IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD, Appellant, v. THE STATE OF NEVADA, Respondent.	) Case No. 51409

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Successive Petition for Writ of Habeas Corpus (Post Conviction)
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the district court erred in finding that Defendant's former post-conviction counsel was not ineffective.
2. Whether the district court correctly dismissed Defendant's remaining claims without conducting an evidentiary hearing.
3. Whether the district court erred in adopting the State's Findings of Fact and Conclusion of Law.

STATEMENT OF THE CASE

On June 8, 1999, Defendant Zane Michael Floyd ("Defendant) was charged by way of Criminal Complaint with four counts of Murder With Use of a Deadly Weapon, four 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 each of the following: Burglary While in Possession of a Firearm, First Degree Kidnapping With Use of A Deadly Weapon. Volume 1 Appellant Appendix ("AA), p. 1-5. The State also attached a Notice of Reservation to seek the Death Penalty. 1AA 5.

On June 25, 1999, an Amended Criminal Complaint was filed subtracting two Attempt Murder with Use of Deadly Weapon charges and one Sexual Assault With A Deadly Weapon Charge. 1AA 30-34. Defendant was then charged by Information and two amendments thereafter with the following crimes: One count of Burglary While in Possession of a Firearm, four counts of Murder With Use of a Deadly Weapon, four counts of Sexual Assault With Use of a Deadly Weapon, one count of Attempt Murder With Use of a Deadly Weapon, and one count of First Degree Kidnapping With Use of a Deadly Weapon. 1AA 35-40, 2AA 378-383, 2AA 396-399. On July 6, 1999, the State filed a Notice of Intent to Seek the Death Penalty; alleging all the aggravating circumstances it intended to prove to the jury. 1AA 41-49. Defendant's trial began July 11, 2000. 3AA 426.

After a jury trial, Defendant was found guilty on all counts. 11AA 2096-99. At the penalty hearing, the State introduced three aggravating circumstances in support of a death sentence. 11AA 2096-99. The jury found beyond a reasonable doubt that all aggravating factors existed and that the death penalty was warranted. 11AA 2096-99. The Supreme Court of Nevada affirmed Defendant's convictions on March 13, 2002. Judicial Notice ("JN), page 73-99; Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002). Defendant's subsequent motion for rehearing was denied on May 7, 2002. JN 100. Appellate counsel then filed a Petition for Writ of Certiorari to the United States Supreme Court which was denied in February of 2003, and remittitur issued on March 10, 2003. 11AA 2113, JN 110-11.

Defendant filed his first Petition for Writ of Habeas Corpus on June 19, 2003, through attorney David Schieck and filed a supplemental petition on October 6, 2004. 11AA 2115-53. The District Court denied Defendant's petition and issued Findings of Fact and Conclusions of Law on February 4, 2005. 11AA 2159-69. Upon denial of his petition, Defendant through Mr. Schieck appealed to the Nevada Supreme Court. JN 112-149. The Supreme Court affirmed the denial of Defendant's petition for writ of habeas corpus on February 16, 2006, in an unpublished order. JN 167-183. Thereafter, Defendant initiated federal habeas corpus proceedings in Case No. 2:06-CV-0471-PMP-LRL on April 14, 2006, and requested a stay and abeyance, which was granted on April 25, 2007, for exhaustion of state court remedies.

Defendant filed a Successive Petition for Writ of Habeas Corpus on June 8, 2007. 11AA 2178-2200, 12AA 2201-2392. The State filed an Opposition to Defendant's Successive Petition for Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss on September 18, 2007. 33AA 6408-6506. Defendant filed an Opposition to the State's Motion to Dismiss and a Reply to State's Opposition to Defendant's Petition on November 15, 2007. 34AA 6626-28. On November 29, 2007, the State filed a Reply to Defendant's Opposition to the State's Motion to Dismiss. On December 13, 2007, the district court ruled that it would hold a limited evidentiary hearing concerning the topic of organic brain damage only. 37AA 7342- 47.

On February 22, 2008 the district court conducted an evidentiary hearing wherein former post-conviction counsel David Schieck testified. 37AA 7348-85. The district court found that Mr. Schieck's conduct did not fall below the reasonable standard and he was not ineffective regarding the issue of organic brain damage. 37AA 7383-85.

On March 28, 2008, Defendant filed an Opposition to the State's proposed Findings of Fact and Conclusions of Law. 37AA 7406-10. On April 2, 2008, the district court filed the Findings of Fact and Conclusion of Law. 37AA 7411-18. On April 7, 2008 the Defendant filed a Notice of Appeal regarding the denial of his second post-conviction petition for writ of habeas corpus. 37AA 7420. Defendant filed his Opening Brief on March 4, 2009. The State responds accordingly.

STATEMENT OF THE FACTS

The facts are taken verbatim from Floyd v. State, 118 Nev. 156, 162-63, 42 P.3d 249, 253-54 (2002).

> 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 Troy 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 of the store, Las Vegas Metropolitan Police Department (LVMPD) officers were waiting for him. He **254 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.

The jury found Floyd guilty of four counts of first-degree murder with use of a deadly weapon, one count of attempted murder with use of a deadly weapon, one count of burglary while in possession of a firearm, one count of first-degree kidnapping with use of a deadly weapon, and four counts of sexual assault with use of a deadly weapon.

The jury found the same three aggravating circumstances in regard to each of the murders: the murder was committed by a person who knowingly created a great risk of death to more than *163 one person by means which would normally be hazardous to the lives of more than one person; the murder was committed at random and without apparent motive; and the defendant had, in the immediate proceeding, been convicted of more than one murder. For each murder, the jury imposed a death sentence, finding that the aggravating circumstances outweighed any mitigating circumstances. For the other seven offenses, the district court imposed the maximum terms in prison, to be served consecutively. The court also ordered restitution totaling more than $180,000.00.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF FIRST POST-CONVICTION COUNSEL

The State maintains that Defendant's claim that his first post-conviction counsel David Schieck was ineffective for failing to raise the issue of "organic brain damage caused

by Fetal Alcohol Spectrum Disorder ("FASD) is untimely and thus procedurally barred pursuant to NRS 34.726 and 34.810 (2). However, since the district court considered the issue in an evidentiary hearing, the State has addressed the matter of whether Mr. Schieck was ineffective for failing to raise "organic brain damage caused by FASD on its merits. A review of the record clearly demonstrates that brain damage caused by Defendant's mother drinking was presented to the jury several times at trial. Additionally, the record indicates that Defendant's trial attorneys did look into severe brain damage (as well as severe neurological damage) issues but Defendant's own experts were unable to find any signs of any severe ailments. Finally, the record indicates that Mr. Schieck was not ineffective for not bringing up organic brain damage in the first habeas petition and thus the district court's ruling should be affirmed.

A. The District Court Correctly Determined That The Jury Heard Testimony That Floyd Suffered From Brain Damage Caused By His Mother's Use Of Alcohol.

Defendant asserts that his post-conviction counsel was ineffective because he failed to raise arguments of ineffective trial counsel due to their alleged failure to raise the issue of "organic brain damage caused by FASD. Defendant claims that the jury was never presented with this information. However, the record demonstrates that Defendant's trial counsel, while not using the buzz words used by Federal counsel, did present the jury with evidence that Defendant suffered from brain damage that may have been brought about by Defendant's mother's use of alcohol while pregnant.

Defendant's experts testified at the penalty phase of trial regarding Defendant's mother substance abuse while pregnant and possible "brain damage. However, Defendant's own experts also noted that his IQ level was average and that he was capable of B-level school work, which belies any claim of severe brain damage. 8AA 1553, 1593

Floyd's trial attorneys sought expert opinion on Floyd's mental health by contacting neuropsychologist David L. Schmidt who conducted an examination and prepared a report of his findings. Floyd, 118 Nev. at 167, 42 P.3d at 256. The defense also had the benefit of psychologist Dr. Edward J. Dougherty's expertise, who testified at the penalty phase of the

trial regarding the Defendant's mental health. Id. Dr. Norman Roitman, a psychiatrist who treated the Defendant when he was child, also testified at the penalty phase regarding Defendant's mental health status. In rebuttal, the State called its own psychologist, Louis Mortiallaro, Ph.D., who provided his opinion to the jury on Floyd's mental status. Id. Ultimately, Floyd's state of mind and intention was a question of fact for the jury, not an expert.

Moreover, a according the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect in conjunction with the National Center on Birth Defects and Developmental Disabilities, there are no specific or uniformly accepted diagnostic criteria available for determining whether a person has FAS. Centers for Disease Control and Prevention, Nat'l Center on Birth Defects and Developmental Disabilities, Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis, (July 2004), (hereinafter "Guidelines), p. 2-3.[1] The four broad areas of clinical features that constitute a diagnosis of Fetal Alcohol Spectrum Disorder (hereinafter "FASD) have remained unchanged since 1973. Id. The Guidelines clearly state, "these broad areas of diagnostic criteria are not sufficiently specific to ensure diagnostic accuracy, consistency, or reliability. Id. at 2. The Guidelines further state, "it is easy for a clinician to misdiagnose FASD. Id. at 3. Moreover, the Guidelines demonstrate that there are no diagnostic criteria to distinguish FAS from other alcohol-related conditions. Id. at 3.

Diagnostic characteristics for FASD vary by provider. This has led to a determination that the lack of specificity can result in inconsistent diagnostic methodology and the inconsistent application of the FASD diagnosis. Id. at 11. For example, one particular method which is widely in use has been criticized because it will result in a number of false-positive findings. Id. at 11. Nine additional syndromes have overlapping features with FAS. Id. at 12. Thus, determining whether a particular defendant does suffer from FAS is subjective, rather than objective. Like ADHD, it is simply the popular label of the day for

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[1] See http://www.cdc.gov/ncbddd/fasd/documents/FAS_guidelines_accessible.pdf

symptoms presented to the jury repeatedly by defense counsel and does not amount to actual innocence.

