanagan court remarked that:

> "...a prosecutor could not blatantly attempt to inflame the jurors by urging that if they wished to be deemed 'moral' and 'caring' then they must approach their duties in anger and give the community what it needs. We observe that the prosecutor's remark in the instant case serves no other purpose than to raise the specter of public ridicule and arouse prejudice against Flanagan.
>
> We are compelled to conclude that the cumulative effect of the prosecutor's extensive misconduct was of such a magnitude as to render Flanagan's sentencing hearing fundamentally unfair. Given the uncontroverted evidence of guilt, there is simply no justification for such outrageous behavior."

Flanagan, 104 Nev. at 112.

Most disturbing of the arguments made by the prosecution were those that minimized the existence and utilization of mitigating circumstances in the weighing process. In Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) this Court reversed a death penalty based in part on the argument of the prosecution against the existence of mitigation. In Hollaway the Court stated:

> "The United States Supreme Court has held that to ensure that jurors have reliably determined death to be the appropriate punishment for a defendant, 'the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.' *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). In *Penry*, the absence of instructions informing the jury that it could consider and give effect to certain mitigating evidence caused the Court to conclude that:

> 'the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision. Our reasoning in [Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982),] thus compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"

Hollaway, 116 Nev. at 744. The Court then went on to command that a jury instruction be given in all capital cases directing the jury to make an independent and objective analysis of all relevant evidence and that arguments of counsel do not relieve the jurors of this responsibility.

> "Now, in addition to these three that are provided by the law, again, I told you that it was open ended. Any other mitigating circumstance. So the defense has made a laundry list of red herrings to make it appear in this case that there's a whole lot of them and, therefore, they should have some weight. They've stacked wishes upon hopes upon dreams that you'll count numbers, that you'll count some things twice, and you'll say, 'Well, wait a minute. There's a lot of mitigation here.'" (10 APP 2579)
>
> . . .
>
> "Now, it really doesn't matter that Mr. Bell took this entire box of paper clips and threw it on the table. You could have every one of these. How on earth could all of these reasons or excuses, whatever you want to call them, how could all of them put together possibly outweigh the fact that more than one person was killed in this case? How could that possibly outweigh a second murder? It can't. None of these combined." (10 APP 2655)
>
> . . .
>
> "Cooperation with the police as a mitigating circumstance? Give me a break. How does that reduce his moral culpability?
>
> You can throw the whole list away." (10 APP 2658)

In the case at bar the arguments of the prosecutors directly violated that which the Nevada Supreme Court has announced as the proper use of mitigation evidence by the jury. If this issue had been

preserved by trial counsel it could have formed the basis for the Court to have vacated the death penalty on direct appeal.

B. *Trial counsel failed to object and appellate counsel failed to raise on direct appeal a number of improper jury instructions. The failure to object and raise issues on direct appeal constituted ineffective assistance of counsel. The specific instruction that should have been raised were the following*:

(1) The "anti-sympathy" instruction.

Without any objection from trial counsel the Court gave Instruction No. 37 at the penalty hearing, the second paragraph of which provides:

> "A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgement and sound discretion in accordance with these rules of law." (Emphasis added). (1 APP 99)

It was error to give an anti-sympathy instruction. Sentencers may not be given unbridled discretion in determining the fate of those charged with capital offenses. Death penalty statutes must be structured to prevent the penalty being imposed in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2126, 33 L.Ed.2d 346 (1972). However, a capital defendant must be allowed to introduce any relevant mitigating evidence regarding his character and record and circumstance of the offense. Woodson v. North Carolina, 428 U.S. 280,96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The anti-sympathy instruction given violated FLOYD'S Eighth Amendment rights because it undermined the jury's constitutionally mandated consideration of mitigating evidence. If an alleged error

in jury instructions in the sentencing phase of a capital case requires a determination of how a reasonable juror could construe the instruction in such ways to make its sentencing decision improper, the reviewing court should reverse the sentencing decision. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

The instant instruction is comparable to the instruction that was struck down in Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), which stated: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." In reaching this conclusion, the 10th Circuit found the instruction precluded any consideration of sympathy and thus created an impermissible risk that a reasonable juror might disregard mitigating evidence.

The jury was instructed that its verdict may never be influenced by sympathy. The jury instructions on mitigating factors did not cure the constitutionally defective anti-sympathy instruction. At best, the jury received conflicting instructions. In Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Court stated:

> "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."

A capital defendant has a constitutional right to have the jury give "individualized" consideration to the mitigating circumstances of his character, record and the circumstances of the crime. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The jury instruction in the case at bar failed to inform the jury of the proper consideration concerning the death penalty.

(2) Trial counsel failed to request an instruction during the penalty phase that correctly defined the use of "character" evidence

for the jury.

NRS 200.030 provides the basic scheme for the determination of whether an individual convicted of first degree murder can be sentenced to death and provides in relevant portion:

> "4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:
>
> (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances; or
>
> (b) By imprisonment in the state prison..."

In the case at bar, in addition to the alleged aggravating circumstances there was a great deal of "character evidence" offered by the State that was used to urge the jury to return a verdict of death. The jury, however, was never instructed that the "character evidence" or evidence of other bad acts that were not statutory aggravating circumstances could not be used in the weighing process.

