

ZANE MICHAEL FLOYD,

VS.

Respondents.

Case No. 51409

APPELLANT’S REPLY BRIEF

Eighth Judicial District Court, Clark County

Counsel for Appellant

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I. Introduction

The state’s central argument – that retaining several experts, who did not perform competently, to testify about an issue central to Mr. Floyd’s mitigation defense inoculates trial counsel from a claim of ineffectiveness – is absurd. Mr. Floyd had a right to competent expert testimony regarding the fact that he suffers from organic brain damage caused by Fetal Alcohol Spectrum Disorder (FASD). Trial counsel’s failure to present competent expert testimony on this crucial issue was ineffective and violated Mr. Floyd’s state and federal constitutional due process right to competent expert assistance. Despite the state’s efforts to piece together snippets of the trial testimony in an attempt to support the district court’s erroneous finding of fact, it is clear from the record that there was no expert testimony presented about Mr. Floyd’s FASD-related organic brain damage, or how this damage affected him on the day of the offense. The Federal Court of Appeals in Caro v. Caldron, 165 F.3d 1223, 1227 (9th Cir. 1999), held that, regardless of the amount of testimony at trial about child abuse, head injuries and exposure to possible brain damaging toxins, where the jury does not have the benefit of “expert testimony to explain the ramifications” of such information, due process has been violated because “[e]xpert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone.” First state post-conviction counsel’s failure to raise this meritorious claim was also ineffective; and the district court violated Mr. Floyd’s state and federal constitutional right to due process of the law when it refused to allow him to present competent expert testimony during the evidentiary hearing on the merits of this issue. Without repeating the arguments made in his Opening Brief, Mr. Floyd submits the following reply to specific arguments advanced by the state.

1 II. The state's argument, that the quantity of experts employed rather
2 than the quality of the assistance provided satisfies the constitutional
3 right to competent expert assistance, is unfounded in clearly
4 established federal law.

5 Effective counsel would not use a real estate attorney to provide expert
6 testimony about criminal law. Similarly, effective counsel would not use an
7 unqualified psychiatrist, psychologist or mitigation specialist to provide expert
8 testimony about the organic brain damage caused by Fetal Alcohol Spectrum
9 Disorder (FASD). Only a neuropsychologist is competent to diagnose organic
10 brain damage, and to testify about how this damage manifests itself in the actions
11 of a particular individual. Furthermore, only a properly prepared FASD expert can
12 competently present testimony about the effects of FASD-related organic brain
13 damage. Where trial counsel's investigation, including their consultation with
14 experts, suggests the presence of an organic brain disease, the failure to secure the
15 assistance of a competent neuropsychologist is ineffective. See Daniels v.
16 Woodford, 428 F.3d 1181, 1191 (9th Cir. 2005). Where the jury hears no
17 testimony to mitigate or explain the defendant's behavior "other than the
18 testimony of an unqualified and incompetent psychologist," trial counsel is
19 ineffective, and the defendant's state and federal constitutional due process right
20 to competent expert testimony is violated. Id. at 1193; Caro v. Calderon, 165 F.3d
21 1223 (trial counsel ineffective in failing to hire neurologist and toxicologist
22 despite evidence that defendant was exposed to brain damaging pesticides).

23 In its Answering Brief, the state circumvents this important issue by
24 pointing to snippets of the trial testimony provided by a psychiatrist, Dr. Roitman,
25 a psychologist, Dr. Dougherty, and a mitigation specialist, Jorge Abreu, none of
26 whom are qualified as experts in neuropsychology or FASD, or competent to
27 diagnosis or testify about the devastating effects of FASD-related organic brain
28 damage. The state's reference to "organic brain damage" and "FASD" as "buzz

words,” reflects its fundamental lack of understanding about the seriousness and complexity of FASD-related organic brain damage, which can only be explained to the jury by experts specializing in these areas. Where trial counsel fails to follow up on important leads by seeking a comprehensive evaluation by more qualified and experienced practitioners, they are ineffective. Daniels, 428 F.3d at 1204. The Court in Caro recognized that, when a jury is not provided with expert testimony that can differentiate between the type of brain damage that does not cause aggressive behavior from the type of brain damage that does cause aggressive behavior, “[i]t may be the difference between life and death.” Caro, 165 F.3d at 1227.