1. The jury heard evidence of Defendant's brain damage and Defendant's mother's alcohol and substance abuse while pregnant.

It is clear from the record that the jury heard evidence about brain damage and Defendant mother's substance abuse during pregnancy.[2] During the penalty phase portion of the trial, Defendant's counsel in his opening stated, "The Floyd family, they will be exposed in the next couple of days to the whole world. The family secrets. They're embarrassed and humiliated about so much of their past, but they understand that you, the jury, must have every detail of this factual scenario in order to make an informed decision about whether their son lives or dies. 8AA 1405.

Defense counsel while explaining mitigating factors stated before anything else that the Defendant's mother had consumed alcohol and drugs while pregnant and this had a physical effect on the Defendant:

> "One of the first things you're going to learn is that Zane Floyd's mother, Valerie Floyd, while she was pregnant with Zane, **she was still abusing alcohol and drugs early on in her pregnancy.**
>
> Now, not surprising, we're going to find out that Zane was born six weeks premature. He came into the world at four pounds, ten ounces with underdeveloped lungs. . . His mother and father were both heavy drinkers throughout his childhood.

8AA 1407-08 (emphasis added).

The effect on the Defendant caused by his mother's substance abuse while pregnant was later brought up, as the Defense counsel went through the Defendant's life story:

> Zane was born six weeks premature and he weighed four pounds, ten ounces, suffering from underdeveloped lungs. He was immediately transported by a Flight-for-Life helicopter to the larger city of Boulder, Colorado, where he was placed into an incubator and was given the necessary medical treatment.
>
> **It could be argued that a key factor in the early prematurity and the later behavioral problems could be reflective of the – that Valerie Floyd early on in her pregnancy with Zane was still abusing alcohol and still**

[2] Defendant's mother claimed to stop drinking and drug ingestion approximately two weeks into her pregnancy. 9AA 1751.

> **abusing drugs.** Valerie will tell you as soon as she was sure she was pregnant, she ceased taking drugs and stopped drinking alcohol. She continued to smoke, but one can only wonder the level of damage that had already been done.

8AA 1414 (emphasis added).

Later in the opening, defense counsel further delves into the Defendant's mental health problems:

> "(the Defendant was) (i)nsufficiently treated for attention deficit/hyperactivity disorder and other emotional/behavioral problems including chronic depression…(t)he murders were committed while the defendant was under the influence of extreme mental or emotional disturbance.

8AA 1408-09.

Defense counsel also discussed Defendant's brain damage related to frontal lobe dysfunction:

> Recognizing the continued behavior problems, the family had Zane seen and evaluated by Child Focus Psychological Services. This was when he was 13 years old. **Dr. Maria Cardle diagnosed Zane with organizational difficulties which may be related to frontal lobe dysfunction.** 8AA 1420 (emphasis added).
>
> . . . .
>
> Valerie in her attempts to try to do something about Zane's inability to concentrate . . . went to a physician and [Zane] was prescribed Ritalin, and that happened . . . somewhere in the neighborhood of age six.
>
> So I should have pointed that out earlier because when I read the reports from the child focus psychological services they make reference to the fact that **Zane has had a history of difficulties with concentration or inattention and it may be related to frontal lobe dysfunction.**
>
> He is diagnosed with adjustment reaction with mixed emotional and behavioral symptoms and they say that he has Attention Deficit Disorder and they also indicate in there that he has been prescribed Ritalin.

8AA 1534 (emphasis added).

Dr. Roitman, a Board Certified Child and Adult Psychiatrist testified during the penalty phase at trial that he treated the Defendant when he was 13 years old. 8AA 1566-68. The Defendant was being treated for what was thought to be straightforward attention deficit hyperactivity disorder by neurologist Dr. Kehne. 8AA 1569. Dr. Kehne referred the Defendant to Dr. Roitman and Dr. Cardle (Psychologist) when she "felt that she did not have

a grasp on the full problem, when the medication wasn't helping fully and it didn't' look like the, you know, typical attention deficit hyperactivity disorder. 8AA 1569.

When Defendant came to Dr. Roitman, he had already seen two other different professionals and their reports help facilitated the doctor's treatment of the Defendant. 8AA 1570. Additionally, Dr. Roitman performed his own evaluation of the Defendant which "overlaps the neurologist and psychologist testing. 8AA 1573. Moreover, Dr. Roitman testified:

> When I saw Zane, I thought there was the potential that he would run in and develop a permanent emotional problem. And then I was further concerned because he showed some thinking problems. That's the best way I can describe it. They call it information processing learning disability . . .
>
> Q: And these are all things that as you sat with Zane, you discovered some of these problems?
>
> **A: Well I would say the combination of the referral from the neurologist which gave me the knowledge he didn't like have gross brain damage,** he didn't have horrible infections, didn't have a meningitis or something that rotted his brain away or a stroke, you know, that his - -motorcally, what a neurologist picked up, all of that as okay.

8AA 1574.

Dr. Roitman later stated that "Dr. Kean (sic) and Dr. Cardle were some of the best people in town. 8AA 1576. Later on Defendant's own doctor stated: "I think it's very rare that an event, a crime like this, could be explained solely on the basis of a mental illness. 8AA 1586.

Dr. Dougherty testified for the Defense that he reviewed 302 documents ranging from one page to thirty pages in terms of documents in addition to his own psychological testing and the clinical interviews he conducted. 9AA 1700. Dr. Dougherty's first job in 1964 was working with brain damaged children where he evaluated children's neurological problems. 9AA 1711.

During his evaluation, Dr. Dougherty wanted to understand Floyd's behavior and intelligence and personality as much as possible. 9AA 1701. He stated, "I need to understand such things as if there was any problems of neurological nature. Id. In addition

to the interviews, Dr. Dougherty administered a barrage of tests which indicated that Floyd possessed average intelligence. 9AA 1708.

Because of Floyd's stuttering while giving his police statement, Dr. Dougherty administered the "Bender Gestalt Test, which is a brain test. 9AA 1709. During that test, Dr. Dougherty testified that he used "a special technique developed by Dr. Patricia Lacks in 1985 to detect **organic brain damage**. 9AA 1709 (emphasis added). The result of this test was that Floyd **"did not meet the standard which could say he had significant organic brain damage that required really further detailed evaluation**. 9AA 1710 (emphasis added).

Dr. Dougherty also administered the "Kaufman Short Neuropsychological Assessment Procedure which was used to determine any possible neurological problems. 9AA 1710. Dr. Dougherty discovered that Floyd tested average "despite the fact that there's a history of some **minimal brain damage**. 9AA 1710 (emphasis added).

Dr. Dougherty next administered the Human Figure Drawing Test which ruled out the possibility that Floyd had organic problem of low intellectual functioning. 9AA 1713. Dr. Dougherty then talked about fetal alcohol syndrome in his analysis of Defendant's development. He stated:

> What happens is that you go through your development, certain things that affect you, and child development, which I've studied for years. Basically we're taking a look at the tings that could have affected Zane Floyd and affected anybody but the cumulative effect of those various things.
>
> **Prenatal, what happens during the prenatal period? When a woman is pregnant, she could be exposed to what we call toxicants. That's anything that negatively could affect the development of the fetus.** If a woman smokes, we know now, and maybe not known as well when Valerie was pregnant with Zane, that you have a very good likelihood of having an underweight birth or maybe having other problems. **We know that if you ingest alcohol, particularly during the first trimester, that it can have a negative effect on the development of the fetus. In fact, on many liquor bottles and things now they have those warnings. They didn't have those in the '70's. But we know now from extensive research it could affect you.**
>
> . . . And we know with Zane Floyd, that Zane's mother, Valerie, drank alcohol, and she used drugs during her pregnancy. And we did establish that it was during the first trimester. We

> know that basically she primarily used alcohol, some marijuana. She also had a history of using other drugs, which she denies during this pregnancy. She continues to smoke one and a half packs of Camel cigarettes throughout the pregnancy. . . . So we have some environmental or biological factors that could be affecting Zane Floyd.

9AA 1722-24 (emphasis added).

Dr. Dougherty follows this discussion with a listing of the Defendant's developmental problems that started with his premature birth and undeveloped lungs and continued into his teenage years. 9AA 1724-26. Dr. Dougherty referred to Defendant's "minimal brain damage again later in his testimony. 9AA 1738.

The State during rebuttal offered the testimony of Dr. Louis Mortillaro, an expert neuropsychologist. 9AA 1884. Dr. Mortillaro testified that he reviewed the Expanded Halstead-Reitan Neuropsychological Test Battery conducted on the Defendant and interviewed the Defendant. 9AA 1886.[3] Dr. Mortillaro testified that the test showed that "certain parts of the (Defendant's) brain were not as mature as others…the frontal lobes of the brain 9AA 1889-90. He ultimately found that the Defendant's brain had matured enough that it was no longer an issue. 9AA 1891. Ultimately, Dr. Motillaro found that the Defendant was not brain damaged. 9AA 1907.

At closing during the penalty phase of the trial, Defense counsel once again pointed out the effects of Defendant's mother's drinking and narcotic abuse while pregnant: "Zane would suffer from the effects, early effects of his mother's drinking, her ingested alcohol, drugs early on in her pregnancy, as well as smoking throughout. This led to his premature birth. 9AA 1986.