The instructions that were given to the jury spelled out the process as follows:

> "The jury must find the existence of each aggravating circumstance, if any, unanimously and beyond a reasonable doubt.
>
> The jurors need not find mitigating circumstances unanimously. In determining the appropriate sentence, each juror must consider and weigh any mitigating circumstance or circumstances which that juror finds.
>
> The jury may impose a sentence of death only if:
>
> (1) The jurors find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists;
>
> (2) Each and every juror determines that the mitigating circumstance or circumstances, if any, which he or she has found do not outweigh the aggravating circumstance or circumstances; and

(3) The jurors unanimously determine that in their discretion a sentence of death is appropriate." (1 APP 102)

The jury was not told that:

"Evidence of any uncharged crimes, bad acts or character evidence cannot be used or considered in determining the existence of the alleged aggravating circumstance or circumstances."

Thus the jury was never instructed that such evidence was not to be part of the weighing process to determine death eligibility.

The Nevada Supreme Court decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) found that the proper use of character evidence is that the jury may not consider character evidence until the jury has first determined that a defendant is death eligible, to wit: by finding that at least one aggravator exists; and second, that any aggravators are not outweighed by any mitigators.

C. *Other objections and motions that trial counsel failed to make at trial and that were not raised on direct appeal, were the following:*

(1) Trial counsel failed to object and move to strike overlapping aggravating circumstances and appellate counsel failed to raise the issue on direct appeal.

FLOYD asserts that overlapping and multiple use of the same facts as separate aggravating circumstances resulted in the arbitrary and capricious imposition of the death penalty. Additionally, trial counsel failed to file any pretrial motion challenging the aggravating circumstances, failed to object at trial, failed to offer any jury instruction on the matter, and the issue was not raised on direct appeal.

In essence the State was allowed to double count the same conduct

in accumulating three of the aggravating circumstances. The use of the same set of operative facts to multiple aggravating circumstances in a State that uses a weighing process, such as Nevada does, violates principles of Double Jeopardy and deprived FLOYD of Due Process of Law. United States Constitution, Amendments V, VII, XIV; Nevada Constitution, Article I, Section 8.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The traditional test of the "same offense" for double jeopardy purposes is whether one offense requires proof of an element which the other does not. See, Bockburger v. U.S., 284 U.S. 299, 304 (1932). This test does not apply, however, when one offense is an incident of another; that is, when one of the offenses is a lesser included of the other. U.S. v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 2857 (1993); Illinois v. Vitale, 447 U.S. 410, 420 100 S.Ct. 2260 (1980).

Courts of other jurisdictions have found the use of such overlapping aggravating circumstances to be improper. In Randolph v. State, 463 So.2d 186 (Fla. 1984) the court found that the aggravating circumstances of murder while engaged in the crime of robbery and murder for pecuniary gain to be overlapping and constituted only a single aggravating circumstance. See also Provence v. State, 337 So.2d 783 (Fla. 1976) cert. denied 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

The California Supreme Court in People v. Harris, 679 P.2d 433 (Cal. 1984) found that evidence showed that the defendant traveled to Long Beach for the purpose of robbing the victim and committed a burglary and two murders to facilitate the robbery. In determining

that the use of both robbery and burglary as special circumstances at the penalty hearing was improper the court stated:

> "The use in the penalty phase of both of these special circumstances allegation thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state 'tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty' (Godfrey v. Georgia, (1980) 446 U.S. 420 at P.28, 100 S.Ct 1759 at p. 1764, 64 L.Ed.2d 398. The United States Supreme Court requires that the capital - sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.' (Jurek v. Texas (1976) 428 U.S. 262 at pp. 273-74, 96 S.Ct. 2950 at pp 2956-2957), 49 L.Ed.2d 929). That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance."

Harris, 679 P.2d at 449.

Other States that prohibit a "stacking" or "overlapping" of aggravating circumstances include Alabama (Cook v. State, 369 So.2d 1251, 1256 (Ala. 1978) disallowing use of robbery and pecuniary gain) and North Carolina (State v. Goodman, 257 S.E.2d 569, 587 (N.C. 1979) disallowing using both avoiding lawful arrest and disrupting of lawful government function as aggravating circumstances).

It can be anticipated that the State will argue that any error that occurred as a result of the inappropriate stacking of the aggravating circumstances was harmless error in this case because of the existence of other valid aggravating circumstances. The Nevada statutory scheme has two components that would seem to foreclose the existence of harmless error at a penalty hearing. First the jury is required to proceed through a weighing process of aggravation versus mitigation and second, the jury has the discretion, even in the absence of mitigation to return with a life sentence irregardless of the number of aggravating circumstances.

> "When there is a 'reasonable possibility that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently substantial' to justify the imposition of the death penalty,' the test for prejudicial error has been met. (citation omitted) Because the jury arrived at a sentence of death based upon weighing . . . and it is impossible now to determine the amount of weight ascribed to each factor, we cannot hold the error of submitting both redundant aggravating circumstances to be harmless."