By highlighting the testimony provided by Dr. Roitman, Dr. Dougherty and Mr. Abreu, the state demonstrates trial counsel’s ineffectiveness. Essentially, the jury was provided only with trial testimony that Mr. Floyd had organizational difficulties, frontal lobe related attention deficit disorder and “minimal brain damage,” which might have been caused by his mother drinking and abusing drugs during her pregnancy. Had trial counsel retained and properly prepared experts competent to diagnose and testify about FASD-related organic brain damage, these experts could have provided the jury with testimony that, during the time of the offense, “Mr. Floyd’s organic impulsivity and inability to control impulses, especially under stress, was fueled by the extreme stress caused by his temporally associated serial failures and rejections causing him to resort to at least a partially dissociated soldier hero state.” 5 App 0799. A qualified neuropsychologist, Dr. Mack, opines that

the experts in the penalty phase of Mr. Floyd’s trial failed to fully explain Mr. Floyd’s extreme level of mental and emotional disturbance at the time of the crime; nor did they adequately explain how his diagnoses of Dissociative Disorder NOS, Personality Change due to Neurodevelopmental Brain Damage, Obsessive Compulsive Disorder and Attention Deficit Hyperactivity Disorder caused Mr.

1 Floyd to not be fully in control of his impulses and actions at the time
2 of the crimes in question, as further supported by his own disbelief at
3 his actions in his post-incident statements to the police. Thus, the
4 intentionality of Mr. Floyd’s actions, although he stated his intention
5 to do what he did immediately beforehand to Ms. Carter, was clearly
6 influenced and controlled by his underlying diseases of the mind and
7 brain.”

8 19 App 03800 (emphasis added). As more fully explained in the Opening Brief,
9 this information was essential to the jury’s deliberations.

10 A qualified FASD expert, Dr. Novick-Brown, states that “Zane Floyd
11 displayed almost every major neurodevelopmental disorder that has been associated
12 with the primary disabilities seen in individuals with FASD.” 19 App 03735
13 (emphasis added).

14 [D]eficits in impulse control and emotion self-regulation are hallmark
15 behavioral symptoms in individuals with FASD. These deficits often
16 lead to compulsive use of alcohol and drugs as well as other
17 uncontrolled behaviors such as rage reactions, physical aggression,
18 stealing and other high risk behaviors. In some FASD-impaired
19 individuals, there is very little self-control even when they are not
20 under the influence of disinhibitory substances such as alcohol. In
others, while they may generally function in a pro-social manner
under the best of circumstances, when their central nervous system is
affected by something that erodes inhibitory control, there can be a
significant and abrupt decrease in volitional control. Alcohol and
street drugs are powerful disinhibitors because of their impact on the
neurochemistry of the brain. In FASD-affected individuals with
deficits in self-control caused by brain damage, the disinhibitory
effects of alcohol and drugs tend to be greatly magnified. As a result,
when faced with events that trigger negative emotions, individuals
with FASD often overreact and behave impulsively without the
moderating (i.e., socializing) steps involved in healthy executive
functioning.

21 19 App 03735. Dr. Novick-Brown explains that this analysis is relevant to Mr.
22 Floyd’s behavior on the day of the offenses, which occurred shortly after he drank
23 an excessive amount of alcohol, ingested methamphetamine, and experienced
24 several “stressful events: job problems, the death of his cousin, the ‘loss’ of his
25 best friend to homosexuality, the loss of his girlfriend, his unsuccessful return
26 home to live with his parents, the lost of his entire paycheck to gambling, and
27
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1 \$10,000 in debts that he was behind in paying.” 19 App 03736.

2 Additionally, Dr. Mack reveals that the results of his neuropsychological
3 testing “support numerous areas of potential mitigation which could have been
4 used in the penalty phase of Mr. Floyd’s trial.” 19 App 03799. Dr. Mack opines
5 that at the time of the offense, “Mr. Floyd was not able to deal with the massive
6 and overwhelming feelings he had . . . that triggered [a] series of dissociations and
7 dissociative experiences related to his Dissociative Disorder (Not Otherwise
8 Specified) and his exposure to extreme violence from his stepfather.” 19 App
9 03799. It is Dr. Mack’s opinion that

10 all of the experiences of intense failure and rejection combined to
11 create a situation which was further aggravated by an organic
12 impulsivity and inability to control impulses, as clearly manifested
13 behaviorally during his evaluation, and as a direct consequence of
14 [Mr. Floyd’s] Attention Deficit Hyperactivity Disorder, Combined
15 Type/Personality Change Due to Brain Damage, Combined Type.
16 19 App 03799.