It is clear from the evidence presented at trial, that Defendant's trial counsel presented evidence of brain damage and Defendant's mother's alcohol abuse while pregnant as mitigating factors. It is also clear that the jury did not find such evidence sympathetic enough for the Defendant to avoid a death sentence. Nothing in Defendant's lengthy brief indicates why additional mitigation testimony on these same topics would have a reasonable

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[3] These tests were conducted or overseen by Dr. Schmidt, a neuropsychologist retained by the Defendant for trial. 9AA 1869.

probability of success in altering the jury's ultimate decision. Moreover, Defendant's post-conviction attorney knew that Defendant's own experts did not detect significant neurological damage and that evidence of alcohol abuse during pregnancy was presented at length in the trial, thus there was no reason for him to further pursue those issues. Therefore, Defendant's first post-conviction counsel was not reasonably ineffective for not pursuing these issues.

B. Defendant Was Provided With Competent Expert Assistance.

Defendant alleges that his trial counsel was ineffective because he failed to provide him with competent expert assistance. In doing so, the Defendant ignores the eight experts (plus an additional two expert reports) he was provided access to, including a couple of neuropsychologists, in preparation for his trial. Defendant alleges that his post-conviction counsel was ineffective for not raising a claim of ineffective trial counsel in the first post-conviction petition due to their alleged failure to provide him with the necessary experts. However, the record belies the Defendant's claim.

A criminal defendant's constitutional right to the assistance of a psychiatrist arises from the concept of due process, and is founded upon the principle that due process guarantees fundamental fairness. Ake v. Oklahoma, 470 U.S. 68, 76, 87 n. 13, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Defendant correctly cites to Ake for the proposition that a defendant must have access to a competent psychiatrist to conduct the appropriate examinations if the defendant demonstrates that his sanity at the time of offense is in question. Ake, 470 U.S. at 83, 105 S.Ct. at 1096. However, the Ake Court warned that this "does not mean that indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Id. The due process protection is also limited to "one competent psychiatrist. Ake, 470 U.S. at 79, 105 S.Ct. at 1094; Pawlyk v. Wood. 248 F.3d 815, 822 (9th Cir. 2001). In Pawlyk, the Ninth Circuit explained: "The limitation to a single, independent psychiatrist is critical given that '[p]sychiatry is not ... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, [and] on

cure and treatment.' Pawlyk, 248 F.3d at 823 (quoting Ake, 470 US. at 80, 105 S.Ct. 1087). Additionally, the Ninth Circuit noted that due process does not guarantee a favorable evaluation nor does it guarantee that the appointed psychiatrist's testimony will be favorable for the defendant. Pawlyk, 243 F.3d at 823-824;[4] also see Sonner v. State, 112 Nev. 1328, 1340, 930 P.2d 707, 715 (1996) ("the law does not require an unlimited expenditure of resources in an effort to find professional support for his theory).

In this case, the Defendant was supported by the testimony of several experts at the penalty phase of the trial including child psychiatrist Dr. Roitman, psychologist Dr. Dougherty and social worker/mitigation specialist Jorge Abreu. Dr. Roitman relied on the neurological examination conducted by neurologist Dr. Kehne and Dr. Cradle. 8AA 1569.[5]

Defendant also retained and was evaluated by several other experts that did not testify at trial. Dr. Jakob Camp is a forensic psychiatrist who examined the Defendant on the day of murders and conducted several follow up evaluations. 16AA 3168; 16AA 3180; 16 AA 3229. Dr. Camp found that Defendant "does not suffer from a mental illness or defect regarding his competency. 16AA 3168. Additionally, he noted that the Defendant "shows no gross evidence of neuropsychological impairment. 16AA 3229. Defendant was also evaluated by Dr. Frank Paul, a clinical psychologist, who has a military background. 16AA

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[4] Defendant also asserts that the case Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1999) supports his position that his due process rights were violated because he allegedly did not receive competent psychiatric evaluation. However, in Wallace the defendant's trial mental health experts failed to take even a cursory glance at the defendant's family background. A family history described by one later expert as "one of the most dysfunctional family environments I have ever encountered which included constant violence in the household and a mother who was in and out of mental facilities. Wallace, 184 F.3d at 1116. In this case, the Defendant's family history was thoroughly researched and painstakingly detailed throughout the penalty hearing.

[5] Dr. Cradle's evaluation made in 1989 (Defendant was 13) stated that "a neuropsychological battery was completed to look further at the subtle difficulties which were evident in the prior testing. ***None of Zane's scores exceed critical level*** or fall above fifty. However, his impairment score of 48 is slightly elevated. 37AA 7395 (emphasis added).

3183. Finally, Defendant retained a learning consultant, Joseph Spano, who specializes in children with learning difficulties, to review Defendant's education records. 16 AA 3178

As stated above, Defendant was evaluated by Dr. Schmidt, a clinical neuropyschologist, to determine if the Defendant was suffering from "any neuropsychological impairment. 17AA 3215. Dr. Schmidt conducted several tests, reviewed materials provided by the public defender's office (including a very detailed report about the Defendant's family and military history) and interviewed the Defendant. 17AA 3215-3221. Dr. Schmidt reported that "**there is no clear evidence of neuropsychological impairment** suffered by the Defendant. 17AA 3226 (emphasis added). Dr. Schmidt also reported that "it is clear that even given Mr. Floyd's psychological problems, in everyday circumstances, he is able to distinguish right from wrong.[6]

Defendant was also evaluated by clinical neuropsychologist Dr. Thomas F. Kinsora who reviewed the neuropsychological assessment of Dr. Schmidt. 17AA 3240. Dr. Kinsora reported that Dr. Schmidt covered Defendant's background "sufficiently. 17AA 3240. However, he disagreed with Dr. Schmidt's interpretation and conclusions for several of the tests. 17AA 3240-41. He also believed that the Dr. Schmidt should have used some other tests besides the one administered but ultimately reported that it was "not clear whether or not a more comprehensive assessment would have revealed ongoing deficits. 17AA 3241-42. He also placed the lack of clarity on the "inherent limitations in the present state of neuropsychological testing. 17AA 3242.

As shown above, Defendant was examined and evaluated by not one, but two neurophysiologists before trial. Neither expert was able to report that Defendant suffered from a serious neurological disorder. Defendant now claims that Dr. Schmidt did not have all

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[6] Dr. Schmidt was even more critical of the Defendant outside of his report. Dr. Schmidt told Defendant's counsel that he was unable to find any neuropsych basis for the Defendant's actions. Dr. Schmidt believed that the Defendant realized that he was going to go to jail for the rape of Tracie Carter and decided to act on a longtime fantasy of killing people since he was going to jail anyway. It was his opinion that Defendant is a "psychopath. Dr. Schmidt agreed not to put some of these opinions in his report. 24AA 4763.

background information necessary to make a proper diagnosis. However, Dr. Kinsora, while critical Dr. Schmidt's conclusions, did note that his report covered "all of the major issues necessary to gain an understanding of the Defendant. 17AA 3240. Defendant does not state what specific information Dr. Schmidt was missing in his evaluation. Likely, Dr. Kinsora's difference in opinion is due to the fact that psychiatrists disagree frequently on what constitutes mental illness and the appropriate diagnosis attached to behavior and symptoms. Pawlyk, 248 F.3d at 823. Therefore, under the rulings in Ake and Pawlyk, Defendant's due process rights were not violated because he was provided access to competent, independent psychiatrists.

Moreover, Defendant's post-conviction counsel was not ineffective because the mental health reports he would have reviewed in preparation for drafting a habeas petition would demonstrate that the Defendant did not suffer from a major neurological problem. It is unlikely that the district court would have granted a motion by post-conviction counsel for yet another mental health expert when so many experts of the same expertise were retained previously by the Defendant. Sonner, 112 Nev. at 1340, 930 P.2d at 715 (defendant needed to demonstrate a need for additional testing after being evaluated by three psychiatrist).

C. Trial Counsel Did Not Fail To Investigate

Defendant alleges that his trial counsel failed to conduct an adequate investigation into Defendant's family history of domestic violence and substance abuse. However, the record plainly indicates that such evidence was repeatedly presented to the jury by Defendant's trial counsel, thus Defendant's claim is without merit.

A defendant who claims that his counsel failed to conduct an adequate investigation must specifically show how a more thorough investigation would have changed the outcome of his case. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). "[T]he duty to investigate and prepare a defense is not limitless: it does not necessarily require that every conceivable witness be interviewed or that counsel must pursue 'every path until it bears fruit or until all conceivable hope withers.' United States v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983) (quoting Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)).

As stated above, Defendant's trial counsel introduced the testimony of several experts during the penalty phase at trial. Additionally, trial counsel also introduced the testimony of several individuals that testified about Defendant's troubled family history and substance abuse. This includes the testimony of Carolyn Smith ("Smith) and Robert J. Hall ("Hall), two individuals that the Defendant asserts in his brief should have been presented by trial counsel as mitigating witnesses.

During the penalty phase at trial the Defense played an audio statement made by Paulina Atamoh to the police, wherein she relayed her perception of Defendant's intoxication the night before the commission of the crimes. 8AA 1486-87. Laurel Lane and Robert Miller, former co-workers of the Defendant's, testified to Defendant's alcohol and drug abuse problems. 8AA 1603, 1617-19. Smith testified to Defendant's step-father's physical violence against Defendant's mother. 8AA 1500-01. Hall also testified about Defendant's history of drug and alcohol abuse (8AA 1642-45, 1659-61), Defendant's parents' alcohol abuse (8AA 1647-48) and domestic violence in Defendant's household (8AA 1649).