State v. Quisenberry, 354 S.E.2d 446 (N.C. 1987).

The stacking of aggravating circumstances based on the same conduct results in the arbitrary and capricious imposition of the death penalty, and allows the State to seek the death penalty based on arbitrary legal technicalities and artful pleading. This violates the commands of the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976) and violates the Eighth Amendment to the United States Constitution and the prohibition in the Nevada Constitution against cruel and unusual punishment and that which guarantees due process of law.

In the instant case the State only was allowed to present three aggravating circumstances at the penalty hearing. Analysis of these show that a "great risk of death to more than one person" is based on the same set of facts as "in the immediate proceeding been convicted of more than one offense of murder." This stacking unfairly adds weight to the number of aggravators.

Trial counsel was deficient in failing to strike the duplicate and overlapping aggravating circumstances and appellate counsel should have raised the issue on direct appeal and urged plain error, even in the absence of contemporaneous objection at trial.

(2) The malice instruction given to the jury contained an unconstitutional presumption that relieved the State of it's burden

of proof and violated FLOYD'S presumption of innocence.

The jury was instructed as follows during the trial phase:

> "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."

The instruction in no uncertain terms defines what express malice is without issuing a directive as to when express malice may be found. The distinction is obvious, express malice is merely defined whereas the jury is directed that it may find implied malice "when no considerable provocation appears".

The State of California having recognized the problem has altered its instruction to read "Malice is express when...; and malice is implied when...." California Jury Instructions, Criminal, Section 8.11.

The Eleventh Circuit Court of Appeals in reviewing a Georgia case that incorporated the similar statutory language as used herein found that the statutory language is constitutionally infirm as it is a directive instruction and shifts the burden of proof by giving the prosecution a presumption of malice. Fulgham v. Ford, 850 F.2d 1529 (11th C.A. 1988). The objectionable language imposes an impermissible mandatory presumption. See, Yates v. Aiken, 484 U.S. 211, 108 S.Ct. 534 (1988); Hill v. Maloney, 927 F.2d 644, 646, 651 (1st Cir. 1990).

Although this Court has upheld the validity of the instruction as correctly informing the jury of the distinction between express and implied malice under NRS 200.020, Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), FLOYD still urges that the presumption language is

improper.

Second, the instruction violates due process because the facts on which the presumption are based do not rationally support the element presumed and are in themselves unconstitutionally vague. The terms "abandoned or malignant heart" do not convey anything in modern language. See Victor v. Nebraska, 511 U.S. 1, 11, 13-14 (1994) (term "moral evidence" not "mainstay or the modern lexicon"); id. at 23 (Kennedy, J., concurring) ("what once might have made sense to jurors has long since become archaic"). They are devoid of rational content and are merely pejorative, and they allow the jurors to find malice simply on the ground that they believe the defendant is a "bad man." In People v. Phillips, 64 Cal.2d 574, 414 P.2d 353, 363-364 (1966), the California Supreme Court analyzed the element of implied malice, and concluded that an instruction would adequately define implied malice if it made clear that "the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." 414 P.2d at 363: Nevada law is basically consistent with this definition. See Collman v. State, 116 Nev. 687, 7 P.3d. 426 (2000).

> "Nevada statutes and this court have apparently never employed the phrase "depraved heart," but that phrase and "abandoned and malignant heart" both refer to the same "essential concept ... one of extreme recklessness regarding homicidal risk." Model Penal Code § 210.2 cmt. 1 at 15; see also Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970) (malice as applied to murder includes "general malignant recklessness of others' lives and safety or disregard of social duty")".

The California Supreme Court disapproved the use of the language referring to an "abandoned or malignant heart" as superfluous and

misleading:

> "Such an instruction renders unnecessary and undesirable an instruction in terms of 'abandoned and malignant heart.' The instruction phrased in the latter terms adds nothing to the jury's understanding of implied malice; its obscure metaphor invites confusion and unguided speculation.
>
> The charge in the terms of the 'abandoned and malignant heart' could lead the jury to equate the malignant heart with an evil disposition or a despicable character; the jury, then, in a close case, may convict because it believes the defendant a 'bad man.' We should not turn the focus of the jury's task from close analysis of the facts to loose evaluation of defendant's character. The presence of the metaphysical language in the statute does not compel its incorporation in instructions if to do so would create superfluity and possible confusion.
>
> . . .
>
> The instruction in terms of 'abandoned and malignant heart' contains a further vice. It may encourage the jury to apply an objective rather than subjective standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter."

414 at 363-364 (footnotes omitted). Although the court did not find the use of the language to be error (as it reversed the conviction on other grounds), the passage of time since Phillips has certainly not increased the likelihood that the term "abandoned or malignant heart" conveys anything rational to a juror. No reasonable juror could understand the challenged phrase as requiring that the defendant commit the homicidal act with conscious disregard of the likelihood that death would result.

CONCLUSION

Based on the authorities herein contained and in the pleadings heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of ZANE FLOYD and remand the matter to District Court for a new trial.

Dated this 12 day of July, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: 7-12-05

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 12 day of July, 2005, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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