17 Contrary to the state’s representation, after committing the offenses Mr.
18 Floyd was examined and evaluated by one neuropsychologist, Dr. Schmidt, whose
19 test results trial counsel had good reason to suspect were inaccurate given Mr.
20 Floyd’s childhood diagnosis of brain damage. 37 App 7334. Trial counsel had a
21 duty to followup on this issue. Dr. Mack notes that Dr. Schmidt failed to capture
22 Mr. Floyd’s neurocognitive difficulties because he relied upon tests administered
23 by an individual who was not a neuropsychologist, “underreported some of his
24 own data,” and did not go beyond the basic testing battery despite Mr. Floyd’s
25 childhood diagnosis of brain damage by Dr. Cardle. 19 App 03798. Dr. Mack
26 explains that if Dr. Schmidt had gone beyond the basic battery and

27 given tests such as the Rey Complex Figure Test, a more elaborate
28 writing sample and the Controlled Oral Word Association Test, and
29 attempted to explore the points raised by Dr. Cardle, it is [Dr.
30 Mack’s] opinion that [Dr. Schmidt] would have captured more of the
31 neurological difficulties of [Mr. Floyd]. From a behavioral

1 perspective, [Dr. Mack] was cued in quickly to some underlying
2 neurodevelopmental dysfunction just by the way [Mr. Floyd] held his
3 pencil, which was an abnormal grip, often associated with
developmental neurobehavioral disorders.

4 19 App 03798. Dr. Mack also reveals that

5 Dr. Schmidt was too reliant on the cutoff scores of the Halstead
6 Reitan Neuropsychological Battery in the presence of obvious
7 prenatal and perinatal neurological insult, and given the signs of
8 neurological dysfunction on Dr. Cardle's testing. The fact that Mr.
9 Floyd consistently had a 20-point discrepancy between verbal and
10 non-verbal intellectual functions, in and of itself, is highly suggestive
of brain damage. In the current testing, there is evidence of deficient
verbal fluency. There is evidence of bilateral motoric dysfunction.
There is evidence of right-sided sensory perceptual dysfunction.
There is evidence of constructional dyspraxia. There is evidence of
organizational difficulty.

11 19 App 03798. Dr. Mack also indicates that Mr. Floyd was in a dissociative state
12 during the time of the shooting that no one fully evaluated and diagnosed. 19 App
13 03798. "If the doctors who originally evaluated Mr. Floyd had used such
14 instruments as the Multiscale Dissociation Inventory, the Detailed Assessment of
15 Posttraumatic Stress, the Posttraumatic Diagnostic Scale," they would have been
16 confronted with the need to diagnose a Dissociative Disorder and Posttraumatic
17 Stress Disorder. 19 App 03798. Dr. Mack opines that the doctors who tested Mr.
18 Floyd "failed to identify his Dissociative Disorder NOS with very severe
19 derealization and severe disengagement and moderate memory
20 disturbance/psychogenic amnesia, depersonalization and emotional
21 constriction/numbing." 19 App 0380. They also failed to identify Mr. Floyd's
22 Posttraumatic Stress Disorder, even their test results in this area were "extremely
23 elevated." 19 app 0380. They failed to identify Mr. Floyd's Personality Change
24 due to neurodevelopmental brain damage. They failed to emphasize the fact that
25 [basic] neuropsychological testing in adulthood may not fully capture the residual
26 deficits of neurodevelopmental brain damage (as explained by Dr. Kinsora in his
27 report). They failed to diagnose Mr. Floyd's obvious Obsessive Compulsive

1 Disorder.19 App 03800.

2 As noted in Mr. Floyd's Opening Brief, trial counsel suspected that Dr.
3 Schmidt's neuropsychological findings were faulty, and therefore had Dr. Kinsora
4 review Dr. Schmidt's findings a few days prior to the trial. Although Dr. Kinsora
5 confirmed trial counsel's suspicions regarding the inaccuracy of Dr. Schmidt's
6 findings, trial counsel failed to seek a continuance of trial for further evaluation
7 and investigation. By failing to do so, trial counsel were ineffective. See Daniels,
8 428 F.3d 1181. Furthermore, as noted in Mr. Floyd's Opening Brief, Dr. Schmidt
9 was not provided with the FASD investigative information necessary to
10 competently evaluate Mr. Floyd, and was not hired in enough time to administer
11 the full battery of tests necessary to perform a competent neuropsychological
12 evaluation. Where insufficient time and funding prevent a reasonable evaluation,
13 trial counsel are ineffective. Id. at 1206. "Counsel have an obligation to conduct
14 an investigation which will allow a determination of what sort of experts to
15 consult. Once that determination has been made, counsel must present those
16 experts with information relevant to the conclusion of the experts." Caro, 165 F.3d
17 at 1226. Clearly established federal law dictates that where trial counsel fail to
18 consult the necessary experts, or fail to provide their experts with the information
19 necessary to make an accurate evaluation, trial counsel are ineffective. Id. at 1227.