Social worker Jorge Abreu testified in detail about Defendant's family history including: Defendant's family history of substance abuse (8AA 1517-20), Defendant's stepfather's domestic violence episodes (8AA 1521, 1536), Defendant's mother's stint in a psychiatric hospital (8AA 1525), Defendant's developmental problems (8AA 1530-32), Defendant's alcohol (8AA 1537-42, 1545), marijuana and methamphetamine abuse (8AA 1537-39) and Defendant's inconsistent use of prescribed medication to him (8AA 1538). Defense expert Dr. Dougherty testified to Defendant's mother drug and alcohol abuse (9AA 1723, 1726) and Defendant's development delays (9AA 1727-28). He also details Defendant's alcohol and drug abuse. 9AA 1743.

Defendant's step-father, Michael Floyd, testified that he often punished the Defendant as child with corporal punishment. 8AA 1676. He also testified to Defendant's alcohol and drug abuse. 8AA 1683. Defendant's mother, Valerie Floyd, testified about the demanding nature of her family. 9AA 1836-37. She testified about her own drug and alcohol abuse.

9AA 1839, 1841, 1848-49. Finally, the Defendant gave an allocution during the penalty phrase, wherein he expressed remorse for his actions. 9AA 1862-63.

Defendant also claims that trial counsel failed to conduct an adequate investigation of Correction Officer Dan Webb before deciding not to call him at the penalty phase. They claim that Officer Webb would have testified that he witnessed the Defendant express remorse for his crimes. Defendant claims that Officer Webb's reluctance to testify at the trial placed his trial counsel in a conflict. However, it appears from the record that the reason for not calling Officer Webb was made not due to a conflict but because it was unknown how the witness would testify. This was particularly worrisome to Defense counsel because there was no written report or sworn statement that detailed the incident between Officer Webb and the Defendant. 24AA 4770. Therefore, the decision not to call Officer Webb was purely strategic and Defendant has not established that counsel's conduct was unreasonable.

In light of the foregoing, defense counsels' performance did not fall below an objective standard of reasonableness. More importantly, given the overwhelming weight of the evidence against Defendant, he cannot establish that he was prejudiced by any of his counsels' alleged investigation failings.

D. First Post Conviction Counsel Was Not Ineffective As He Adequately Investigated, Developed And Presented Defendant's Mitigation Evidence.

Appellate counsel/post-conviction attorney has no obligation to raise every conceivable issue on appeal. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3313 (1983). Trained counsels have a superior ability to examine the record, research the law, and marshal arguments on behalf of their clients. Id. Thus, a "defendant has [no] constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. Id. at 751. Therefore, to succeed on a claim that counsel was ineffective in failing to raise an issue in a post-conviction petition for writ of habeas corpus, a Defendant must establish that counsel's conduct fell below an objective standard of reasonableness as measured by prevailing professional norms, and that he was prejudiced by such conduct. Strickland v.

Washington, 466 U.S. 668, 687-88 (1984); Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 277-78 (1995). Prejudice is proven where the Defendant successfully establishes that the issue had a reasonable probability of success on appeal. Rippo v. State, 122 Nev. 1086, 1095-96, 146 P.3d 279, 285 (2006).

As shown in Section I(A), I(B) and I(C), Defendant has failed to prove that post-conviction counsel's conduct fell below an objective standard of reasonableness as measured by prevailing professional norms. Post-conviction counsel raised numerous issues for relief in his thirty-eight (38) page Supplemental Petition for Writ of Habeas Corpus – several of which the Defendant re-allege in this instant brief. 11AA 2115-2153. Post-conviction counsel was able to glean from a simple review of the record that Defendant's mental health, developmental problems, mother use of alcohol while pregnant, substance abuse[7] and turbulent family life was all sufficiently presented at trial by counsel. Additionally, post-conviction counsel would have noted that Defendant was evaluated by numerous mental health experts including two independent neuropsychologists, a forensic psychiatrist who saw the Defendant on the same day as the criminal offenses, Defendant's childhood psychiatrist and a clinical psychologist that specializes in military personal. Therefore, Defendant is unable to show that his post-conviction counsel was ineffective for failing to further explore these issues.

Defendant also has not established that any of the alleged omitted issues had a reasonable likelihood of success on appeal in post-conviction proceedings. David Schieck testified at the February 22, 2008 evidentiary hearing that he did not raise the issue of organic brain damage during first post-conviction because he did not believe that such a claim would be successful at the time. 37AA 7369. The experts developed in the federal

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[7] Defendant alleges that his post-conviction counsel should have interviewed Paulina Atomah regarding his alcohol consumption prior to the crimes. However, Ms. Atomah audio-recorded voluntary statement to police, including a detailed account of Defendant's drinking the night before the murders, was played to the jury during the penalty phase. Therefore, it is unclear what additional evidence could have been obtained by such an interview. 8AA 1487, 18AA 3416-3436.

court, add only marginally to the facts. Moreover, Defendant has not established that the alleged errors actually and substantially prejudiced him or that despite the overwhelming evidence against the Defendant the inclusion of such evidence had a reasonable probability of success in the habeas proceedings. Thus, he has not established prejudice sufficient to overcome the procedural bars.

II

THE DISTRICT COURT DID NOT ERR WHEN IT HELD THAT DEFENDANT FAILED TO DEMONSTRATE GOOD CAUSE TO OVERCOME PROCEDURAL BARS FOR THE REMAINING ALLEGATIONS.

Defendant alleges that the district court erred by denying Defendant an evidentiary hearing regarding allegations that first post-conviction counsel was ineffective for failing to bring up claims that should have (or in some case had been) raised by Defendant's previous attorneys. However, in the Finding of Facts, Conclusions of Law and Order, the district court held that Defendant's second attempt at habeas relief was barred pursuant to NRS 34.726 as well as the successive petition bar. 37AA 7413. Additionally, the district court found that many of Defendant's claims were previously denied by this Court and now constitute law of the case. 37AA 7413; see Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001). Finally, the district court found that ineffective assistance of counsel by first post-conviction counsel did not constitute good cause to overcome the procedural bars in this case because the Defendant delayed in bringing these claims to the state court. 37AA 7414; see Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

This Court has found that "application of the statutory procedural default rules to post-conviction habeas petitions is mandatory. State v. District Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (citing State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003)). These rules are necessary to avoid an unreasonable burden and ensure a workable criminal justice system. Riker, 121 Nev. at 231, 112 P.3d at 1074. This Court also noted that "although serious and careful consideration of death penalty cases is always required, the fact that a habeas petitioner faces a death sentence does not somehow lessen the effect of procedural bars. Riker, 121 Nev. at 234, 112 P.3d at 1076.

A. Defendant's Claims Were Procedurally Barred Under The Provisions Under NRS §§ 34.746 And 34.810.

1. Defendant's claims were barred by NRS 34.746(1) one year time limitation.

NRS 34.726 (1) states in part that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence ***must*** be filed within one (1) year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one (1) year after the Supreme Court issues its remittitur. (Emphasis added).

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini, 117 Nev. at 873, 34 P.3d at 528 (2001). As per the language of the statute, the one-year time bar prescribed by NRS 34.726 begins to run from the date the Judgment of Conviction is filed or from the date this Court issues its remittitur following a direct appeal. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998)

In this case, this Court issued a remittitur on March 10, 2003, affirmed the judgment of conviction and sentence of death. 11AA 2113. Defendant filed his first Petition for Writ of Habeas Corpus on June 19, 2003 and filed a supplemental petition on October 6, 2004. The district court denied Defendant's Petition and this Court affirmed that decision. A remittitur was issued on March 15, 2006. 11AA 2176. Defendant then initiated federal habeas corpus proceedings in Case No. 2:06-CV-0471-PMP-LRL on April 14, 2006. Defendant filed the instant successive state Petition for Writ of Habeas Corpus on June 8, 2007, more than four years after remittitur from direct appeal.

Defendant's filing more than four years after remittitur and more than one year after the conclusion of the first habeas petition is untimely under the statutory limitation delineated in NRS 34.726(1). Therefore, Defendant's claims of ineffective assistance of trial, appellate and post-conviction are all untimely. As such, these claims are procedurally barred. This includes any allegations of which Defendant had knowledge of but has delayed in raising. Pursuing federal remedies does not constitute good cause to overcome a procedural bar. Colley, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Because Defendant cannot

show good cause to overcome the procedural bar, as discussed below, and there is no cognitive argument for actual innocence, this Court should affirm the district court's decision.

2. Defendant's claims were barred by the successive petition bar pursuant to NRS 38.810(2).

NRS 34.810(2) provides as follows:

> "A second or successive petition ***must*** be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. (Emphasis added).

Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. Evans v. State, 117 Nev. 609, 646, 29 P.3d 498, 523 (2001). Similarly, in Lozada v. State, this Court stated: "[W]ithout such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions. Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). This Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition. Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498, 111 S.Ct. 1454, 1472 (1991).

The following claims or sub-claims were raised in Defendant's first State post-conviction petition and denied on the merits. That denial was upheld on appeal by this Court. They are procedurally barred as successive under NRS 34.810(2).

b. Allegations found in Claim B(2)(b)(i)(a-f) of Defendant's Opening Brief. Such claims can be found in Defendant's direct appeal and first habeas petition. This Court upheld the district court's denial of these claims. JN 91-92, 170-78

(covering the same statements that Defendant realleges in this instant appeal).

c. The allegation in Claim B(2)(d)(i) of Defendant's Opening Brief that his rights were violated by the trial court's allowance of a limited number of victim impact testimony. This claim was brought up in Defendant's direct appeal and first petition. This Court rejected Defendant's argument and upheld the district court's denial of this claim. JN 93-95, 174-75 (noting that this issue was also brought up in direct appeal).

d. The allegation in Claim B(2)(d)(ii)(d-f) of Defendant's Opening Brief that his rights were violated because the jury was allegedly improperly instructed in the guilt phase regarding malice; Defendant also claims it was improper to include the so-called "anti-sympathy instruction in the guilt phase. Finally, Defendant claims that that the jury was not properly instructed that it could not consider character evidence during the penalty phase. All three allegations were made in Defendant's first habeas petition. This Court rejected Defendant's claims and upheld the district court's denial on these matters. JN 178-182.

e. Defendant's allegations made in Claim B(2)(a) regarding the jury not being a fair cross-section of the community. 11AA 2150-52, 2161.

f. The allegations in Claim B(2)(f) of ineffective assistance of direct appeal counsel that were not raised in the first State post-conviction petition. All claims in Defendant's first post-conviction petition were couched as ineffective assistance of counsel claims. JN 169. This Court affirmed the district court's denying Defendant habeas corpus relief. JN 183.

Because these issues did not involve new or different grounds for relief and were previously decided on their merits, they are successive under NRS 34.810(2). The district court did not err in dismissing these claims as procedurally barred.[8]

[8] These claims are also barred by the law of the case doctrine. Pellegrini, 117 Nev. at 884-85, 34 P.3d at 535-36.

3. Defendant failed to show good cause and actual prejudice to overcome the procedural bars.

Defendant has failed to show good cause and actual prejudice for any of the allegations made in his Argument 2 section. Defendant failed to plead facts that demonstrate good cause for not presenting these claims in a timely petition or not including them in his first habeas petition. Additionally, Defendant failed to demonstrate the Defendant suffered from actual prejudice at his trial. Thus, Defendant's claims should be denied due to the procedural bars.

To show good cause, a defendant must demonstrate an impediment external to the defense prevented him from complying with the procedural rules. Riker, 121 Nev. at 232, 112 P.3d at 1074 (citing Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997)). A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default. Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Court held that "appellants cannot attempt to manufacture good cause. Clem, 119 Nev. at 621, 81 P.3d at 526. Additionally, this Court has found civil tolling provisions to be inapplicable to post-conviction habeas petitions when post-conviction habeas rules are inconsistent with the civil procedure rules. Klein v. Warden, 118 Nev. 305, 309-10, 43 P.3d 1029, 1032-33 (2002).

Absent good cause, the defendant may only overcome the procedural bars by showing that he suffered a fundamental miscarriage of justice. Id. The fundamental miscarriage of justice standard requires a colorable showing of that constitutional error has resulted in the conviction of one who is actually innocent. Id. While a Sixth Amendment claim of ineffective counsel may excuse a procedural default, a petitioner must still demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion. Riker, 121 Nev. at 235, 112 P.3d at 1077 (citing Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)).

Additionally under, NRS 34.810(2) requires the Defendant to present facts that demonstrate actual prejudice along with good cause for failure to present the claim in an earlier proceeding. Riker, 121 Nev. at 232, 112 P.3d at 1075. Actual prejudice requires the

defendant to show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. Id. (citing United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584 (1982)) (emphasis included in cite).

Defendant fails to show both good cause and prejudice to overcome the procedural bars contained in NRS 34.726 and NRS 34.810. Defendant implies "good cause exists for various reasons, most predominantly he claims ineffective assistance of trial, appellate, and post-conviction counsels. However, Defendant's ineffective assistance of counsel claims are in and of themselves barred and thus cannot constitute good cause to overcome the procedural bars.

Defendant bears the burden of demonstrating why he allowed the procedural bars to run before bringing his claims of ineffective assistance of counsel. Riker, 121 Nev. at 232, 112 P.3d at 1074-1075. As with any claim, Defendant must show that his delay was due to an external impediment to the defense which prevented him from complying with the procedural default rules. Crump v. Warden, Nevada State Prison, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997), (citing Passanisi v. Director Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989)). Other than implying that any fault in the delay was that of his attorneys, Defendant has presented no evidence of an external impediment to his defense. Defendant's implication that ineffective assistance of counsel constitutes good cause to overcome the procedural bars is without merit.

Defendant also claims that his filing of a Federal habeas petition prevented him from filing this instant petition on an earlier date. However, this Court has held that pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley, 105 Nev. at 236, 773 P.2d at 1230. State procedural rules do not call for the luxury of federal counsel and extensive investigation by said counsel before being required to raise state claims. Accordingly, no matter how diligent and expansive the federal investigation may have been, it does not constitute good cause as a matter of law.

Moreover, Defendant claims that he filed his successive state petition within eight

months of "discovering his claims. This claim is without merit. The claims made in Argument 2 of the Opening Brief have always been available to the Defendant. There was no external impediment which prevented the Defendant from discovering and timely raising his claims of ineffective assistance of post-conviction counsel.

Finally, Defendant's passing reference that he filed his successive state petition within 14 days of the federal remand order is irrelevant. State procedural bars operate independent of federal rules and the remand order was not a perquisite for the Defendant to file a state petition. Therefore, nothing stated in Defendant's brief constitutes good cause and the district court's holding that he was subject to the time-bar should be affirmed.

B. Defendant's Claims Were Procedurally Barred Under The Law Of The Case Doctrine.

Defendant alleges that his post-conviction counsel was ineffective because he failed to raise claims that had previously been raised in his direct appeal and first habeas petition. The district court denied these claims because they had been previously denied on the merits and constituted law of the case. 37AA 7413. Nothing in the Defendant's Opening Brief provides any support to disturb the district court's ruling.

When an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); Pellegrini, 117 Nev. at 884-85, 34 P.3d at 535-36. The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine "cannot be avoided by more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings. Hall, 91 Nev. 314, 535 P.2d 797. Any claim Defendant raised in his successive habeas petition, upon which the Nevada Supreme Court has previously determined on the merits, is barred by the law of the case doctrine.

The district court properly held that Defendant's following claims B(2)(a)(v), B(2)(b)(i)(a-f), B(2)(d)(i), B(2)(d)(iii), B(2)(d)(iv), B(2)(d)(viii) and B(2)(e) are all procedurally barred, as all of these issues had been previously raised and addressed by this

Court on direct appeal. JN 76-99. Defendant does not allege a single reason why the law of the case doctrine would not apply to these claims. Therefore, this Court should affirm the district courts ruling regarding these matters.

C. The District Court Properly Denied The Defendant's Remaining Claims Without Conducting An Evidentiary Hearing.

1. The district court provided defendant with a fair evidentiary hearing.

Defendant claims his rights were violated when the district court failed to conduct an evidentiary hearing on several issues raised in his successive Petition for Writ of Habeas Corpus. The district court limited the evidentiary hearing to whether first post-conviction counsel was ineffective for not raising the issue of "organic brain damage in the earlier habeas petition. 37AA 7346-47. The district court properly determined that an evidentiary hearing was not needed on every issue raised in his petition.[9]

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief, unless the factual allegations are belied by the record. Marshall, 110 Nev. at 1331; 885 P.2d at 605. (1994); See also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record). "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.

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[9] Defendant cites to Panetti v. Quarterman, 551 U.S. 930, 127 S.Ct. 2842 (2007) for support of his position. However, Pannetti specifically limits itself to constitutional protections involved in a competency hearing in lieu of a stay of execution when a prisoner has made a threshold showing of insanity. Panetti, 551 at 947-50, 127 S.Ct. at 2855-56. Due to the nature of such a claim, it could not be brought up in an earlier proceeding and thus is not procedurally barred. Panetti, 551 at 942-47, 127 S.Ct. at 2852-55. Therefore, the Panetti decision is limited to the factual situation raised in that case and is not relevant to the matters in the instant case.

Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). "Bare and "naked allegations are not sufficient to entitle a defendant for relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

In this case, Defendant's claims were either belied by the record and/or should have been raised in an earlier proceeding and thus procedurally barred. Additionally, as stated above, several claims were previously decided upon by this Court in an earlier proceeding and therefore barred by the law of the case doctrine. Thus, the district court correctly limited the evidentiary hearing to the "organic brain damage issue.

2. Defendant's claims regarding jury selection.

Defendant alleges that his trial attorneys were ineffective during the voir dire proceedings because they did not object to alleged arbitrary time limit[10], did not "life qualify the jury, failed to get two alleged bias jurors off the jury panel and dismissed jurors who were against the death penalty.

The Defendant fails to allege good cause or manifest injustice for failing to raise these issues in a timely matter pursuant to NRS 34.726. Nor does he indicate any external impediment which would have prevented him from raising these claims in a timely matter. Therefore, these claims are time-barred. The district court also found that these claims could have been raised at an earlier proceeding, since nothing in Defendant's current arguments indicate any external impediment. Thus, the Defendant's arguments are an abuse of a writ and procedurally barred by NRS 34.810(2).

It should be noted that the Defendant failed to make a single cognizable claim that one of the jurors seated for the trial was biased. Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (citing Ross v. Oklahoma, 487 U.S. 81, 86, 108 S.Ct. 2273, 2277 (1988)) (if the

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[10] Defendant claims that the district court "***mandated*** that the parties complete the entire voir dire in Mr. Floyd's capital case by 2:30pm and cites to the record. Defendant's Opening Brief, p. 26 (emphasis added). However, a cursory glance to the citation belies Defendant's claim. The district court was stating what time it expected voir dire to be finished- "I had once ***estimated*** that we were going to have this jury picked about 2:30. I still believe that to be the case. 3AA 591 (emphasis added).

impaneled jury is impartial, the defendant cannot prove prejudice).[11] This Court previously observed in this case that "every juror…expressed a willingness to consider sentences other than death in the event of a guilty verdict. Floyd, 118 Nev. at 165, 42 P.3d at 256.

Therefore, even if this Court considered Defendant's new allegations, any such error would be harmless because the jury impaneled was impartial. Thus this Court should affirm the district court's denial of the claim.