20 "A lawyer who knows of but does not inform his expert witnesses about
21 these essential pieces of information going to the heart of the case for mitigation
22 does not function as 'counsel' under the Sixth Amendment, let alone as a 'good
23 lawyer.'" Id. Trial counsel clearly were constitutionally ineffective in failing to
24 provide Mr. Floyd with competent expert assistance regarding an issue central to
25 his mitigation defense.

1 III. The district court erred in failing to provide Mr. Floyd with a full and fair
2 evidentiary hearing by refusing to allow him to demonstrate that he was
3 prejudiced by first post-conviction counsel's failure to raise his meritorious
4 FASD-related organic brain damage claim.

5 The state in its Answering Brief attempts to use internet research to
6 discredit the validity of Fetal Alcohol Spectrum Disorder (FASD), despite its
7 failure to present this argument to the district court. Answering Brief at 6. In her
8 declaration, qualified FASD expert, Dr. Novick-Brown, presents the history of the
9 evolution of the valid science of FASD. 19 App 03724-3726. Dr. Novick-Brown
10 notes that "[w]hile the labels have become more precise and perhaps more
11 confusing, the original diagnostic criteria for FASD established in 1973 have
12 changed very little over time, even after being reconsidered by other groups such
13 as the Fetal Alcohol Study Group of the Research Society on Alcoholism (1980s),
14 the Institute of Medicine (1990s), and the Center for Disease control (2000)." 19
15 App 03729. Dr. Novick-Brown has "evaluated and treated approximately 300
16 children and adults affected by prenatal alcohol exposure," is a Clinical Assistant
17 Professor in the Fetal Alcohol and Drug Unit at the University of Washington, and
18 provides "individual therapy to a caseload of fetal alcohol impaired youth in an
19 effort to prevent adverse life outcomes and to a caseload of adults with FASD,
20 many of whom are sex offenders in Washington's State's Community Protection
21 Program." 19 App 03723.

22 Dr. Novick-Brown states that "[b]rain imaging studies over the last decade
23 have shown that prenatal exposure [to alcohol] causes significant malformation in
24 structures within the brain . . . that are necessary for normal development and
25 functioning." 19 App 03724. Dr. Novick-Brown explains that "[r]esearch has
26 shown that prenatal exposure causes structural brain damage that affects
27 functioning in the frontal lobe of the brain, particularly the prefrontal cortex, an
28 area that is especially sensitive to the teratogenic effects of ethanol." 19 App

1 03726. She notes that “brain imaging research has found that prenatal alcohol
2 exposure seems to target the corpus collosum in particular and is associated with a
3 pattern of deficits in executive functioning.” 19 App 03726. Executive functioning
4 “controls impulses and channels them into prosocial rather than antisocial
5 behavior, involving cognitive skills such as perception, social awareness,
6 organization, planning, internal ordering, working memory, self-monitoring,
7 inhibition, motor control, regulation of emotion, and motivation.” 19 App 03726.
8 Damage to executive functioning produces a number of problems for individuals
9 with FASD including, but not limited to, being “unable to control behaviors that
10 stem from emotion-evoked urges” which results in FASD damaged individuals
11 engaging in a “wide range of socially (and often legally) inappropriate behaviors.”
12 19 App 03726. As elaborated upon in his Opening Brief, Mr. Floyd was prevented
13 by the district court from presenting this crucial evidence, despite the presence in
14 court of FASD and neuropsychological experts prepared to testify on the day of
15 his evidentiary hearing.