3. Defendant's change of venue claim.

The lower court properly dismissed this claim finding that it was barred by the law of the case doctrine because it was raised in Defendant's direct appeal. 37AA 7413. This Court denied this claim in the past and there was no reason set forth by the Defendant why the decision should be revisited. Floyd v. State, 118 Nev. 156, 165, 42 P.3d 249, 255-56 (2002). This claim is also barred by NRS 34.726 as untimely and by NRS 34.810 (2) as an abuse of writ.

4. Defendant's claims regarding prosecutorial misconduct.

The lower court dismissed these claims finding that they were barred by the law of the case doctrine because these issues were raised in both Defendant's direct appeal and his first post-conviction petition. 37AA 7413. The district court also found that this Court upheld the denial of these claims in the past and that there was no reason to revisit this Court's findings. 37AA 7413-14; JN 91-92; JN 170-178; also see Floyd, 118 Nev. at 172-174, 42 P.3d at 260-61. These claims are also barred by NRS 34.726 as untimely and by NRS 34.810 (2) as an abuse of writ.

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[11] Defendant only brings up two alleged "biased jurors. One, Tammy Hanlon was removed due to Defendant's peremptory strike and thus should not be considered in the analysis. Wesley, 112 Nev. at 511, 916 P.2d at 799. Defendant misconstrues the statements of the other one, Gertrude Curl-Leatherwood. Defendant alleges that Ms. Curl-Leatherwood claimed that that she could not consider life with parole. However, Ms. Curl-Leatherwood told the trial court that she could consider all four possible outcomes of trial and would consider life with the possibility of parole. 4AA 637. Thus, Defendant was not prejudiced by her presence on the jury.

5. Defendant's claim that Nevada's death penalty does not satisfy state or Federal constitutional standards should be denied because this claim has been previously rejected by the Nevada Supreme Court.

Defendant alleges that the use of lethal injection constitutes cruel and unusual punishment. This claim is time-barred under NRS 34.726. It is also barred under NRS 34.810 because this issue could have been raised on appeal or in Defendant's first post-conviction petition. Defendant does not explain nor offer good cause for his delay in raising this issue. As such, this claim is procedurally barred.

Moreover, Defendant's use of post-conviction habeas petition to challenge the constitutionality of Nevada's execution protocol has recently been rejected by this Court. McConnell v. State, 212 P.3d 307, 311 (Nev. 2009). This Court held that a "challenge to the lethal injection protocol in Nevada does not implicate the validity of a death sentence because it does not challenge the death sentence itself but seeks to invalidate a particular procedure for carrying out the sentence. McConnell, 212 P.3d at 311. This is because a successful challenge to the execution protocol would preclude the Department of Corrections from using a certain protocol but they would still be free to use another protocol to carry out the sentence. Id. Therefore, the district court was correct to reject this claim without an evidentiary hearing.

This Court has also previously denied Defendant's claims that the imposition of death sentences in Nevada is arbitrary and capricious because it permits "juries an unlimited ability to impose a death sentence, regardless of the circumstances of the case. State v. Haberstroh, 119 Nev. 173, 188, 69 P.3d 676, 686 (2003) (rejecting the exact same language used in Defendant's opening brief). This Court has also rejected the argument that imprisonment on death row for several years creates a presumption of inhumane or degrading treatment. Id. Therefore, the district court was correct to reject these claims without an evidentiary hearing.

6. Defendant's claim regarding the State's alleged failure to preserve a blood sample

Defendant brings up this claim for the first time in his successive habeas petition. Defendant has failed to cite sufficient grounds of good cause and/or actual prejudice to

overcome the procedural bar. Defendant also failed to raise this claim in a timely matter pursuant to NRS 34.726 Thus, this claim is procedurally barred.

Additionally, the burden is on the Defendant to show that the lost or destroyed evidence could reasonably have been anticipated to be material and exculpatory. Sheriff v. Warner, 112 Nev. 1234, 1239-40, 926 P.2d 775, 778 (1996). It is not sufficient that the Defendant demonstrates merely a hoped-for conclusion from examination of the destroyed evidence, nor is it sufficient for the defendant to show only that examination of the evidence would be helpful in preparing his defense. Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979) (citation omitted).

Defendant had a blood sample drawn to determine what and how much intoxicants were in his system at the time of the criminal offense. 6AA 1137-44. It was determined that Defendant had alcohol in his system but tested negative for narcotics. 6AA 1143-44.[12] There is no evidence in the record that indicates that the Defendant could not have re-tested the blood sample or tested for narcotic use another way.

Defendant appears to claim that this evidence was material because proof that he ingested methamphetamines before the crime would add to his defense that he was in a "dissociative state. However, there was no evidence presented at trial that the Defendant had used a significant amount of methamphetamines before the crime. 18AA 3419-36[1314].

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[12] Defendant failed to demonstrate how the police lab failed to follow its own protocol. First, they provide evidence of what the lab's policy is in 2007, not what the policies were in 1999 when the blood sample was collected. Second, according to Defendant's investigator's affidavit, the police lab preserves blood samples for two years. There is no indication that the blood was not preserved for those two years and then destroyed according to protocol. 37AA 7341.

[13] Ms. Atamoh was with the Defendant from 6 pm that night before to about 3:00 am the morning of the incident and did not report that Defendant had ingested narcotics.

[14] Defendant told his own investigator that he did not do a lot of methamphetamines that month before the incident and never disclosed to him leading up to the trial that he had down methamphetamine on the day of the offense. 27AA 5298-5304. Defendant told one of his experts he did "about a line of methamphetamine before the incident. 27AA 5255.

Such a "hoped-for result is inadequate to sustain Defendant's burden. Therefore, the district court was correct to reject Defendant's claim without an evidentiary hearing.

7. Defendant's claim regarding the use of victim impact statements.

The lower court properly dismissed this claim finding that it was barred by the law of the case because it was raised in Defendant's direct appeal. This Court has previously rejected Defendant's argument. Floyd, 118 Nev. at 174-75, 42 P.3d at 261-62. Thus, it is barred by the law of the case doctrine. Hall, 91 Nev. at 315-16, 535 P.2d at 798-99. The claim is also subject to the procedural bars of NRS 34.726 and 34.810 (2).

8. Defendant's claims of erroneous jury instructions

Defendant's claim that the trial court gave erroneous jury instructions in violation of right to due process, equal protection and other rights is without merit. Such claims are not properly presented in a successive habeas petition, nine years after the trial. Defendant has failed to demonstrate good cause or manifest injustice to overcome the procedural bars. Therefore, these claims subject to the procedural bars of NRS 34.726 and 34.810(2).

Additionally, Defendant previously raised the claims made in 2(d)(ii)(d)-(f) in his first State Habeas Petition proceedings and was denied relief by this Court. JN 178-182. Thus, these claims are specifically barred by the law of the case doctrine. Hall, 91 Nev. at 315-16, 535 P.2d at 798-99.

Defendant's other three arguments of erroneous jury instruction are either belied by the record or by Nevada case law. In claim 2(d)(ii)(a), Defendant contends that the jury was required to be instructed specifically that it find the aggravators outweighed the mitigators beyond a reasonable doubt. This Court has recently reaffirmed its rejection of this argument. McConnell v. State, 212 P.3d 307, 31415 (Nev. 2009) (court rejects invitation to overturn established caselaw and require State to prove the aggravators outweigh the mitigators by a reasonable doubt) also see Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002) (the jury's decision whether to impose a sentence of death is a moral decision that is not susceptible to proof).

Additionally, Defendant contends that the inclusion of the phrase "more weighty affairs of life in the reasonable doubt instruction is unconstitutional and lessens the State's burden. These instructions comports with NRS 175.211. This Court has repeatedly upheld the constitutionality of the reasonable doubt instruction. Garcia v. State, 121 Nev. 327, 345, 113 P.3d 836, 847 (2005); Bolin v. State, 114 Nev. 503, 530, 960 P.2d 784, 801 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002). Therefore the District Court did not abuse its discretion in denying Defendant's proposed instruction.

Finally, the Defendant contends that the use of "instantaneous in the premeditation instruction blurs the line between first and second degree murder citing Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) and Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). However, Floyd's jury did not receive the so-called Kazalyn instruction but were properly instructed pursuant to Byford with separate definitions for willfulness, deliberation and premeditation. 7AA 1346-49. Floyd was also charged alternatively with felony-murder which would render harmless any perceived error in the premeditation instruction. Accordingly, there was no danger in blurring the distinction between first and second degree murder and the instructions actually given in this case comport with the Byford change in law. There is no good cause for challenging these jury instructions in a successive petition and the claim was properly barred.

As shown above, Defendant failed to demonstrate that any of his jury instruction issues would have had a reasonable probability of success on appeal, thus this Court should affirm the district court's decision to reject Defendant's contention of ineffective assistance without conducting an evidentiary hearing. Byford, 116 Nev. 233-34, 994 P.2d at 712-713 (sufficient evidence to establish premeditation, therefore the defendant was not entitled to the relief despite concerns about the premeditation jury instruction).

9. Defendant's claims made in 2(d)(iii) and (iv) were previously rejected by this Court during the direct appeal.

The lower court properly dismissed Claim 2(d)(iii) and (iv) because they were barred

by the law of the case doctrine. This Court previously rejected the arguments set forth in those claims. Floyd, 118 Nev. at 163-165, 42 P.3d at 254-55 (severance of charges); Floyd, 118 Nev. at 167-70, 42 P.3d at 256-259 (State's use of psychological evidence garnered by a defense expert). These claims are also subject to the procedural bars of NRS 34.726 and 34.810 (2).

10. Defendant's claim that the trial court forced him to waive his right to a preliminary hearing by allowing media access to the courtroom.

Defendant brings up this claim for the first time in his successive habeas petition. Defendant has failed to demonstrate good cause or manifest injustice to overcome the procedural bars. Therefore, this claim was subject to the procedural bars of NRS 34.726 and 34.810(2). Thus the district court correctly denied Defendant's claim without an evidentiary hearing.

Defendants are generally entitled to enter into agreements that waive or otherwise affect their substantial rights. Hodges v. State, 119 Nev. 479, 483, 78 P.3d 67, 69 (2003). The First Amendment guarantees public access to places traditionally open to the public, such as criminal trials. Del Papa v. Steffen, 112 Nev. 369, 374, 915 P.2d 245, 248 (1996) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577, 580, 100 S.Ct. 2814, 2827, 2829 (1980)). Pursuant to NRS 171.204, the "magistrate ***may, if good cause is shown*** conduct a closed preliminary hearing. Nev. Rev. Stat. 171.204 (emphasis added). The decision to conduct a closed preliminary hearing is discretionary and the magistrate's refusal to conduct a closed hearing is subject to abuse of discretion analysis. Davis v. Sheriff, Clark County, 93 Nev. 511, 512, 569 P.2d 402 (1977).

It is undisputed that the Defendant waived his right to a preliminary hearing after being fully informed of his rights regarding the matter. 1AA 57-58. Defendant claims that his waiver was due to concern about the media coverage of the hearing and its possible effect on potential jurors.[15] However, Defendant fails to demonstrate that the court abused its

[15] The State's attorney argued that the real reason the Defendant waived his right to a preliminary hearing was that he was worried about the testimony of two witnesses (the

discretion by denying Defendant's request or that he was even prejudiced by the court's decision. The evidence presented at trial clearly demonstrates that this case would have been binded over to the district court on all charges even if a preliminary hearing took place. The district court was correct to dismiss Defendant's claim without holding an evidentiary hearing.

11. Defendant's claim regarding photographs admitted into evidence.

Defendant brings up this claim for the first time in his successive habeas petition. Defendant has failed to demonstrate good cause or manifest injustice to overcome the procedural bars. Therefore, this claim is subject to the procedural bars of NRS 34.726 and 34.810 (2). Thus the district court correctly denied Defendant's claim without an evidentiary hearing.

The admissibility of evidence is within the trial court's sound discretion; this Court will respect the trial court's determination as long as it is not manifestly wrong. Byford, 116 Nev. at 231, 994 P.2d at 711. Additionally, this Court has previously held that gruesome photographs are admissible at trial if they aid in ascertaining the truth. Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). Such photos have been deemed appropriately admitted when they depict the crime scene, the severity of the wounds and the means of infliction. Byford, 116 Nev. at 231, 994 P.2d at 711.

In this case, there were numerous victims and a large crime scene (an Albertson's supermarket). Therefore, the State presented several photographs to depict the crime scene, the severity of the wounds and the means of infliction. The State admitted as evidence several photographs that were used in conjunction with the testimony of Dr. Gary Telgenhoff and Dr. Larry Simms, as a means of helping the jury understand the basis of there findings. (7AA 1204-28). Some other photographs were used to give the jurors an idea of the crime scene. As its members are without medical training, the jury might otherwise be incapable of

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sexual assault victim and an attempted murder victim), both of whom may be unavailable to testify at a later date. 1AA 52-56.

understanding the extent of the victims' injuries without the visual assistance of photographs to coincide with the expert testimony. Additionally, the photographs were necessary to illustrate Defendant's actions when he entered into the Albertson and how he methodically murdered several people. As such, the probative value of the photographs far outweighed the potential for prejudice. Therefore this claim was appropriately denied by the district court without an evidentiary hearing.

12. Defendant's claims regarding judicial misconduct.

Defendant brings up this claim for the first time in his successive habeas petition. Defendant has failed to demonstrate good cause or manifest injustice to overcome the procedural bars. Therefore, this claim is subject to the procedural bars of NRS 34.726 and 34.810(2). Thus the district court correctly denied Defendant's claim without an evidentiary hearing.

Defendant is only able to cite to two alleged instances of judicial misconduct. One comment was a brief passing joke made by the trial judge during the State's direct examination of a police officer. 6AA 1035. The other instance was during the testimony of Mr. Johnson, the State's firearm expert. During his testimony, Mr. Johnson assured the court he was demonstrating loading the weapon with "dummies rounds- gun cartridges without a primer, wherein the trial judge responded that he trusted Mr. Johnson was using "dummies . 6AA 1188-90. These two comments even if deemed improper do not prejudice the Defendant's right to a fair trial due to their passing nature and the amount of evidence presented at trial. Rudin v. State, 120 Nev. 121, 140-41, 86 P.3d 572, 584-85 (2004). The district court was correct in denying Defendant's claim without an evidentiary hearing.

13. Defendant's claim that the aggravating factors should have been submitted to a grand jury.

The lower court properly dismissed this claim finding that it was barred by the law of the case because it was raised in Defendant's direct appeal. 37AA 7413. The district court also found that this Court denied this claim in the past and that there was no reason to revisit this Court's findings. Floyd, 118 Nev. at 166, 42 P.3d at 256. This claim is also barred by NRS 34.726 as untimely and by NRS 34.810 (2) as an abuse of writ.

14. Defendant's claims regarding Defendant's appearance in prison clothes and stun belt.

Defendant brings up these claims for the first time in his successive habeas petition. Defendant has failed to demonstrate good cause or manifest injustice to overcome the procedural bars. Therefore, these claims are subject to the procedural bars of NRS 34.726 and 34.810(2). Thus the district court correctly denied Defendant's claims without an evidentiary hearing.

The burden rests upon Defendant to prove that his jury was not fair and impartial. Summers v. State, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986). Even if a juror or jurors saw restraints, it would not have been grounds for reversal under the facts of this case. Holbrook v. Flynn, 475 U.S. 560, 572, 106 S. Ct. 1340 (1986). Early in the trial, the jury was presented with overwhelming evidence of Defendant's violent and brutal actions. Defendant even in admits in his brief that his actual committing of the multiple murders was never in dispute. Defendant's Opening Brief, pg. 66. The jurors immediately knew Defendant was dangerous and unpredictable, regardless of any restraints.

In Deck v. Missouri, the United States Supreme Court, the Court addressed the issue of the prejudicial impact of juries seeing defendants visibly restrained by shackles. Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007 (2005). In holding that constitutional considerations require that criminal defendants not be routinely placed in restraints visible to jurors, the Deck Court offered the following caveat:

> "The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say special security needs or escape risks, related to the defendant on trial.
>
> Id. at 633, at 2014-15.

There is no indication on the record that Defendant was in prison garb during the guilt or penalty phase of trial. Defendant cites to two jurors commenting that they saw the Defendant in prison garb and shackles at the beginning of the trial. 20AA 3993, 24AA 4746.

One juror clarified her remark by saying she "saw Mr. Floyd wearing his jail outfit ***one time*** at the beginning of the trial or during the voir dire process. 20AA 3993 (emphasis added). This statement shows that the Defendant was mainly not shackled and/or in prison garb.

This claim and the jurors' statements have been previously available to the defense without any external impediment so there is no good cause for raising it now in a successive petition. Defendant does not allege any facts in support of his claim that this brief moment where some of the jurors might have seen him in shackles and prison garb prejudiced him in any manner. Defendant also fails demonstrate that *any* of the jurors were aware of the presence of a stun belt and therefore was not prejudiced by its use. Any error in failing to articulate in the record a particularized consideration for the restraints is harmless as the restraints were justified by genuine security concerns specific to the Defendant who had shot and murdered several people without warning or provocation.

15. Defendant's claim regarding the constitutionality of two of the three aggravating factors.

This Court has previously considered the aggravators in this case and upheld Defendant's sentence. Floyd, Nev. at175-76, 42 P.3d at 262. Thus, Defendant's claims are barred by the law of the case doctrine. These claims are also subject to the procedural bars of NRS 34.726 and 34.810 (2). Defendant has failed to demonstrate good cause or manifest injustice to overcome the procedural bars. Thus the district court correctly denied Defendant's claims without an evidentiary hearing.

Defendant argues that Nevada's death penalty statutory scheme, NRS 200.033, is unconstitutional in that it is cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution and Article I of the Nevada State Constitution, and that the death penalty statutory scheme fails to sufficiently narrow the categories of eligible defendants. Defendant's argument lacks merit.

The Nevada Supreme Court has held on numerous occasions that Nevada's death sentencing procedure is constitutional. See Thomas v. State, 122 Nev. 1361, 1373, 148 P.3d 727, 735-36 (2006). Furthermore, a statute enacted by the legislature is presumptively

constitutional, and anyone attacking the validity of a statute bears the burden of clearly demonstrating the statute is unconstitutional. Sun City Summerlin Community Ass'n v. State By and Through Dept. of Taxation, 113 Nev. 835, 841, 944 P.2d 234, 238 (1997); Skipper v. State, 110 Nev. 1031, 1033, 879 P.2d 732, 733 (1994). Therefore, Defendant bears the burden of proving Nevada's death penalty statute is unconstitutional.

Defendant argues that the Nevada death penalty statutory scheme fails to narrow the categories of eligible defendants, thereby failing to honor the spirit of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) and Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). However, this Court has found on numerous occasions that Nevada's death penalty statutes are constitutional and consonant with Gregg and other United States Supreme Court rulings on the matter. Leonard v. State, 117 Nev. 53, 83, 17 P.3d 396, 416 (2001); Ybarra v. State, 100 Nev. 167, 175-76, 679 P.2d 797, 802 (1984).