16 Instead, the district court, without hearing any expert testimony, attributed
17 post-conviction counsel’s ineffective failure to raise the issue of Mr. Floyd’s
18 FASD-related organic brain damage to the inaccurate factual finding that “possible
19 organic brain damage” was “testified to at the time of trial.” 37 App 7413. As
20 demonstrated above and in Mr. Floyd’s Opening Brief, however, there was
21 absolutely no testimony at trial that Mr. Floyd suffered from the DSM-IV
22 diagnoses of “Personality Change Due to Neuropsychological Brain Damage,” and
23 there certainly was no testimony that he suffered from FASD-related organic brain
24 damage. See Opening Brief at 2-3.

25 Despite trial counsel’s notes that FASD needed to be investigated, 21 App
26 4016, trial counsel ineffectively failed to do so, and first post-conviction counsel

1 admitted during the evidentiary hearing that he did not have a strategic reason for
2 failing to raise this meritorious claim during the first state post-conviction
3 proceedings. 37 App 7353, 7357, 7358, 7360, 7361, 7363, 7369. As noted in the
4 Opening Brief, post-conviction counsel testified that he “should have followed-up
5 and raised as ineffectiveness” trial counsel’s failure to pursue the “footprints in
6 this case file indicating fetal alcohol syndrome.” 37 App 7370.

7 It is contrary to clearly established federal constitutional law to “find a
8 strategic basis for [] counsel’s actions in absence of any evidence.” Alcala v.
9 Woodford, 334 F.3d 862, 871 (9th Cir. 2003). Courts cannot “assume facts not in
10 the record in order to manufacture a reasonable strategic decision” for counsel. Id.;
11 see also Brown v. Starnes, 304 F.3d 677 (9th Cir. 2002).

12 After failing to provide Mr. Floyd with a full and fair evidentiary hearing,
13 the district court compounded this error by adopting verbatim the state’s proposed
14 Finding of Fact, Conclusion of Law and Order (“FOFCL”). In its Answering
15 Brief, the state does not deny that NRS 34.830(1), and Byford v. State, 123 Nev.
16 67, 156 P.3d 691 (2007), require the district court’s order to accurately reflect both
17 the facts of Mr. Floyd’s case and the applicable law supporting the court’s
18 decision. The state also concedes that the FOFCL drafted by the state and adopted
19 by the court contained several blatant errors. See Answering Brief at 43. The
20 state, however, argues that Mr. Floyd “has failed to show that any of these errors”
21 were prejudicial. Id. The state, like the district court, ignores Mr. Floyd’s rights
22 under federal and state constitutional due process guarantees to be fairly and fully
23 heard on his claims and to have the FOFCL accurately reflect the district court’s
24 actual findings.

25 The state’s position undermines the importance of accuracy in the FOFCL
26 for appellate purposes. This Court is being asked in this appeal to correct errors
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1 committed by the district court. For this Court to effectively perform its appellate
2 function, it is essential that the lower court record be as complete and accurate as
3 possible. The fact that the district court adopted the state's proposed FOFCL,
4 even after the errors contained therein were pointed out by Mr. Floyd's current
5 counsel, should alert this Court that extra caution should be employed when
6 evaluating the district court's actions and findings.

7 IV. Conclusion

8 For the foregoing reasons, Mr. Floyd respectfully requests that this Court
9 reverse his conviction and sentence. In the alternative, Mr. Floyd requests that
10 this Court remand his case to the district court for a hearing on his meritorious
11 constitutional claims.

12 Dated this 4th day of January, 2010

13 Respectfully submitted,
14 FRANNY A. FORSMAN
Federal Public Defender

15 TIFFANI D. HURST
16 Assistant Federal Public Defender
17 Nevada Bar No. 11027C
danielle_hurst@fd.org

18 Attorneys for Appellant
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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this appellate brief, and to the best of my
3 knowledge, information and belief, it is not frivolous or interposed for any
4 improper purpose. I further certify that this brief complies with all applicable
5 Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires
6 every assertion in the brief regarding matters in the record to be supported by a
7 reference to the page of the transcript or appendix where the matter relied upon is
8 to be found. I understand that I may be subject to sanctions in the event that the
9 accompanying brief is not in conformity with the requirements of the Nevada
10 Rules of Appellate Procedure.

11 Dated this 4th day of January, 2010.

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13 Tiffani D. Hurst
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CERTIFICATE OF SERVICE

In accordance with Rule 5(b)(2) of the Nevada Rules of Appellate Procedure, I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of January, 2010. Electronic Service of the foregoing **APPELLANT’S REPLY BRIEF** shall be made in accordance with the Master Service List as follows:

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Thom Gover, Deputy Attorney General

Rhonda L. Turner,
An Employee of the Federal Public Defender