Additionally, this Court has approved the validity of both these aggravators on several occasions. This Court has upheld the constitutionality of the "random and without apparent motive factor on several occasions. Nika v. State, 198 P.3d 839, 857-58 (Nev. 2008); Clem v. State, 120 Nev. 307, 91 P.3d 35 (2004). In Floyd, this Court found that aggravator applied to this case because the record shows that the Defendant "knew nothing about the people he killed or why he had killed them. For example, immediately after his arrest, Floyd said, 'Why did I kill those people? I, I don't know.' Floyd, 118 Nev. at 176, 42 P.3d at 262. In Leslie v. Warden, this Court upheld the random and without apparent motive factor as constitutional and interpreted it to apply to situations in which the defendant selected his victim without specific purpose or objective and his reason for killing is not obvious or easily understood- i.e. motiveless, thrill-killing murders. Leslie v. Warden, 118 Nev. 773, 780-82, 59 P.3d 440, 445-46 (2002) (detailing the legislative history of the statute). In fact, the Leslie Court found that the situation in this matter to be a demonstrative example of the factor. Leslie, 118 Nev. at 782, 59 P.3d at 446. Therefore, Defendant's claim is without merit.

Defendant also argues that the "great risk of death to more than one person

aggravator pursuant to NRS 200.033(3) is unconstitutional. In Floyd, this Court held that this aggravator applied to this situation because the evidence showed that the Defendant "repeatedly fired a shotgun while walking and running through a supermarket where a number of people were present. Floyd, 118 Nev. at 176, 42 P.3d at 262. This Court has consistently upheld the use of this aggravator. Bennett v. Eighth Judicial Dist. Court ex rel. County of Clark, 121 Nev. 802, 811, 121 P.3d 605, 611 (2005); Flanagan v. Nevada, 112 Nev. 1409, 1421, 930 P.2d 691, 699 (1996); Evans v. State, 112 Nev. 1172, 1195, 926 P.2d 265, 280 (1996). Therefore, Defendant's claim is without merit.

Therefore the district court did not err in dismissing Defendant's claims without an evidentiary hearing.

16. Defendant's claim regarding ineffective appellate counsel.

The lower court properly dismissed this claim finding that it was barred by the law of the case doctrine because it was raised and denied in a previous proceeding. 37AA 7413; JN 167-183. These claims are also barred by NRS 34.726 as untimely and by NRS 34.810 (2) as an abuse of writ.

This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983), the Supreme Court recognized that part of professional diligence and competence involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Id. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. Id. 753, 103 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. Id. at 754, 103 S.Ct. at 3314.

In this case, the Defendant fails to demonstrate how any of the alleged claims that he

believes appellate counsel should have raised would have been successful in appeal. In fact, the Defendant's appellate counsel actually asserted some of these claims (prosecutorial misconduct, improper victim impact statements) - and those claims were rejected by this Court. Therefore, the district court did not err in denying Defendant's claim that he received ineffective assistance from his appellate counsel.

17. Defendant's claim regarding bias in the form of popularly elected judges

Defendant brings up this claim for the first time in his successive habeas petition. Defendant has failed to demonstrate good cause or manifest injustice to overcome the procedural bars. Therefore, this claim is subject to the procedural bars of NRS 34.726 and 34.810 (2).

This argument was recently rejected by this Court in McConnell v. State. In McConnell, this Court rejected the defendant's argument because (1) he failed to substantiate the claim with any specific factual allegations demonstrating actual judicial bias and (2) that such an argument does not have a reasonable probability of success. McConnell, 212 P.3d at 316; Nevius v. Warden, 113 Nev. 1085, 1086-87, 944 P.2d 858, 859 (1997).

Similar to the McConnell case, the Defendant failed to substantiate any factual allegations that he was subjected to actual judicial bias. Additionally, Defendant has not shown that even if such a claim was raised by former counsel that it would have had a reasonable probability of success.

Moreover, this Court's impartiality is easily demonstrated by the fact that it has vacated numerous sentences of death. See, e.g., Servin v. State, 117 Nev. 775, 32 P.3d 1277 (2001) (sentence of death vacated); Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996) (death sentence vacated and remanded for a new penalty hearing); Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985). Defendant's claim is meritless and must be denied.

18. Defendant's cumulative error claim[16]

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial. Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 2, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged. People v. Rivers, 727 P.2d 394, 401 (Colo.App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo.App 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial and it must be said "without reservation that the verdict would have been the same in the absence of the error. Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1998).

Insofar as Defendant failed to establish any error which would have entitled him to relief, there is and can be no cumulative error worthy of reversal. Notably, a defendant "is not entitled to a perfect trial, but only a fair trial… Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)). Here, Defendant received a fair trial- in both the guilt and penalty phase. All the errors alleged here are without merit. Therefore, Defendant's conviction must stand.

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[16] This Court has implied that the cumulative-error standard for direct appeal may not apply to habeas petitions appeals. McConnell, 212 Nev. at 318. However, the State submits that Defendant is not entitled to relief based on cumulative error no matter what standard is applied to the matter.

III

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR BY ADOPTING THE STATE DRAFTED FINDING OF FACTS, CONCLUSION OF LAW AND ORDER.

Defendant alleges that the district court erred by adopting the State's proposed Finding of Facts, Conclusion of Law and Order ("FOFCL). Defendant claims the district court's actions violated Byford v. State, 123 Nev. 67, 156 P.3d 691 (2007) and NRS 34.830(1). However, the FOFCL clearly lays out the district court's reasoning for denying Defendant's claims, several without an evidentiary hearing.

It has long been the practice in Nevada that the prevailing party prepares the order or written findings for the Court. See e.g., Foster v. Bank of America Nat. Trust & Sav. Ass'n., 77 Nev. 365, 365 P.2d 313 (1961); Thompson v. Tonopah Lumber Co., 37 Nev. 183, 141 P. 69 (1914). At a minimum "the district court should enter an order that sets forth specific findings of fact and conclusions of law to support its decision disposing of them. Byford v. State, 123, Nev. 67, 156 P.3d 691, 692 (2007). "…[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. Anderson v. City of Bessemer, N.C., 470 U.S. 564, 572, 105 S.Ct. 1504, 1510-1511 (1985) (citations omitted). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Id. 470 U.S. at 573-574. Defendant has failed to show that the district court's ruling was clearly erroneous.

In Byford, this Court concluded that a district court's order lacked specific findings to support its decision disposing of the defendant's claims on their merits, especially in the absence of an evidentiary hearing. Byford, 123 Nev. at _, 156 P.3d at 692. This Court ordered the district court to reconsider the defendant's claims. Id. However, the district court failed to place the case back on calendar and instead signed a new State proposed order without notifying the defendant. Id. This Court held that (1) the district court must state its ruling before the State can draft a proposed order; (2) ethical rules demand that the district

court allow the defendant to be heard on the proposed findings; and (3) the district court should have advised both parties that it had reconsidered the claims and stated its new rulings, thereby providing guidance to the State in drafting a proposed order. Id., 156 P.3d at 692-93.

This case is easily distinguishable from Byford in several ways. In Byford, the district court failed to follow the Order of the Nevada Supreme Court to conduct an evidentiary hearing or at least reconsider the claims. There is no such order by the Court in this matter. Additionally, in Byford, proposed findings were submitted prior to any ruling by the district court. Here, findings were not prepared until after the district court denied Defendant's petition after two separate hearings. Finally, in this case, the district court (and State) provided the Defendant ample time to be heard on the proposed findings. JN 191.

While the State admits there are a couple of minor errors in the FOFCL, such as the failure to acknowledge the presence of the Defendant at the limited evidentiary hearing. The State also agrees with the Defendant that these errors are "easily correctible and "harmless . Defendant's Opening Brief, p. 81. Defendant has failed to show that any of these errors prejudiced the Defendant.

Defendant also alleges that the FOFCL mistakenly states that there was some testimony regarding organic brain damage at the Defendant's trial. However, the evidentiary hearing record supports the language found in the FOFCL. On December 13, 2007, in the first hearing on the matter, the State argued that the Defendant's claims were procedurally barred. The Defendant's counsel couched the "organic brain damage issue as one that may touch upon manifest injustice i.e. actual innocence. 37AA 7342-7347. Therefore, the district court decided to hold a hearing on "narrow, narrow issue of "organic brain damage. 37AA 7347. As the language of the FOFCL indicates, this was done to explore if any manifest injustice took place, which is reason for overcoming the procedure bar. 37AA 7414.

During the limited evidentiary hearing, the district court heard about instances where testimony regarding Defendant's brain damage was presented to the jury during the penalty phase. 37AA 7370-72. The district court also heard of several experts' testimonies and

reports post-conviction counsel reviewed in preparation of drafting an habeas petition. 37AA 7365-86. Therefore, the finding that "possible organic brain damage was known was not made in clear error.

Additionally, the district court indicated that Defendant's claims regarding ineffective counsel during trial and direct appeal were procedurally barred. 37AA 7383. This is in accord with the successive petition bar, which prevented issues that were or should have been raised in previous proceedings from being raised in a successive petition. Therefore, the district court only allowed a very limited evidentiary hearing regarding the "organic brain damage issue. The evidentiary hearing on that matter does not waive the district court's conclusion that the other claims were procedurally barred. In fact, the district court does not have discretion to ignore the mandatory procedural bars. Riker, 121 Nev. at 231, 112 P.3d at 1074. Thus, the district court did not err by adopting the State's proposed FOFCL outlying the reasons for the denial of Defendant's claims.

CONCLUSION

WHEREFORE, in light of the foregoing, the State respectfully requests that this Court affirm the district court's denial of Defendant's second petition for post conviction relief.

Dated this 8th day of October 2009.

Respectfully submitted,

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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 this 8th day of October 2009.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on this 8th day of October 2009. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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